# Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions

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With the drawdown of standing armies following the end of the Cold War, the United States and other Western governments have increasingly used civilian contractors in support roles to free up limited military forces to perform combat missions.[1] Since the initiation of hostilities under the rubric

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1. According to one account, there are an estimated 100,000 civilian support personnel working in Iraq,

> from highly-trained former special forces soldiers to drivers, cooks, mechanics, plumbers, translators, electricians and laundry workers and other support personnel.
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> A trend toward "privatizing war" has been accelerating steadily since the end of the Cold War, when the United States and its former adversaries began cutting back professional armies. U.S. armed forces shrank from 2.1 million when the Berlin Wall came down in 1989 to 1.4 million today.
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> "At its present size, the U.S. military could not function without civilian contractors," said Jeffrey Addicott, an expert at St. Mary's University in San Antonio. "The problem is that the civilians operate in a legal gray zone. There has been little effort at regulation, oversight, standardized training and a uniform code of conduct."

Bernd Debusmann, *In Iraq, Contractor Deaths Near 650, Legal Fog Thickens*, REUTERS, Oct. 10, 2006; *see also* Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees,* 5 CHI. J. INT'L L. 511 (2005). Professor Schmitt asks,

> What accounts for the explosion of contractor personnel and civilian government employees on or near the battlefield? Cost is one factor. In the aftermath of the Cold War, most governments sought to realize the "peace dividend" by drawing down legacy armies sized and equipped to fight a global conflict. But the dividend never materialized; on the contrary, many states found their security environment complicated by the demise of (stabilizing) bipolarity and the emergence of new threats like transnational terrorism and internal unrest. Yet, for domestic political reasons, downsizing was a process that usually proved irreversible.
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> In light of this dilemma, the use of civilians in support roles proved especially appealing because it freed up military personnel to perform combat missions. In this way, armed forces avoided a straight-line relationship between reduced numbers and reduced combat effectiveness. In the US, the consequent civilianization was labeled "Transformation."

*Id.* at 517 (citations omitted). As of October 10, 2006, more than 600 civilian support personnel had been killed while performing duties associated with the armed conflict in Iraq. *See* Debusmann, *supra*.

of the global war on terror,[2] however, this extensive reliance on civilian support, coupled with the increasing technological sophistication of the contemporary battlefield, has pushed these civilians ever closer to performing tasks historically reserved for uniformed personnel.

The increased dependency on these civilians, sometimes called "augmentees," has caused U.S. military planners and legal advisers to struggle to define the limit of legally permissible civilian support functions. An International Committee of the Red Cross (ICRC) report of a meeting of experts on the law of armed conflict (LOAC)[3] described the issue this way:

> One expert explained how a number of factors – notably the dependence of modern armies on technology combined with decreasing military budgets and the relative cost-efficiency of private companies – had led some countries to outsource some of their military activities. Contracts for the sale of arms, for example, are no longer limited to the simple purchase of a weapon but often, even during armed conflict, include the maintenance and functioning of the system by the civilian employees of the seller. Such agreements raise legitimate questions regarding the status of the employees involved.[4]

The rapid pace of "civilianization" of the battlefield has only added to uncertainty about what limits, if any, apply to this use of civilians.

Resolution of this uncertainty is crucial for two reasons. First, it will enhance the predictability of decisions about force composition, thereby helping military commanders plan for allocations of limited uniformed resources. Second, it will enhance the likelihood of compliance with the law of armed conflict by ensuring that only properly trained, disciplined, and authorized personnel perform functions implicating that law.

Unfortunately, the law of armed conflict does not explicitly define the limits of permissible civilian support functions. While it is generally accepted that civilian personnel are barred from direct participation in hostilities, this "direct participation" rule is insufficient to fully address the issue of permissible "civilianization" of battlefield functions. This is because the rule

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2. The term "global war on terror" is used here as a convenient reference to the various military operations by the United States against armed and organized opposition groups after September 11, 2001. It is not intended to reflect the author's position on the legitimacy of labeling these operations a "war."

3. The law of armed conflict, also known as the law of war or international humanitarian law, refers to the body of international treaty and customary law regulating the methods and means of warfare and establishing protections for the victims of war.

4. Int'l Comm. of the Red Cross, *Direct Participation in Hostilities under International Humanitarian Law* 5, Sept. 2003 [hereinafter *ICRC Direct Participation Report*], *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf (documenting discussions by some 50 LOAC experts of whether and how to "clarify the notion of 'direct participation in hostilities' under international humanitarian law").

does not define permissible or impermissible civilian functions, but only operates to establish the *consequence* of engaging in functions that amount to direct participation in hostilities.[5]

This article proposes an alternative approach for determining legal limits on the use of civilian personnel: a *functional discretion* test. This test is based on the premise that the legality of civilianization must be derived from the consideration and synthesis of a broader spectrum of LOAC principles and treaty provisions, and that the entire structure of the LOAC is based on the relationship between a military commander and military subordinates. Properly configured, this relationship is supposed to ensure that individuals who exercise discretion on the battlefield implicating LOAC compliance are

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5. The following comment from a Department of Defense LOAC expert reflects the nebulous nature of the existing standard:

> As civilians accompanying the armed forces in the field, in accordance with Article 4A(4) and (5), GPW, contractors are entitled to prisoner of war status if captured. Contractors in an active theater of operations during armed conflict are at risk of incidental injury as a result of enemy operations. A contractor may be subject to intentional attack for such time as he or she takes a direct part in hostilities. A contractor who takes a direct part in hostilities (a phrase as yet undefined, and often situational) remains entitled to prisoner of war status, but may be subject to prosecution if his or her actions include acts of perfidy; Article 85, GPW.

Email from W. Hays Parks, Office of the General Counsel, Dept. of Defense, to Col. Michael Meier, Chairman of the Joint Chiefs of Staff Office of the Legal Advisor (May 4, 2005) (on file with the author). The acronym GPW is a reference to Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW], *reprinted in* DEP'T OF THE ARMY, TREATIES GOVERNING LAND WARFARE (DA Pam. 27-1) (Dec. 1956), at 67, *available at* http://www.apd.army.mil/pdffiles/p27_1.pdf. As the quoted language confirms, entitlement to prisoner of war status upon capture is a question distinct from the permissible activities of such personnel. The quote also confirms that "direct participation" is not only an ill-defined term, it is also focused primarily on the risk of becoming a lawful object of enemy attack, rather than on functions that may permissibly be assigned to civilian augmentees.

One example from recent military operations illustrates the need for a more effective test. During Operation Iraqi Freedom the shortage of qualified uniformed interrogators, coupled with the large number of detainees, led to use of contract civilian interrogators. There have been allegations that some of these civilians abused detainees. *See* Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors,* WASH. POST, May 13, 2004, at A1; *see also* Shane Harris, *Bad to Worse, From Contract to Oversight, the Army Mismanaged Interrogators at Abu Ghraib,* GOVEXEC.COM, Sept. 15, 2004, *at* http://www.govexec.com/features/0904-15/0904-15newsanalysis2.htm; Josh White & Dafna Linzer, *Ex-Contractor Guilty of Assaulting Detainee: Passaro Is the First U.S. Civilian Convicted for Abuse in Afghanistan or Iraq*, WASH. POST, Aug. 18, 2006, at A8.

This incident has raised serious questions about whether it is ever appropriate to use civilians to interrogate detainees or prisoners of war. The direct participation standard has little utility in assessing whether such use is legally permissible, because direct part in hostilities is understood to mean causing actual harm to enemy personnel or equipment. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY], at 619, *available at* http://www.icrc.org/ihl.nsf/WebList?ReadForm&id=470&t=com. For this purpose, "harm" means the application of destructive force against enemy personnel, a concept far removed from interrogation.

members of organized military units that operate within a military command, control, and disciplinary system.[6] Because such a system is necessary in order to enforce compliance with the LOAC, only such individuals may properly be considered "combatants." Because civilian support personnel – referred to throughout this article as "augmentees" – do not fall into this category, they must be prohibited from performing any function involving the exercise of such discretion.

Accordingly, unlike the direct participation rule that has traditionally been relied on to assess the legality of civilianization, the proposed functional discretion test is derived from a broader synthesis of LOAC principles. It reflects consideration of the qualification of combatants, the complementary obligation of distinction, and the authority and responsibility of the military commander. By shifting the analytical focus from the consequences of direct participation in hostilities to the discretion associated with executing the proposed function, and to the risk that exercise of discretion will result in violations of the LOAC, this test is intended to ensure that only lawful combatants – individuals who genuinely qualify as "members of the armed forces" – will perform functions that implicate LOAC principles. Only these individuals are subject to the full spectrum of LOAC compliance mechanisms, the most significant of which is being subject to responsible command. As a

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6. Simply subjecting a civilian augmentee to military disciplinary authority would not, in the opinion of this author, transform the civilian into a "member of the armed forces" for purposes of the LOAC. The penal authority of a military commander is only one aspect of comprehensive command and control and unit discipline over a fighting force. Rather, the complex relationship between superior and subordinate, and the relationship among all members of a military unit, produce the cohesion and discipline inherent in the concept of "military unit." As one Army field manual puts it,

> You achieve excellence when your people are disciplined and committed to Army values. Individuals and organizations pursue excellence to improve, to get better and better. The Army is led by leaders of character who are good role models, consistently set the example, and accomplish the mission while improving their units. It is a cohesive organization of high-performing units characterized by the warrior ethos.

DEPT. OF THE ARMY, ARMY LEADERSHIP: BE, KNOW, DO (FM 22-100), Aug. 31, 1999, at ¶1-72, *available at* https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/9502-1/fm/22-100/toc.htm.

Extension of military criminal jurisdiction to civilian support personnel had been proposed, *see, e.g.*, William C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq,* 2006 B.Y.U. L. REV. 367 (proposing revision to the Uniform Code of Military Justice to extend military jurisdiction over civilian contractors), and Congress recently enacted legislation to accomplish that. *See infra* note 42. A constitutional challenge to the first exercise of this resurrected jurisdiction is currently pending before the Army Court of Criminal appeals. Petition for Hearing, Mohammad Alaa Ali v. Lt. Gen. Loyd Austin (copy on file with author). It remains to be seen whether this jurisdiction will survive constitutional scrutiny. *See* Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach To Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008).

result, they alone are granted the authority to engage in conduct implicating LOAC compliance.

The expectation that members of the armed forces will exercise their authority in accordance with the LOAC is derived from the historic relationship between military commanders and their subordinates – a relationship that implies a level of training, discipline, selflessness, and responsibility associated with the performance of war fighting functions.[7] Additionally, by requiring that only members of the armed forces may perform functions implicating LOAC compliance, the functional discretion test also ensures symmetry between command authority and command responsibility. This is because only individuals subject to the full spectrum of command, control, and discipline will be permitted to engage in conduct that could be imputed to the commander under the doctrine of vicarious criminal responsibility.

Part I of this article discusses LOAC principles and treaty provisions that must underlie any determination of permissible civilian support functions. These provisions include rules related to combatant qualification, civilian immunity, and the principle of distinction.

Part II analyzes the relationship between combatant status, compliance with the LOAC, and the doctrine of command responsibility. The analysis here supports the conclusion that the line between permissible and impermissible civilian functions should be based on a recognition that only members of the armed forces are subject to the internal command and discipline required for compliance with the LOAC. This part of the article

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7. Unfortunately, increased reliance on civilian support has not been matched by any significant update to decisional criteria for determining the legally permissible scope of their activities. The most recent Defense Department policy on the use of civilian support simply states the obvious: "Each service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements." DOD Instr. No. 3020.41, *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, Oct. 3, 2005, at ¶6.1.1.

While the emphasis on compliance with international law in this policy is certainly appropriate, the glaring lack of any meaningful test to ensure such compliance is unacceptable. This is particularly true during the current era of increasing pressure to maximize civilian support in order to reduce demands on the uniformed force and increase the "tooth-to-tail" ratio.

Several undesirable consequences flow from this failure of guidance. First, individual subordinate commands cannot determine how to comply with the policy. Second, different commands may adopt divergent standards. Third, the lack of uniform decisional criteria hampers strategic planning and force development.

Even more troubling is the risk that assessment of compliance will be influenced by operational demands for mission accomplishment. One need only imagine a commander with limited uniformed resources, but a far more robust contracting budget, struggling to match capabilities to requirements during ongoing combat operations. Such a commander would be under intense – albeit often subtle – pressure to maximize the use of contracted civilian support in order to maintain maximum flexibility regarding where and when to commit limited uniformed resources.

describes the nature of the command authority needed to ensure such compliance and the scope of the associated command responsibility. It also addresses the relationship between the doctrine of imputed criminal responsibility and the authority of military commanders over civilian support personnel.

Part III explores the "direct participation test," which is currently accepted as the primary test for the legality of civilian support functions. It explains why this test is both inadequate to describe LOAC limitations on civilian functions and insufficient to meet the demands of contemporary military operations.

Part IV sets out an alternative test – the functional discretion test – for assessing the permissible role of civilian augmentees. It demonstrates that this test will provide the flexibility essential to meet the demands of the rapidly evolving nature of warfare. It also shows that this test will give operational commanders justified confidence that only uniformed members of military units will be permitted to engage in activities that implicate LOAC compliance. The proposed test raises a presumption against civilianization that can be rebutted only by a good faith determination that the use of a civilian augmentee will not likely risk a LOAC violation. Part IV concludes with several examples to illustrate the application of the functional discretion test.

## I. CIVILIAN AUGMENTATION AND THE LAW OF ARMED CONFLICT

Civilians have always augmented the military forces in the field, providing a wide array of services to those forces. Therefore, the status of civilian augmentees is specifically addressed in Article 4A(4) of the Third Geneva Convention of 1949 – the Prisoner of War Convention (GPW).[8] This language therefore provides the starting point for determining the permissible civilian support functions. It specifies that upon capture civilian augmentees are to be treated as prisoners of war, and thus acknowledges the authority of States Parties to utilize civilian augmentees in support of armed forces in the field.

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8. GPW, *supra* note 5. Article 4 of the GPW identifies the individuals who qualify as prisoners of war, and includes civilians accompanying the armed forces within the definition:

> Article 4.
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> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: . . .
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> (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

The treaty establishes only two prerequisites for civilians to qualify for prisoner of war status. First, such civilians "shall have received authorization from the armed forces which they accompany."[9] Second, they must "accompany the armed forces without actually being members thereof ."[10] The treaty does not *expressly* limit the functions that may be performed by civilian augmentees. There is, indeed, no treaty provision that explicitly establishes such a limitation. However, as noted throughout this article, such a condition is almost certainly a customary norm. By indicating that these individuals are associated with the armed forces "without actually being members thereof," the treaty clearly suggests that civilian augmentees possess different authorities and bear different obligations than members of the armed force they support. This provision of the GPW therefore provides a *prima facie* basis for concluding that civilian augmentees are not entitled to participate in the same range of functions as their military counterparts.

Direct participation in hostilities is the most obvious example of a function traditionally reserved for members of the armed forces.[11] However, it is the thesis of this article that the treaty language set out above suggests a broader constraint on civilians. Because they are not members of the armed forces, civilians accompanying the force are barred from performing any function reserved for such members. As will be developed below, these include any functions that involve exercising the type of discretion that could, if abused, result in a LOAC violation. Any other reading would lead to the absurd result that civilian augmentees could engage in combatant activities without being subjected to the command and discipline structures normally associated with membership in the armed forces – structures intended to prevent LOAC violations.

These two concepts – command[12] and discipline – are essential to ensuring compliance with the LOAC.[13] It would be inconsistent to assert that a treaty specifically intended to mitigate the suffering associated with armed conflict

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9. *Id.*

10. *Id.*

11. According to Professor Schmitt, "It is difficult to imagine a situation in which individual government civilian or contractor employees might qualify as formal members of the armed forces, regardless of the duties they perform." Schmitt, *supra* note 1, at 524.

12. The Defense Department's definition of "command" is:

> command – 1. The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. *It also includes responsibility for health, welfare, morale, and discipline of assigned personnel*. . . .

Dep't of Defense, *Dictionary of Military and Associated Terms* (Jt. Pub. 1-02), Apr. 12, 2001, at 101 (emphasis added), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

13. The significance of these structural aspects of "armed forces" is highlighted by the use of the terms "command" and "discipline" in Article 43(1) of Additional Protocol I. *See* 1977 Protocol I Additional to the Geneva Conventions [hereinafter AP I], *reprinted in* 16 I.L.M. 1391, at art. 43(1).

would authorize individuals to perform combatant functions without the internal command, control, and disciplinary structures essential to ensure such compliance. The GPW must, therefore, regard civilian augmentees as a distinct class of individuals on the battlefield who, although subject to detention as prisoners of war if captured by an enemy, are not permitted to engage in "combatant" functions.

Analysis of the GPW provisions for members of irregular combatant forces reinforces this interpretation. Article 4A(2) addresses the post-capture status of members of volunteer corps, militia groups, and "organized" resistance movements. Such persons are a species of "augmentees" – individuals who are not part of the regular armed forces. Unlike civilian augmentees, however, these individuals become associated with the armed forces because of their choice to take up arms in combat activities. More importantly, their organizations are expected to possess military command, control, and disciplinary characteristics analogous to the regular forces they join. According to the commentary of the International Committee of the Red Cross (ICRC) on the GPW:

> It is true that the phrase "organized resistance movements" was added to "militias" and "volunteer corps." The Conference of Government Experts had generally agreed that the first condition preliminary to granting prisoner-of-war status to partisans was their forming a body having a military organization. The implication was that such an organization must have the principal characteristics generally found in armed forces throughout the world, particularly in regard to discipline, hierarchy, responsibility and honour.[14]

Like civilian augmentees, these members of irregular combatant forces are entitled to prisoner of war status upon capture. Unlike civilian augmentees, however, this entitlement is available only if they comply with the combatant identification requirements (wearing a fixed and distinct symbol recognizable at a distance and carrying arms openly), if they operate under responsible command, and if they comply with the LOAC.[15]

The disparity between POW qualification requirements for these two categories of augmentees is critical in understanding the limits of permissible civilian functions. By subjecting members of paramilitary organizations to LOAC requirements that enhance both LOAC compliance and distinction

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14. INT'L COMM. OF THE RED CROSS, COMMENTARY, CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (n.d.) [hereinafter GPW COMMENTARY], at 58, *available at* http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument.

15. *See* GPW, *supra* note 5, art. 4A(2). For purposes of this article, such groups are referred to collectively as "paramilitary" organizations.

between combatants and civilians,[16] the law creates the logical inference that only members of paramilitary groups may engage in the same range of activities permitted to members of the regular armed forces.[17]

The omission of any analogous "combatant qualification" for civilian augmentees seeking prisoner of war status confirms a critical conclusion: GPW Article 4 reflects an understanding that civilian augmentees are barred from performing combatant functions. Why else would the provision subject civilians who become "paramilitary" combatants to strict distinction and other LOAC requirements, then omit comparable requirements for civilian augmentees? The answer is apparent: the activities of civilian augmentees are presumed to be limited to those that do not cross the line from support functions to actions traditionally understood as being combatant in nature. To date, this line has been drawn at direct participation in hostilities. However, because civilian augmentees are not entitled to perform *any* combatant function, other activities involving the exercise of discretion that implicates LOAC compliance are also beyond the legally permissible scope of their support activities.

Unfortunately, this conclusion is obscured by the lack of a definition for the term "combatant" in the GPW. In fact, it was not until the Geneva Conventions were supplemented in 1977 by Additional Protocol I that this term was finally defined.[18] As noted by the ICRC commentary to the 1977

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16. *See* GPW COMMENTARY, *supra* note 14:

> The enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons. Thus, a civilian could not enter a military post on a false pretext and then open fire, having taken unfair advantage of his adversaries.

*Id.* at 61; *see also* Geoffrey S. Corn, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War* (DA Pam. 27-50-307), 1998-JUN Army Lawyer 17.

17. Indeed, since September 11, 2001, compliance with these prerequisites has been regarded by the United States as the *sine qua non* of lawful combatant status, and the United States has cited these conditions in policies relating to captured Taliban and al Qaeda personnel. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Asst. Attorney General, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 22, 2002, *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf.

18. Additional Protocols I and II of 1977 were developed to supplement and bring up to date the four Geneva Conventions of 1949. Although the United States played a significant role in the drafting of these treaties, Additional Protocol I was withdrawn from Senate consideration by President Reagan. *See* Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987). This was in large measure because of the conclusion that several provisions of Additional Protocol I extended LOAC protections to terrorists, and that the scope provision of Additional Protocol II was too restrictive. *Id.*

Nonetheless, prior to U.S. military response to the attacks of September 11, 2001, most legal experts responsible for advising U.S. military planners and commanders considered the bulk of Additional Protocol I as a reflection of customary international law, and thus binding on the United States. The post-September 11 legal determinations made by President Bush

Protocol I Additional to the Geneva Conventions of 1949 (AP I),[19] one of the treaties designed to update the Geneva Conventions, the GPW left the definition of this critical term to inference:

> In the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture.[20]

Although overbroad for suggesting that *any* person entitled to prisoner of war status upon capture is, by implication, a combatant, the subsequent

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regarding the applicability of law of war provisions to the conflict with al Qaeda, however, radically altered the approach to these issues. A much more textual approach prevailed when interpreting law of war treaty obligations. *See* Memorandum, Jay S. Bybee, *supra* note 17. This revised approach to interpreting the status of provisions of Additional Protocol I is reflected by comparing treatment of this treaty in the law of war chapter of the *Operational Law Handbook*, which is perhaps the most widely relied upon reference for military legal practitioners supporting ongoing operations. The current version of the *Handbook* provides:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Additional Protocol I] and II, 155 nations have ratified [Additional Protocol I]. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. This difference in obligation has not proved to be a hindrance to U.S./allied or coalition operations since promulgation of AP I in 1977.

INT'L & OPERATIONAL LAW DEP'T, JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK (JA 422) (Aug. 2006), ch. 2, at 2.

The full significance of this excerpt is apparent only when compared to the description of Additional Protocol I in prior editions of the *Operational Law Handbook*. For example, the 2003 edition stated:

> 1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Geneva Protocols] I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the [United Nations]). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. *Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law.*

Comparison of these two versions of the *Operational Law Handbook* indicates a general "rollback" by the executive branch of the treatment of Additional Protocol I provisions. Numerous experts and government legal advisers have argued for years that many of these provisions reflect binding norms of customary international law. *See, e.g.*, Michael J. Matheson, *Humanitarian Law Conference, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987); *see also* Memorandum for Assistant General Counsel (International), OSD, from W. Hays Parks, Michael F. Lohr, Dennis Yoder, and William Anderson, *1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications*, May 8, 1986 (on file with author). Unfortunately, opponents of this proposition have relied on the repudiation of Additional Protocol I by President Reagan. These opponents assert this repudiation is particularly relevant vis-à-vis the armed conflict with al Qaeda because it was motivated in large part by the U.S. concern that Additional Protocol I unjustifiably extended law of war protections to terrorist operatives.

19. *See* AP I, *supra* note 13.

20. AP I COMMENTARY, *supra* note 5, at 515.

definition of this term by AP I makes clear that civilian augmentees are not to be considered combatants in describing the scope of their permissible functions.[21] The commentary to AP I confirms this conclusion:

> All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore dispense with the concept of "quasi-combatants," which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities . . . .[22]

A combatant – an individual extended the authority to participate in hostilities – must therefore be a member of the armed forces or a member of a paramilitary organization associated with the armed forces who works under traditional command and is subject to the disciplinary structure associated with regular armed forces. It is clear that civilian augmentees – even though they may be authorized by a State to be present in the conflict area, and even though they are entitled to prisoner of war status upon capture – need not and normally do not satisfy these distinction and LOAC compliance requirements.[23] Accordingly, they are not properly regarded as members of the armed forces. It is therefore improper to characterize them as combatants, or even as some type of quasi-combatants. As a consequence, they are without question prohibited from taking a direct part in hostilities. But the direct participation prohibition is not an exclusive test for determining the scope of permissible civilian support functions. Because they do not qualify as combatants, a more appropriate test is whether a particular function is one that *should* be reserved for a qualified combatant.

One function that unquestionably must be reserved for combatants is engaging the enemy with combat power. Allowing anyone other than qualified combatants – individuals required to distinguish themselves from the civilian population – blurs the distinction between lawful objects of attack (combatants) and protected civilians. The "direct participation" prohibition is intended to maintain this distinction.[24] The limitation of targeting to only

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21. *See* AP I, *supra* note 13, art. 43(2): "Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities." The term "armed forces" is defined in Article 43(1).

22. AP I COMMENTARY, *supra* note 5, at 515.

23. *See infra* notes 42-46 and accompanying text.

24. According to the commentary to AP I, the distinction between lawful and unlawful targets is at the very foundation of virtually every aspect of the contemporary LOAC. *See* AP I COMMENTARY, *supra* note 5, at 586 ("Although it was never officially contained in an

international treaty, the principle of *protection* and of *distinction* forms the basis of the entire regulation of war . . . ." ) (emphasis in original). *See generally* DEP'T OF THE ARMY, THE LAW OF LAND WARFARE (FM 27-10) (July 1956); THE LAW OF WAR 17-27 (Richard I. Miller ed., 1975). The principle of distinction in targeting has been at the core of the laws and customs of war for centuries, even prior to the advent of multinational treaties regulating the conduct of hostilities. *See* Leslie C. Green, *What Is – Why Is There – the Law of War, in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 141 (Michael N. Schmitt & Leslie C. Green eds., 1998); *see also* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 20-28 (2d ed. 2000). It was not until 1977, however, that this principle of distinction was codified in a multilateral treaty. The codification came in Article 48 of AP I:

> 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.

AP I, *supra* note 13, art. 48. This provision reflects the relationship between the principle of distinction and the concept of "military objective": combat power must be directed only at those persons, places, or things that qualify as lawful military objectives. All other persons, places, and things are presumptively *not* military objectives. Accordingly, the law requires combatants to "distinguish" between lawful objects of attack and all other persons, places, and things, which best understood as civilian in nature, which means they are immune from attack. This immunity is primarily intended to protect members of the civilian population who do not take a direct part in hostilities. In an excellent and concise analysis, Professor Horace B. Robertson Jr. notes that the contemporary rule of military objective evolved in order to implement this principle of distinction. *See* Horace B. Robertson Jr., *The Principle of the Military Objective in the Law of Armed Conflict, in* THE LAW OF MILITARY OPERATIONS 197 (Michael N. Schmitt ed., 1998) (tracing the rule back to the Hague Rules of Aerial Warfare of 1923, drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923). This evolutionary process culminated in 1977 in Articles 48 and 52 of AP I. *See* AP I, *supra* note 13, arts. 48, 52. The language of Article 48 is characterized as the "basic rule." Article 52(2) states these additional requirements:

> Attacks shall be limited to strictly military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

*See* AP I COMMENTARY, *supra* note 5, at 629.

Although not all States are parties to AP I, widespread compliance with Article 48 of the treaty supports the conclusion that it reflects a customary norm of the LOAC. There is no indication that the United States objected to this provision of the treaty, and indeed both U.S. practice and the widespread citation to this rule in U.S. military manuals suggest that the principles reflected in Articles 48 and 52 apply to U.S. forces as a matter of custom. *See* Robertson, *supra*, at 204 (citing Matheson, *supra* note 18, at 426). Both Matheson and Abraham Sofaer, who was Legal Adviser to the Department of State, commented at a conference co-sponsored by the Red Cross that analyzed the status of the Additional Protocols. Sofaer and Matheson indicated several provisions of Additional Protocol I that the United States considered not reflective of customary international law. By implication, provisions not so identified have always been regarded as binding on U.S. forces. The only provision of Additional Protocol I relating to distinction that Sofaer identified as objectionable was Article 51, which prohibits making civilians the object of reprisal. *Id.*

However, it must be noted that the significance of these statements by Sofaer and Matheson has recently been called into question. Although for many years the publications of the Army Judge Advocate General's School relied on their remarks as evidence of the customary nature of certain provisions of AP I, after combat operations began in response to

military objectives is effectuated by the requirement that members of armed forces and other "lawful combatants" distinguish themselves from the civilian population. This requirement enables members of opposing forces to comply with the LOAC by allowing them to recognize legitimate military objectives – or targets – and avoid targeting persons presumptively entitled to immunity from attack. This "distinction facilitation mechanism" is reflected in Article 4 of the GPW, which imposes certain conditions for obtaining status as a prisoner of war.[25] These conditions include: (1) having a fixed distinctive sign recognizable at a distance, and (2) carrying arms openly.[26]

It is highly significant that these "distinction facilitation" measures are not required of civilian augmentees as they are of members of the armed forces and associated paramilitary groups.[27] This indicates that civilians may not perform functions that blur the distinction between combatant and

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the attacks of September 11, the Department of Defense General Counsel instructed the JAG School to refrain from making such assertions in the future. Since then, both the Department of Defense and the Department of Justice have consistently asserted that any U.S. compliance with AP I is the result of policy decisions, and not of legal obligation. This position has caused significant operational uncertainty, and it has provoked criticism from proponents of the customary nature of this treaty. Nonetheless, even assuming *arguendo* that the longstanding reliance on these statements as evidence of the customary nature of most of the provisions of Additional Protocol I was overbroad, however, it is virtually inconceivable that the United States would oppose application of the principle of distinction – the "basic rule" of the law of war – as a binding obligation governing the conduct of U.S. military operations.

Even in the current "anti-custom" climate that has dominated Bush administration policies, the principle of distinction, as implemented by the principle of military objective, does indeed form part of the customary law of war. Indeed, it lies at the very core of the LOAC. This position is endorsed in the U.S. Army Judge Advocate General's *Operational Law Handbook,* a resource widely relied on by military legal advisers. The *Handbook* is regarded throughout the U.S. and international military legal communities as a concise and accurate statement of the law. *See* INTERNATIONAL AND OPERATIONAL LAW DEPT., JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK (2007).

25. *See* GPW, *supra* note 5, art. 4A(2).

26. *Id.* While these conditions are expressly required only for "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory," *id.*, the conditions are also impliedly required for members of the armed forces. *See* GPW COMMENTARY, *supra* note 14, at 65-66. The indirect manner in which this issue is addressed was explained in this way:

> The drafters of the 1949 Convention, like those of the Hague Convention, considered it unnecessary to specify the sign that members of armed forces should have for purposes of recognition. It is the duty of each State to take steps so that members of its armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces and from civilians. The Convention does not provide for any reciprocal notification of uniforms or insignia, but merely assumes that such items will be well known and that there can be no room for doubt.

*Id.* at 52.

27. This prisoner of war status is provided by Article 4A(4) of the GPW, set forth in the text accompanying note 8.

civilian.[28] While civilian augmentees – like combatants – may become casualties because of their proximity to combat operations, they do not become lawful targets as a result of that proximity. Thus, civilian augmentees are the beneficiaries of a unique dichotomy. They are civilians for purposes of enemy targeting, but they must be treated as prisoners of war if captured. Accordingly, because the GPW does not link the prisoner of war status of civilian augmentees to compliance with the "distinction facilitators" applicable to combatants, it would irreparably dilute the distinction compliance mechanisms of the LOAC if civilians were permitted to perform functions analogous to those of combatants, the most obvious of which is participation in hostilities.

The direct participation test is intended to prevent such dilution. However, the prohibition against direct participation is more properly understood as a *consequence* of a broader constraint against civilian augmentees performing *any* combatant function. As explained in greater detail below, it does not effectively address other functions that should be reserved for combatants. Accordingly, the direct participation prohibition and the underlying principle of distinction must be augmented by additional LOAC norms that distinguish other functions reserved for combatants from those that may properly be assigned to civilian augmentees.

## II. WAR CRIMES AND COMMAND RESPONSIBILITY: THE MISSING ELEMENT IN AN ASSESSMENT OF THE LINE BETWEEN THE COMBATANT AND THE CIVILIAN AUGMENTEE

The complex interrelationship between the principle of distinction, the authority to operate as a combatant, and the requirement that combatants

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28. In fact, Article 44 of AP I expressly recognizes the link between combatant qualification and the principle of distinction: "In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." AP I, *supra* note 13, art. 44.

Although the United States objected to Article 44, the basis for its objection actually bolsters the conclusion that the principle of distinction prohibits civilian augmentees from performing combatant functions. The U.S. opposition to Article 44 was motivated by the perception that it imposed new temporal limits on the combatant identification requirement. U.S. officials interpreted Article 44 to mean that combatants need make themselves distinguishable only while engaged in or immediately prior to an attack. They regarded the proposed change in the traditional distinction requirement as having been motivated by a desire to grant prisoner of war status to unconventional warriors who move back and forth between military units and the civilian population, thus diluting the protection of the civilian population. *See* Jean-François Quéguiner, Working Paper, *Direct Participation in Hostilities Under International Humanitarian Law*, Nov. 2003, *available at* http://ihlresearch.org/ihl/pdfs/briefing3297.pdf. This dilution was a major factor leading to U.S. rejection of AP I. It would be fundamentally inconsistent with the U.S. objection to Article 44 now to endorse an interpretation of the law that would permit civilian augmentees to "periodically" perform combatant functions.

operate under responsible military command provides insight into how effectively to delineate between combatant and augmentee functions. Distinction requires a bright line between combatants and civilians. The prerequisite for gaining legal status as a combatant is compliance with the four GPW criteria for entitlement to prisoner of war status – an inherent obligation for members of the armed forces and an express requirement for civilians who decide to join the fight in associated "paramilitary" organizations. Three of these four "combatant qualification" requirements could, however, conceivably be routinely satisfied by civilian augmentees: carrying arms openly, wearing a fixed and distinctive symbol, and complying with the LOAC. The true distinguishing factor between members of the regular armed forces and associated militia groups, on the one hand, and civilian augmentees, on the other, is operation within the type of command relationship that is essential to ensure compliance with the LOAC. This factor is referred to in the LOAC as operating under "responsible command."

The LOAC establishes a linkage between responsible command, the legal privilege of operating on the battlefield as a qualified combatant, and the liability of military commanders for the misconduct of subordinates. This linkage serves the interests of LOAC compliance by emphasizing to the military commander – the individual with the most direct and meaningful opportunity to ensure respect for the LOAC – that violations jeopardize not only State and international interests, but also the commander's personal interest in avoiding imputed criminal responsibility. It also suggests that legitimate combatant status is contingent not simply on whether or not an individual will take a direct part in hostilities, or wears distinguishing clothing and equipment, but instead on the expectation that the individual is subject to the fundamental compliance mechanism of the LOAC – a military command/subordinate relationship.

To ensure compliance, the LOAC historically has relied on the relationship between the exercise of responsible command and the existence of command and disciplinary authority over combatants. It is therefore no surprise that "operating under responsible command" is an essential condition for attaining lawful combatant status. The military command authority over subordinates emphasized in LOAC training, and the discipline inherent in such command, are essential during the intensity of armed conflict.[29] Membership in a military unit is also expected to produce a high degree of loyalty to the military commander, often referred to as "unit cohesion." This bond of obedience and loyalty is a unique and critical aspect of military organizations.

Accordingly, the most effective test for determining the limits on functions that may be legally assigned to civilian augmentees is not simply whether a function involves direct participation in hostilities, but whether performance of the function requires an exercise of discretion implicating

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29. *See* GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 24, at 280-285.

compliance with the LOAC. Only individuals who qualify as combatants should be permitted to perform such functions, because only combatants are fully subject to the military command and control relationship so central to ensuring LOAC compliance. While direct participation in hostilities surely falls into this category, a focus on this type of discretion goes well beyond this traditional test to address other functions that do not involve causing immediate harm to enemy personnel or equipment, but that should nonetheless be reserved for military personnel.

The link between military command and discipline, on the one hand, and combatant qualification and authority, on the other, is not novel. The principle that only individuals operating under responsible command are lawful combatants is reflected in treaty provisions defining prisoner of war status.[30] Combatant status was historically based on the implied correlation between command structure and internal disciplinary codes and the expectation of compliance with the LOAC. Such a correlation was finally codified in 1977, when AP I defined the term "combatant," explicitly establishing military command and discipline as conditions for recognizing combatant status.[31]

The rationale for this requirement is clear. In order to ensure compliance with the LOAC, only those individuals subject to military command and discipline should be permitted to perform functions with the potential to produce a LOAC violation. This is reflected in the commentary to Article 43 of AP I:

> This requirement [the link between combatant status and internal command discipline and control structure] is rendered here with the expression "internal disciplinary system," which covers the field of military disciplinary law as well as that of military penal law. . . . The principle of the inclusion of this rule in the Protocol was from the beginning unanimously approved, as it is clearly impossible to comply with the requirements of the Protocol without discipline. . . . *Anyone who participates directly in hostilities without being subordinate to an organized movement under a Party to the conflict, and enforcing compliance with these rules, is a civilian who can be punished for the sole fact that he has taken up arms, unless he falls under one of the categories listed under (2) and (6) of Article 4A of the Third Convention (categories (1) and (3), which cover the regular armed forces, should automatically fulfil these requirements).*[32]

Note the omission in this excerpt of any reference to individuals entitled to prisoner of war status by operation of Article 4A(4) of the GPW.[33] The significance of this omission is clear. The drafters of the only treaty to

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30. *See id.* at 102-109.
31. *See* AP I, art. 43(1), set forth *supra* note 21.
32. AP I COMMENTARY, *supra* note 5, at 513-514 (emphasis added).
33. GPW, *supra* note 5.

explicitly address combatant status must have presumed that civilian augmentees – the individuals addressed by Article 4A(4) – would not be "part of the armed forces" for purposes of authority to engage in combatant activities. Professor Schmitt notes:

> There are but two categories of individuals in an armed conflict, combatants and civilians. Combatants include members of a belligerent's armed forces and others who are directly participating in a conflict. As noted, the latter are labeled unlawful combatants or unprivileged belligerents; they are either civilians who have joined the conflict or members of a purported military organization who do not meet the requirements for lawful combatant status. Everyone else is a civilian, and as such enjoys immunity from attack.[34]

Under Schmitt's system of classification, which is entirely consistent with the relationship between the GPW and AP I, civilian augmentees are simply civilians. The fact that they are authorized to be present in the conflict area and perform functions in support of the armed forces does not alter this conclusion, because they are not required to comply with the four "combatant identification" requirements, and therefore they are not truly part of a military unit.

This "obligation enforcement" component of the LOAC is manifested in the doctrine of command responsibility.[35] This principle imposes upon the "responsible military commander" criminal liability for violations of the LOAC committed by subordinates.[36] Commanders may be liable not only for ordering, aiding, encouraging, or abetting LOAC violations, but also for LOAC violations that they "should have known" would occur.[37] This "should have known" prong of the doctrine subjects commanders to vicarious criminal responsibility for the conduct of subordinates, a stark departure from

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34. Schmitt, *supra* note 1, at 522.

35. *See* GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 24, at 303-316; *see also* Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and Its Analogues in United States Law,* 38 HARV. INT'L L.J. 272 (1997); Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations,* 164 MIL. L. REV. 155 (2000).

36. For an excellent summary of the history of this doctrine and recent developments, see Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility,* 34 N.Y.U. J. INT'L L. & POL. 797 (2002); *see also* Victor Hansen, *What's Good for the Goose Is Good for the Gander – Lessons from Abu Ghraib: Time for the United States To Adopt a Standard of Command Responsibility Towards its Own*, 42 GONZ. L. REV. 335 (2007).

37. *See generally* In re Yamashita, 327 U.S. 1 (1946).

traditional criminal law doctrines of individual culpability.[38] The broad sweep of this doctrine is summarized by Professor Green:

> A commander, that is to say, anyone in a position of command whatever his rank might be, including a Head of State or the lowest non-commissioned officer, who issues an order to commit a war crime or a grave breach is equally guilty of the offense with the subordinate actually committing it. *He is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it*.[39]

Command responsibility is intended to ensure that commanders diligently execute their responsibilities in a way that will enhance the probability of LOAC compliance by their forces. These responsibilities include training subordinates in their legal obligations; involving legal advisers in operational decision-making; establishing a command atmosphere that emphasizes good-faith compliance with the law; and taking swift disciplinary action in response to any breach of the law.[40] Indeed, failure to respond to LOAC violations with

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38. A military commander serving in the armed forces of the United States would normally be subject to criminal responsibility for violations of the Uniform Code of Military Justice pursuant to the article of that code establishing principal liability:

> Art. 77. Principals
>
> Any person punishable under this chapter who –
>
> (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; or
>
> (2) causes an act to be done which if directly performed by him would be punishable by this chapter;
>
> is a principal.

10 U.S.C. §877 (2000).

39. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT, *supra* note 24, at 303 (emphasis added). But according to Shany and Michaeli,

> given the very exceptional nature of the vicarious liability that is at the heart of the command responsibility doctrine, moral fault cannot justify per se the imposition of responsibility under the doctrine. The attribution of a criminal act to a person who has neither committed the act (did not participate in the actual *actus reus*) nor displayed the requisite mental attitude towards it (did not necessarily have the required *mens rea*, which might in certain offenses consist of special intent) is a radical measure that constitutes an exception to the ordinary presumption of personal culpability (that every person ought to be held liable only for his own acts and omissions). While the existence of moral fault might justify the personal culpability of commanders for their own acts and omissions (e.g., breach of a positive duty to prevent or punish violations of the law), it is questionable whether it also should justify the imposition of vicarious liability. It is at least debatable whether the moral fault associated with negligent oversight on the part of a commander should be equated with the moral fault of the actual perpetrator of war crimes, as the perpetrator might have committed the atrocities with malicious intent.

Shany & Michaeli, *supra* note 36, at 831-832 (citations omitted).

40. *See* Green, *supra* note 24, at 277-283.

effective disciplinary measures, even when the violations are seemingly minor, may become critical evidence of the creation of an atmosphere that the commander should have known would lead to more severe violations.[41] By imposing liability on a commander for failing to ensure compliance with the LOAC by members of his unit, command responsibility plays a central role for the profession of arms. It links operations under a military command structure with the authority to engage in the full range of combatant functions, for that linkage operates to ensure the proper exercise of battlefield discretion by combatants.

Unlike members of the armed forces, civilian augmentees are not considered by the LOAC or the Department of Defense as "members of the armed forces." They are instead understood to be supplemental resources made available to military commanders in order to enable maximization of combat forces for combat tasks. As a result, U.S. military commanders possess only questionable criminal disciplinary authority over civilian augmentees, even those employed by the armed forces in the area of military operations.[42]

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41. *See, e.g.,* In re Yamashita, 327 U.S. 1 (1946) (imposing vicarious criminal responsibility on a Japanese commander for LOAC violations of his subordinates on the theory that his prior indifference to violations produced a culture of non-compliance).

42. Until recently, Article 2 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §802 (2000), identified the individuals subject to the jurisdiction of the Code. In addition to members of the armed forces, two relevant categories of civilians were also subjected to this military jurisdiction:

> (10) In time of war, persons serving with or accompanying an armed force in the field.
>
> (11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

This jurisdiction had, however, been restricted by judicial decision. In the seminal case to address the question of military jurisdiction over United States civilians, Reid v. Covert, 354 U.S. 1 (1956), the Supreme Court held that the practice of subjecting U.S. civilian spouses who accompany their military members overseas to court-martial jurisdiction violated the Constitution. The Court noted that the issue presented related to Article 2 (11) of the UCMJ, and *not* Article 2 (10), and accordingly distinguished civilian dependants from civilians who are connected to the armed forces in a functional support role what this article has referred to as civilian augmentees. However, *Reid* was subsequently relied on by the highest United States military appellate court to invalidate the assertion of military criminal jurisdiction over civilian augmentees pursuant to Article 2 (10), absent a formal declaration of war (a prerequisite the Court of Military Appeals derived from the "in time of declared war" language of Article 2 (10) of the UCMJ). *See* United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970). Thus, while the Supreme Court seemed to leave intact the jurisdiction established by Article 2 (11) over civilian augmentees, the *Averette* decision evolved to become an article of faith within the military legal community that short of a formally declared war, civilian augmentees were immune from the jurisdiction of the UCMJ.

This longstanding prohibition against asserting military jurisdiction over civilian augmentees absent a formal declaration of war was altered in October 2006, when Congress included in the John Warner National Defense Authorization Act for Fiscal Year 2007 the

Ironically, however, this limited disciplinary arsenal may provide evidence of sufficient *de facto* authority over civilian augmentees to justify imposition of command responsibility. For example, a commander who suspects misconduct by a civilian augmentee, but fails to remove that civilian from the command, risks triggering the "should have known" theory of criminal responsibility. Still, while the commander may possess a certain degree of real-world authority over such civilians, her lack of genuine disciplinary power makes it fundamentally inequitable to impute liability to her for the conduct of civilian augmentees.

This is all significant in relation to defining permissible civilian functions because of the recent trend to base liability on *de facto* as opposed to purely *de jure* command relationships.[43] As a result of this trend, the doctrine could

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following amendment to the UCMJ:

> Sec. 552. Clarification of Application of Uniform Code of Military Justice During a Time of War.
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> Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking ''war'' and inserting ''declared war or a contingency operation''.

Pub. L. No. 109-364, Div. A, Title V, §552, 120 Stat. 2083, 2217, *codified at* 10 U.S.C.A. §802(a)(10) (West Supp. 2008). Reportedly inserted by Senator Lindsay Graham of South Carolina, the amendment has the effect of subjecting any civilian – civil servant or contractor – "accompanying" the armed forces in a deployed location to the criminal jurisdiction of military courts. Because there is no legislative history for this amendment, nor any other background information that might have existed had the Department of Defense requested this amendment, it is wholly unclear how far this "accompanying" theory might reach. While most experts would likely assert that the term refers to civilians connected to the military through some kind of employment relationship, military jurisprudence from an earlier era suggests that the net may actually have been thrown much more widely, potentially allowing it to reach journalists, former employees who remain in the deployed area, and other civilians only peripherally associated with the military. Nor is the jurisdiction limited to the type of common law offenses normally applicable to civilians. Instead, it might be argued to subject these civilians to the every punitive article in the UCMJ, including uniquely military offenses like disrespect to superiors, disobedience of orders, absence without official leave, desertion, and many others.

How this amendment will be implemented by the armed forces, and whether it will withstand constitutional scrutiny in all respects, are two unanswered questions. Until both of these questions are answered, this amendment has only minimal impact on the analysis presented herein.

43. *See, e.g.,* Prosecutor v. Delalic [Celebici], Judgment, Case No. IT-96-21-T (Int'l Crim. Trib. Former Yugo., Trial Chamber, Nov. 16, 1998), at ¶343, *at* http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf; Prosecutor v. Delalic, Judgment, Case No. IT-96-21-A (Int'l Crim. Trib. Former Yugo., Appeals Chamber, Feb. 20, 2001), at ¶231, *at* http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf. While the trend has been to focus on *de facto* relationships, there is still uncertainty about how such relationships influence the conclusion that an individual is under the "command" of a superior for this purpose. According to Shany and Michaeli,

> The proposition that individuals occupying de facto positions of command are responsible for crimes committed by their subordinates, even if they lack formal appointment to their commanding position, seems to be noncontroversial and was reaffirmed by the Appeals Chamber in Celebici. The application of this principle by the Trial Chamber is somewhat confusing, however. In obiter dicta, the Trial

be extended to impose criminal responsibility on military commanders for the conduct of civilian augmentees supporting the military unit and mission. *De facto* control over the activities of these civilians supports this conclusion, regardless of the limits to the commander's *de jure* command and disciplinary authority.[44] As a result, it is conceivable, perhaps even probable, that command responsibility will extend to the conduct of civilian augmentees, exposing commanders to vicarious criminal responsibility for LOAC violations committed by civilian augmentees.[45] This is problematic because the command and disciplinary relationship between the military commander and civilian augmentees is simply not analogous to that between the commander and military personnel. As a result, a commander might be subjected to responsibility for conduct over which he lacked effective control. Applying this doctrine to a commander without a genuine connection between his command and disciplinary authority and the responsibility imputed to him

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> Chamber expressed the view that commanders bear command responsibility over the acts of all persons subject to their de facto control. In adopting this position, the Trial Chamber has virtually dispensed with the command (or authority) requirement and suggested that effective control over individuals operating within or outside military structures suffices to impute command responsibility – including, for example, the imputation of responsibility to occupying commanders for crimes committed by the local population in the occupied territory. Still, in the judgment's ratio decidendi, the Trial Chamber adopted a more restrictive standard and held that the relations created as a result of the superior's de facto control over her subordinates must be comparable to the relations between de jure commanders and their subordinates. The de facto superior must possess powers of control over her subordinates and actually exercise command over them, which includes the powers to issue orders and to punish offenders. Consequently, the Celebici Trial Chamber held that two of the three defendants did not incur command responsibility, despite their personal ability to influence events in the prison camp. While they may have had considerable de facto control over the acts of others, they clearly lacked the authority to command the perpetrators of the atrocities.

Shany & Michaeli, *supra* note 36, at 844-845.

44. This expanded concept of "command" is reflected in the following excerpt:

> Such hierarchy certainly can be found within a specific military unit, but there may be other structural configurations that satisfy this requirement. For instance, it is possible that hierarchic links of command would be formed between a commander and troops who belong to different units and are placed temporarily under her command, as was in essence the situation in Yamashita. In the same vein, an army commander who has effective control over nonregular militias might incur responsibility for their actions if the hierarchic links satisfy the command and control tests. . . . [H]owever, a hierarchical structure . . . that does not involve an intense level of control analogous to that found within military organizations normally does not justify invocation of the command responsibility doctrine.

*See* Shany & Michaeli, *supra* note 36, at 846-847 (citations omitted).

45. *See generally* Roseanne M. Bleam, Command Responsibility for Contractors Accompanying the Force (2006) (unpublished manuscript on file with the author).

for the misconduct of such civilians would not only be fundamentally unfair; it would distort the underlying logic of the doctrine.[46]

The relationship between the military/superior/subordinate relationship and compliance with the LOAC – a relationship that is at the core of the doctrine of responsible command and command responsibility – provides compelling support for adopting a new approach to assessing the legality of civilian augmentation. It reveals that discretion implicating LOAC compliance must be reserved for those who are subject to the command and disciplinary structure historically associated with the military command relationship. This expectation underlies the expansive scope of vicarious criminal responsibility for LOAC violations imposed upon military commanders. While civilian augmentees will normally be subject to a certain degree of *de facto* military authority, their relationship to the military

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46. This conclusion is not necessarily undermined by the recent amendment to the Uniform Code of Military Justice resurrecting military criminal jurisdiction over civilians accompanying the armed forces during contingency operations. While this amendment does seek to arm the military commander with more effective criminal disciplinary authority over civilian augmentees, it has yet to be established that such jurisdiction will be effectively utilized or survive constitutional challenge. *See* Corn, *supra* note 6. To date, only one prosecution has been brought under this amendment, with the defense preparing to launch aggressive constitutional and statutory challenges to the assertion of jurisdiction. *See* email from LTC Mark Maxwell to Geoffrey Corn, *Flow of Brief*, Apr. 8, 2008 (outlining the anticipated defense brief to be filed with the Army Court of Criminal Appeals to challenge the assertion of jurisdiction over Ala Ali, who is currently pending trial by general court-martial for an aggravated assault he allegedly committed while employed by the U.S. Army in Iraq) (on file with author).

Even assuming that the amendment survives challenge, the resurrection of military jurisdiction over civilian augmentees should not necessarily result in the conclusion that the relationship between civilians and the military commander is analogous to that between the commander and military members of the unit. There are other tangible and intangible aspects of the military command/subordinate relationship that remain unique. Perhaps most important is the unitary loyalty between military subordinates and the military commander, but also included are training standards, direct disciplinary relationships between commanders and military subordinates, and the bond established by the constant existence of this relationship. Without a genuine connection between the authority of a commander and the responsibility imputed to him for the misconduct of subordinates, application of this doctrine would not only be fundamentally unjust, but, as noted by one scholar, would distort the LOAC compliance foundation for the doctrine:

> In combat, a commander is responsible for preventing and repressing war crimes and taking appropriate remedial actions, including, if warranted, punishing those responsible for them. In describing General Yamashita's failure as a leader, General MacArthur wrote: "This officer, of proven field merit and entrusted with a high command involving authority adequate to his responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, and to mankind; he has failed utterly his soldier faith."
>
> While the responsibility of a commander is all encompassing, the commander cannot be liable for every crime committed by subordinates. *It would be manifestly unfair to punish a commander for crimes that he had no ability to prevent.*

Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 Mil. L. Rev. 155, 168 (2000) (footnotes omitted) (emphasis added).

commander and the military unit is simply not comparable to that of members of the armed forces; it is essentially contractual. This does not result in the same military superior/subordinate command relationship that is inherent in the notion of being a "combatant." This conclusion is reinforced by the logic that underlies the requirement that militia and volunteer corps members obtain the status of privileged combatants only when they become associated with a regular military unit and operate under responsible military command. Absent such a traditional and comprehensive military command and disciplinary structure, there can be no meaningful expectation that individuals will be prepared or compelled to comply with the LOAC.

This link indicates that only individuals subject to effective command and control should be permitted to engage in activities implicating LOAC compliance. This risk of potential enemy targeting of these individuals – the focus of the direct participation test – is a secondary consideration. The commander is responsible for maintaining the distinction between lawful combatants and all civilians. No commander, nor the State she serves, is released from this obligation simply because the civilian augmentee – or the State on whose behalf he works – accepts the risk of becoming the object of enemy attack. The analytical focus must therefore be on the discretion associated with execution of the assigned function instead of on the targeting consequence of performing that function.

Limiting permissible civilian augmentation functions to those that do not implicate LOAC compliance will go a long way toward restoring the balance between command authority and command responsibility. Such symmetry is not only equitable, but it furthers the underlying purpose of the command responsibility doctrine. It enhances the likelihood of LOAC compliance by creating an incentive for the commander to utilize his command and disciplinary authority over subordinates to demand fidelity to the law. Thus the relationship between commander and subordinate provides the appropriate foundation for assessing permissible civilian augmentee functions.

## III. THE LIMITS OF THE CURRENT DIRECT PARTICIPATION TEST

Throughout this era of increasing civilianization, the "no direct participation in hostilities" test has been the dominant factor used to identify permissible civilian augmentation functions. This test is derived primarily from Article 51of Additional Protocol I to the Geneva Conventions of 1949[47] and Article 13 of Additional Protocol II to the Geneva Conventions of 1949,[48] neither of which expressly restricts the activities of civilians. Instead, both of these treaty provisions operate to divest civilians of their presumptive

47. *See* AP I, *supra* note 13.

48. Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442.

immunity from attack if and when they take a direct part in hostilities. For example, Article 51 of AP I provides:

> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
>
> 3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.[49]

Despite the fact that they were originally directed at other issues entirely, these provisions have become the accepted foundation for the proposition that civilian augmentees are prohibited from performing any function that produces a direct harm to an enemy, such as engaging an enemy with destructive combat power.[50] Unfortunately, this language provides no meaningful definition of functions that civilian augmentees *may* perform in support of combat operations. It also fails to address the need for symmetry between command authority and command responsibility.

Despite its shortcomings, this "direct participation" test is reflected in policies and regulations related to the deployment and employment of civilians during military operations.[51] The Department of Defense instruction

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49. AP I, *supra* note 13, art. 51. AP I Article 50 defines a civilian as a person who, with one exception important here, does not qualify for prisoner of war status under GPW Article 4. *See* GPW, *supra* note 5. The exception concerns civilians "who accompany the armed forces without actually being members thereof." GPW art. 4A(4). Such civilians are entitled to treatment as prisoners of war if captured, and they also enjoy presumptive immunity from attack. This is the law of war foundation for the traditional assumption that civilian augmentees are prohibited from taking a direct part in hostilities.

50. *See ICRC Direct Participation Report*, *supra* note 4; *see also* Schmitt, *supra* note 1.

51. *See, e.g.,* U.S. Joint Publication (JP 4-0), *Doctrine for Logistic Support of Joint Operations* V-7, Apr. 6, 2000, at V-1, *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp4_0.pdf, which indicates:

> In all instances, contractor employees cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.

*See also* U.S. Dep't of Army Reg. No. 690-11, *Use and Management of Civilian Personnel in Support of Military Contingency Operations*, May 26, 2004; U.S. Dep't of Army Reg. No. 715-9, *Contractors Accompanying the Force*, Oct. 29, 1999; U.S. DEP'T OF THE ARMY, CONTRACTORS ON THE BATTLEFIELD (FM 3-100.21), Jan. 3, 2003, at 1-1.

One article has summarized the traditionally understood mandate in the following simple yet unambiguous terms: "Non-uniformed employees of an armed force and contractor personnel of an armed force are non-combatant civilians and must never take part in hostilities." Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 25 (2001).

governing reliance on contracted civilian support during contingency operations[52] illustrates this emphasis:

> 6.1.1. *International Law and Contractor Legal Status*. Under applicable law, contractors may support military operations as civilians accompanying the force, so long as such personnel have been designated as such by the force they accompany and are provided with an appropriate identification card under the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW). If captured during armed conflict, contingency contractor personnel accompanying the force are entitled to prisoner of war status. Contingency contractor personnel may be at risk of injury or death incidental to enemy actions while supporting other military options. *Contingency contractor personnel may support contingency operations through the indirect participation in military operations*, such as by providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, providing security services . . . , and providing logistic services such as billeting, messing, etc. Contingency contractor personnel retain the inherent right of individual self-defense . . . . Each service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.[53]

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52. A contingency operation is
> a military operation that: a. is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force; or b. is created by definition of law.

Dep't of Defense, *Dictionary of Military and Associated Terms* (Jt. Pub. 1-02), Apr. 12, 2001, at 117, *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf.

53. DOD Instr. No. 3020.41, *Contractor Personnel Authorized to Accompany the U.S. Armed Forces*, Oct. 3, 2005, at ¶6.1.1 (emphasis added).

While this most recent version of the instruction[54] states that contingency contractor personnel may only support operations through "indirect" participation, it reflects the traditionally understood prohibition of direct participation in hostilities.

This policy mandate is obviously intended to preserve a line between civilian and combatant. What is inherently misleading about this apparent clear and simple prohibition is that it is derived from a LOAC provision that is unrelated to the issue of legally permissible civilian augmentee functions. It reflects an improper and ultimately confusing transplant of a legal standard for targeting decisions into a test to determine what functions may legally be performed by civilian augmentees.

Several undesirable consequences flow from this transplant. First, it provides an opportunity for proponents of a robust civilian augmentation role to assert that the limit on civilian functions is invalid, because it is derived from an inapplicable LOAC provision. This view is periodically reflected in the quite proper assertion that the direct participation rule operates only to permit the targeting of civilian augmentees if they take a direct part in hostilities, but that it does not prohibit civilians from engaging in such

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54. A draft of the Department of Defense Instruction that would implement this Directive included a clear and direct prohibition against allowing contract civilians to take a direct part in hostilities:

> 6.1.1. *International Law and Contractor Legal Status*. International law allows contractors to support military operations as civilians accompanying the force. . . . However, actions inconsistent with their status could jeopardize the legal protections to which they are entitled. *Therefore, contingency contractor personnel shall not use force or otherwise directly participate in acts likely to cause actual harm to enemy armed forces. This means that contingency contractor personnel may not engage directly in combat operations.* Contingency contractor personnel may support contingency operations through the indirect participation in hostilities, such as providing communications support, transporting munitions and other supplies, performing maintenance functions for military equipment, and providing logistic services such as billeting, messing, etc. Each duty position or service to be performed by contingency contractor personnel in contingency operations shall be reviewed on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.

DOD Instr. No. 4XXX.bb (Draft DOD Working Paper), *Procedures for the Management of Contingency Contractor Personnel During Contingency Operations* (Dec. 3, 2004) (emphasis added) (on file with author).

In the opinion of the author, the omission from the final Instruction of any express reference to the prohibition against direct participation was primarily motivated by a desire to avoid potential criminal liability for civilian contractors regarding their conduct associated with military operations. Ironically, the desire to shield DOD contractors from liability seems to run counter to Pentagon goals in the ongoing proceedings of the military commission at Guantánamo. Because the primary theory of criminal responsibility underlying the creation of the military commission is the unlawful participation in armed conflict by members of al Qaeda, who as a result of this participation become "unlawful belligerents," the Instruction might be used by defense attorneys in support of their assertion that the conduct of their clients did not violate international law.

activities.[55] While such an interpretation may be regarded as extreme, it is supported by the plain text of the direct participation rule.

Second, and more importantly, because the direct participation rule is inextricably linked to the principle of distinction, it suggests that the *sine qua non* of LOAC compliance is avoiding conduct by civilian augmentees that degrades the ability of the enemy to distinguish between the civilian population and the armed forces. This in turn leads to the proposition that LOAC compliance can be achieved simply by requiring that civilian augmentees wear clothing distinguishing them from the general civilian population and associating them with the armed forces (such as uniforms without military rank or insignia), and that they assume the risk that they will become a target of enemy attack, because they will appear to be members of the armed forces. This causes the analysis of LOAC compliance to shift subtly, and inappropriately, from the primary obligation to prohibit civilians from performing functions that implicate LOAC compliance and therefore should be reserved to members of the armed forces, to a secondary concern for how an enemy might react to such performance.

The reliance on inapposite treaty provisions may be traced in part to the fact that there is simply no LOAC treaty provision that expressly prohibits direct participation by civilians in hostilities, nor any that describes the permissible functions of civilian augmentees. While AP I makes clear that direct participation by civilians results in a loss of their immunity from attack, the loss of immunity is relied on to *infer* a coextensive prohibition against such conduct. This inference is supported by reference to LOAC provisions authorizing the presence on the battlefield of civilian augmentees,[56] and to the principle of distinction.[57] In the opinion of many scholars, the inference is ultimately confirmed by AP I's definition of who is considered a civilian for

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55. According to an ICRC Report on a meeting of experts,

> One expert contended that if civilians directly participated in hostilities with the authorization of a state, Article 51 (3) AP I suggested that they could be directly attacked for such time as they were so participating, and Article 4 (4) GC III suggested that they would still be entitled to POW status upon capture and could not be regarded as "unprivileged belligerents." In the view of this expert, civilian contractors would be subject to criminal prosecution under the domestic law of their captors only if their conduct exceeded the terms of their contract or included an element of perfidy.

Int'l Comm. of the Red Cross, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 80, Oct. 23-25, 2005. This position clearly implies that there is no legal prohibition against permitting a civilian augmentee to take a direct part in hostilities, so long as the augmentee's action is authorized by the sponsoring state and is not of a nature to improperly exploit enemy compliance with the law of armed conflict. Similarly,

> One expert also contended that a civilian authorized by a state to directly participate in hostilities on its behalf did not become an unprivileged belligerent, but simply became incorporated and, thereby, a privileged belligerent.

*Id.* at 81.

56. *See* GPW, *supra* note 5, art. 4A(4).

57. *See supra* notes 24-26 and accompanying text.

purposes of targeting, and by the express inclusion in this category of civilian augmentees.[58] However, as noted above, this loss of immunity described in AP I is a *consequence* of direct participation, and does not *prohibit* such conduct. While both the direct participation rule in AP I and the principle of distinction are important factors in the analysis of permissible civilian support functions, neither adequately describes the permissible functions of civilian augmentees. The direct participation rule must no doubt be observed by civilian augmentees, but the increasing range of functions assigned to civilians on the modern battlefield, together with pressure on commanders to increase the "tooth to tail" ratio, show the need for a revised legal analysis.[59]

This need is confirmed by considering the generally accepted scope of the term "direct participation in hostilities," which includes only functions likely to produce immediate harm to enemy personnel or equipment. Within the Department of Defense, it is generally understood to refer to conduct intended to cause actual harm to an enemy.[60] This interpretation is reflected in a U.S.

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58. *See* AP I, *supra* note 13, art. 50; *see also* AP I COMMENTARY, *supra* note 5, at 609-611. The AP I COMMENTARY explains the definition of a civilian for purposes of immunity from attack:

> Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.
>
> This definition has the great advantage of being "ne varietur." Its negative character is justified by the fact that the concepts of the civilian population and the armed forces are only conceived in opposition to each other, and that the latter constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations of States. Therefore it was worth taking advantage of this possibility. It is clear that a negative definition of the civilian population implies that the meaning given to "armed forces" must be pointed out. This provision of the Protocol refers to the relevant article [Article 4A] of the Third Convention and to Article 43 of the Protocol "(Armed forces)," which supplements it.
>
> The paragraph under consideration here therefore follows a process of elimination and removes from the definition those persons who could by and large be termed "combatants." . . .
>
> *In other words, apart from members of the armed forces, everybody physically present in a territory is a civilian.*

*Id.* at 610-611 (emphasis added).

59. The need is also suggested by the failure of three meetings of the most distinguished LOAC experts in the world to produce a comprehensive definition of the phrase "direct participation in hostilities." *See ICRC Direct Participation Report*, *supra* note 4; Int'l Comm. of the Red Cross, *Second Expert Meeting Direct Participation in Hostilities under International Law,* Oct. 25-26, 2004; Int'l Comm. of the Red Cross, *Third Expert Meeting*, *supra* note 55.

60. The Department of Defense has taken a "case by case" approach to dealing with issues related to civilian employment. The entity primarily responsible for addressing such issues is DOD's Law of War Working Group. This group, established pursuant to DOD Dir. No. 5100.77, *DoD Law of War Program*, Dec. 9, 1998 (replaced by DOD Dir. No. 2311.01E, *DoD Law of War Program*, May 9, 2006), is best described as the Pentagon's LOAC "think tank." It is chaired by the DOD General Counsel's principal LOAC expert, and it includes LOAC experts from each service's Judge Advocate General's Office, the Office of the Legal Adviser to the Chairman of the Joint Chiefs of Staff, and each service's General Counsel. The author represented the Army Judge Advocate General in the Working Group from July 2004

understanding attached to its ratification of a treaty addressing the rights of children in armed conflict:

> The United States understands that, with respect to Article 1 of the Protocol . . . (B) the phrase "direct part in hostilities" (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment . . . .[61]

This interpretation is also reflected in an ICRC report of a meeting of LOAC experts:

> The discussion then turned to identifying specific acts that could be deemed to fall within the notion of "direct participation" in hostilities. There was general agreement that civilians attacking or trying to capture members of the enemy's armed forces or their weapons, equipment or positions, or laying mines or sabotaging lines of military communication should be considered to be directly participating in hostilities. . . . Similarly, there were no objections to the proposition that civilians working in depots and canteens providing food and clothing for the armed forces or in factories producing weapons platforms should, in principle, not be considered to be directly participating in hostilities.[62]

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to July 2005. During this time, the case by case approach was relied on exclusively. This approach is also reflected in email from the Chair of the Working Group to a Navy Judge Advocate officer:

> Perhaps the most succinct statement regarding the absence of an agreed definition [of direct participation in hostilities] was provided to this author by Mr. W. Hays Parks, a senior attorney for the Defense Department and recognized expert on the law of armed conflict: "I have been involved in a three-year ICRC project on this subject. The best that can be said so far is it is situational. There is no agreed definition, or even agreed terms of reference. There have been alternative arguments offered by some within DoD. None have been accepted."

Dep't of the Navy, Office of the Judge Advocate General, *Memorandum for Deputy Director, Strategic Mobility and Combat Logistics Division, Opnav N42, Subj: Civilians in Maritime Prepositioning Force Future Ships* (Feb. 20, 2006), at fn. 6 (citing an email from W. Hays Parks, DOD General Counsel's Office and Chair of the Law of War Working Group) (on file with author).

61. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Declarations and Reservations, *available at* http://www2.ohchr.org/english/bodies/ratification/11_b.htm.

62. *See ICRC Direct Participation Report*, *supra* note 4, at 3.

The much wider variety of support functions routinely performed by civilian augmentees highlights the insufficiency of the direct participation test. These functions range from food preparation and equipment maintenance on one end of the spectrum to intelligence collection and the operation of armed unmanned aerial vehicles on the other. These functions share certain characteristics. First, all are essential to the successful execution of the military mission. This is so today more than in the past, as noted by a group of experts assembled by the ICRC: "While civilians have always supported the armed forces in some form, new developments have placed civilian employees of those forces in positions vital to the success of combat operations."[63] Second, the military commander's obligation to ensure compliance with the LOAC ostensibly extends to the control of functions performed by civilians associated with the military unit. Third, these functions are nevertheless performed by individuals not subject to the military command and discipline framework. Finally, because of the doctrine of command responsibility,[64] the military commander may be subject to criminal responsibility for any LOAC violation committed by these civilians.

Because the direct participation test fails to address concerns other than targeting, it is insufficient to account for these aspects of civilianization. Any test for permissible civilian augmentee functions must not only prevent direct participation in hostilities, but must also respond to these additional concerns by taking into account compliance with other LOAC obligations and will preserve the symmetry between command authority and command responsibility.

## IV. AN ALTERNATIVE APPROACH FOR ASSESSING PERMISSIBLE CIVILIAN AUGMENTEE FUNCTIONS

The current direct participation test provides no precise limits on functions assigned to civilian augmentees.[65] Even experts disagree about what constitutes direct participation.[66] Moreover, because the current test is based on when civilian augmentees may properly become targets, it is effectively limited to analysis of tasks that involve direct engagement of enemy forces. It thus fails to account for numerous other tasks performed by civilians that

63. *Id.* at 5.

64. *See generally* Green, *supra* note 24, at 303-310.

65. *See* Schmitt, *supra* note 1; Jeffrey F. Addicott, *Contractors on the "Battlefield": Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT'L L. 323 (2006).

66. In a series of meetings sponsored by the International Committee of the Red Cross, a group of experts failed to reach a consensus on the definition of "direct participation in hostilities." See *supra* note 4.

implicate compliance with the LOAC.[67] In addition, the direct participation test fails to address the relationship between command authority and command responsibility.

A more effective test for the scope of permissible civilian support is based on the discretion associated with performance of each function. Direct participation is only one category of activity that must be reserved to members of the armed forces. The reason *why* direct participation is reserved to members of the armed forces is more instructive than the fact that it *is* so reserved – it is because members of the armed forces are subject to responsible command, and they operate within a military hierarchy involving training, discipline, and unitary loyalty. Therefore, they, and only they, should be permitted to perform tasks requiring the exercise of discretion that implicates the LOAC, because the discipline indelibly associated with the armed forces is expected to ensure compliance with this law. The functional discretion test operates to prevent civilianization of functions that should only be performed by individuals subject to this relationship.

This alternative test is no panacea, but it will be a more effective tool in the arsenals of legal advisers. By focusing on the relationship between a proposed civilian function and LOAC compliance, the decisive question is not "does the function amount to direct participation in hostilities," but instead "will the exercise of discretion associated with this function implicate LOAC compliance?" If the answer is yes, the function must be reserved to members of the armed forces.

Because risk of a LOAC violation is so central to this proposed test, it is essential to understand that when applying the test, the LOAC compliance prong of the analysis requires assessment of whether performing a function creates a risk that an abuse of discretion in performance of the function will result in a war crime. For this purpose, Telford Taylor's definition of "war crime" would control.

> What is a "war crime"? To say that it is a violation of the laws of war is true, but not very meaningful.
>
> War consists largely of acts that would be criminal if performed in time of peace – killing, wounding, kidnapping, destroying or carrying off other peoples' property. Such conduct is not regarded as criminal if it takes place in the course of war, because the state of war lays a blanket of immunity over the warriors. . . .
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> But the area of immunity is not unlimited, and its boundaries are marked by the laws of war. Unless the conduct in question falls within those boundaries, it does not lose the criminal character it

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67. The absence of a clearly defined standard for civilian augmentees is addressed in Quéguiner, *supra* note 28; Turner & Norton, *supra* note 51. *See also* Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority,* 55 A.F. L. REV. 127 (2004); Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111 (2001).

> would have should it occur in peaceful circumstances. In a literal sense, therefore, the expression "war crime" is a misnomer, for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.[68]

It is, of course, possible to label as a "war crime" every criminal act committed by a member of the force or someone associated with the force in time of armed conflict.[69] However, the functional discretion test refers only to those acts or omissions that (1) occur within the scope of duty associated with the proposed task, and (2) are criminal in nature because they violate the laws and customs of war. Thus, only acts or omissions within the scope of duty for that function are considered.

In application, the first step in applying the functional discretion test is to determine whether a function proposed for civilianization falls into one of the following categories of actions regulated by the LOAC:

1. Selection of and employment of methods and means of warfare.
2. Treatment of captured and detained personnel.
3. Collection of and care for the enemy wounded and sick.
4. Protection of civilians from the harmful effects of war.

These categories are not restricted to functions involving direct participation in hostilities. Nor are they limited to functions traditionally performed by a member of the armed forces. Instead, they include a much broader range of functions that involve an exercise of discretion implicating compliance with the LOAC.

Functions that fall into one of these categories usually should not be civilianized. This presumption need not be conclusive, however. It may be rebutted by a determination that performance of the function would not implicate LOAC compliance. In making this determination, a commander would be required to assess the risk that abuse of discretion associated with the function would, under the circumstances, result in a LOAC violation. If a good faith assessment of the nature of the function and the related circumstances indicated that there was no reasonable probability of LOAC

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68. Telford Taylor, *War Crimes*, *in* WAR, MORALITY, AND THE MILITARY PROFESSION 365, 365-366 (Malham M. Wakin ed., 1979).

69. During discussion of the test proposed in this article, one colleague cited this broad definition of a war crime to question the utility of the test. However, as noted in the text, the focus on the discretion associated with a proposed function limits the meaning of the term "war crime" in relation to this test. Any conduct outside the scope of duty associated with the proposed task would be irrelevant for purposes of the test.

violation from an abuse of discretion, the presumption would be rebutted and civilianization of the function permitted.[70]

There is no doubt that the functional discretion test will ultimately turn on an exercise of judgment. It is impossible to eliminate judgment from the civilianization analysis, however, without imposing an inflexible rule that is inconsistent with the legitimate role of civilian augmentation. Judgment is, after all, required in a wide array of LOAC compliance decisions, especially those involving the greatest risk of violation.[71] Perhaps more importantly, the exercise of judgment involved in the application of this test represents an improvement over the current direct participation test. By creating a presumption of disqualification for functions falling into certain categories, the functional discretion test provides a brighter line for distinguishing permissible functions. The risk assessment required by the new test should prove no more difficult than the "case by case" determination of direct participation. The result is likely to be greater predictability for force commanders. At the same time, the category-based presumption may make it easier to manage the growing pressure for civilianization.

Another significant advantage of the functional discretion test is that legal advisers charged with assisting commanders are inherently better equipped to assess potential LOAC violations than to say what constitutes direct participation in hostilities. The new test falls within the normal scope of legal expertise, whereas the direct participation test invariably involves analysis of operational considerations less central to the core competencies of lawyers, even most military lawyers.

The new test also provides a more effective alignment between the authority and the responsibility of the military commander.[72] The fulcrum of

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70. To aid in the implementation of the functional discretion test by subordinate commands and force developers, each anticipated function might be color coded. For example, functions coded RED would be unavailable for civilian performance. Functions coded GREEN would be available for civilian performance. Functions coded YELLOW would be presumptively unavailable for civilian performance, subject to specific determinations of legality. Such a system would evolve over time, incorporating the lessons learned from each military operation, becoming increasingly comprehensive. Even if every possible function were not anticipated, or if the legality of certain functions were dependent on operational variables, a coding system could add predictability, facilitate force development and planning, and promote legally sound operations.

71. For example, good faith judgment must be exercised in applying the rule that only military objectives are lawful objects of attack, or the complementary principle of proportionality in measuring anticipated collateral damage and incidental injury against a lawful military objective.

72. The functional discretion test is consistent with Department of Defense policy related to LOAC training, implementation, and compliance. *See* DOD Dir. No. 2311.01E, *DoD Law of War Program*, May 9, 2006. This Directive requires that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." *Id.* at ¶4.1. This mandate, together with an implementing instruction issued by the Chair of the Joint Chiefs of Staff, spells out training, reporting, review, and other LOAC compliance obligations. *See* Chairman of the Joint Chiefs of Staff Instr. No. 5810.01C, *Implementation of the DoD Law of War Program*, Jan. 31, 2007.

the test is the relationship between the nature of a function and the risk of LOAC violation. Because the test prohibits civilians from performing functions implicating LOAC compliance, the lack of military command and control over civilian augmentees would be far less likely to produce imputed commander responsibility for violations. Such responsibility would be more precisely (and legitimately) based on the actions of members of the armed forces – all of whom are subject to the discipline of their commanders.[73]

Finally, and perhaps most significantly, the functional discretion test is more nearly comprehensive than the direct participation test. Comparing closely related functions illustrates the expanded scope, application, and logic of the functional discretion test.

First, consider the examples of a cook and a logistician responsible for obtaining foodstuffs to be cooked. Normally, neither of these functions would trigger any concern, because neither ordinarily relates to any of the categories of LOAC compliance described above. If, however, these functions are performed in a prisoner of war camp, a presumption against civilianization would arise. With regard to the cook, this presumption is easily rebutted. A cook is only required to prepare meals. Discretion related to this function involves choosing ingredients, quantities, and methods for preparing meals. In the exercise of this discretion, the probability of committing a war crime is extremely low. By contrast, the presumption is not so easily rebutted for the

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It is derivative of the broader inherent duty of the armed forces to be trained and ready for combat operations.

Each commander must see that his forces are prepared to deal with challenges of executing combat operations, including compliance with the LOAC. In general, no such duty exists regarding civilian augmentees, even though such civilians may be trained and prepared to confront law of war related issues, in some cases more extensively than members of the armed forces. DOD policy, however, should be based not on the exception but on reasonable expectations grounded in historical experience. The proposed test reflects the expectation that military personnel are generally better prepared to confront LOAC challenges. Its application would therefore increase the likelihood of LOAC compliance.

73. Any person, of course, whether a member of the military or a civilian, may be charged with and convicted of a war crime. Short of excluding all civilian augmentees from the operational environment or inducting them all into the armed forces (neither of which seems to be a viable option), military commanders will to some extent lack the authority to prevent LOAC violations by such civilians. However, the functional discretion test will allow commanders to bar civilians from performing those functions most likely to lead to a violation. While commanders will be responsible for discharging this duty, their responsibility will be commensurate with their limited authority. And under the new test that authority is reasonably clear and predictable.

It must be emphasized that application of the proposed test is in no way intended to define the scope of a commander's liability for civilian augmentee misconduct. The purpose of this test is to define legally permissible functions to be assigned to civilian augmentees. Any misconduct by a civilian augmentee, whether related to an assigned function or outside the scope of assigned duties, would trigger potential criminal sanctions pursuant to applicable authorities, such as the Military Extraterritorial Jurisdiction Act or the War Crimes Act. However, because these remedies are currently outside the control of the military commander, they are not properly considered part of the internal disciplinary code that would enable characterization of a civilian as a member of the armed forces.

logistician. In the context of a prisoner of war camp, the logistician may have to decide how to distribute inadequate supplies among all the individuals a command is responsible for feeding, or for obtaining foodstuffs needed to honor the religious practices of prisoners. In the exercise of this discretion, there is a reasonable probability that enemy prisoners of war will be deprived of essential food rations, or forced to consume food that violates religious sensibilities. In this setting, the logistician's function creates a legitimate risk of the commission of a war crime.

Consider next the application of combat power. The increasing technological complexity of weapons systems often requires civilian technical experts to maintain these systems. Even if the maintenance of weapons systems is considered to fall within the realm of application of combat power, the exercise of discretion related to this function involves no reasonable probability of a LOAC violation. Accordingly, civilianization is permissible. Operation of the same weapon system in combat, however, involves a very different type of discretion. The operator must decide when and where to engage an enemy, in accordance with fundamental principles of the LOAC. An abuse of this discretion involves a very high probability of a LOAC violation, thereby placing this function outside the scope of permissible civilianization.

Another example involving the application of force concerns the use of unmanned aerial vehicles to launch missile attacks against enemy targets. It is not uncommon to rely on civilian contractors to operate these UAVs, particularly during the launch and recovery process. While the drone itself is clearly capable of applying destructive force to a selected target, the exercise of discretion related to launch and recovery holds virtually no potential for a violation of the LOAC. On the other hand, actual operation of the armed UAV to select and engage targets involves the exercise of a different kind of discretion. An abuse of this discretion clearly implicates LOAC compliance. Launch and recovery of the UAV may be performed by a civilian augmentee; target selection and engagement may not.

A particularly useful illustration of the value of the functional discretion test involves the collection of intelligence from captured or detained personnel. Consider four distinct functions associated with such collection: guarding, interrogation, translation, and document exploitation. All of these implicate LOAC compliance, because all involve some interaction with captured or detained personnel. Abuse of the discretion associated with translation and document exploitation, however, poses virtually no risk of LOAC violation. Such discretion involves selecting words and terms in one language to explain what is expressed in another, or interpreting documents removed from a detainee. In the exercise of this discretion, the probability of committing a war crime is extremely low. In contrast, abuse of the discretion associated with guarding detainees or with their actual interrogation involves an extremely high probability of LOAC violation. Maltreatment of detainees by both guards and interrogators has been one of the most visible examples of such violations during recent operations. Nonetheless, the U.S. armed forces

continue to "outsource" these functions, reasoning that even though such violations are a genuine risk, these functions simply cannot be characterized as direct participation in hostilities.[74] Under the functional discretion test, the substantial risk of LOAC violation in the exercise of relevant discretion would bar outsourcing to civilian augmentees.

One final illustration involves the care and treatment of the wounded and sick. It is certainly conceivable that the medical care capabilities of the armed forces might be augmented by civilian medical personnel. So long as these personnel are tasked to care for friendly forces, LOAC compliance will not be implicated. If, however, these medical personnel are tasked to provide care for U.S. *and* captured wounded and sick personnel, their work might implicate LOAC compliance. The presumption against civilianization would normally be rebutted, because the discretion associated with this function is related exclusively to the performance of medical procedures. The identity of an individual patient is not relevant to the standard of care (in accordance with professional medical standards), so there is minimal risk of LOAC violation. But if a physician is responsible for apportioning limited available treatment between U.S. and captured sick and wounded personnel, she would have to exercise a very different type of discretion. Triage based on the friendly or enemy status of victims is proscribed by the LOAC obligation to ensure equality of treatment. Abuse of discretion associated with this distinct medical function could reasonably result in a LOAC violation. Therefore, the function of apportioning care could not be assigned to a civilian.

Other examples illustrating many other functions can be imagined. What the examples cited here make clear, however, is that with the revised analytical focus of the functional discretion test, neither the location of a civilian augmentee,[75] nor her proximity to the dangers of the armed conflict,[76]

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74. Not all experts agree. For example, Professor Schmitt argues that interrogation could be considered direct participation in hostilities, because it might cause direct harm to enemy personnel. Schmitt, *supra* note 1, at 544.

75. In addition to the operation of a UAV, described above, consider the example of an "over the horizon" computer network attack performed by civilian contractors in the relative safety of a military facility in the United States, which would be far more likely to fall into one of the forbidden categories than a weapons maintenance operation performed in a forward operating base within the zone of active combat.

76. The increasing irrelevance of proximity as a consideration in assessing permissible civilian support functions is highlighted in the report of an ICRC experts meeting:

> The second session was devoted to the notion of "direct participation in hostilities" in the context of contemporary armed conflicts. There was agreement that the recent evolution in strategic theories and military practice had clearly had an impact on the meaning of "direct participation." It was noted, for example, that the progressive disappearance of the battlefield in the traditional sense as the result of new methods of warfare rendered inoperative definitions based on a person's geographic proximity to a combat zone. Another related illustration given was the increased reliance of some countries on technologically advanced means of combat often resulting in asymmetric warfare.

*ICRC Direct Participation Report*, *supra* note 4, at 5; *see also* Schmitt, *supra* note 1, at 537.

nor the degree of her contribution to the war effort is dispositive in determining her assignment to a particular task. While such considerations may influence the outcome of the test, they do not dictate a result.[77]

## CONCLUSION

Civilians are asked to perform a multitude of tasks in support of combat operations. This legally permissible association with the armed forces is reflected both in the customary practice of armed forces, and in the treaty provision extending prisoner of war status to such civilians if they are captured by an enemy. However, while these civilians are granted prisoner of war status upon capture, the LOAC does not extend to them the privilege of engaging in combat. Accordingly, such civilians are not authorized to perform all functions performed by members of the armed forces. The proposition that civilians may not be used as total substitutes for military personnel is almost universally accepted.[78]

Today, the pace and scope of transformation and evolution in U.S. military theory, strategy, and doctrine are unprecedented.[79] Important in this transformation are an increased emphasis on enhancing the "tooth to tail" ratio, an increasingly complex technology associated with equipment provided to the force, and a need for flexibility in force development. These considerations are prompting reconsideration of how to provide resources for combat and combat support activities. Increasingly, military planners and commanders are coming to rely on civilians – primarily contractors, but also civil servants – to perform functions that were traditionally reserved for combatants – uniformed members of the armed forces.[80]

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77. It is important to note that the new test focuses exclusively on the function to be performed by the civilian augmentee, not on any speculative collateral duty or "other duty as assigned" that might result in the civilian augmentee's joining in the active defense of his or her location. If, for example, a civilian augmentee were called upon to join in the defense of a military position or installation (as, for example, occurred on Wake Island during the Japanese onslaught in World War II), any discretion exercised in that defense would be beyond the scope of discretion normally associated with the function for which the augmentee is employed. In such an extreme and rare situation, the civilian augmentee's potential criminal responsibility would be judged on an individual basis. DOD Instr. No. 3020.41, *supra* note 53, sets out limits on a commander's authority and, implicitly, her responsibility:

> Contingency contractor personnel retain the right of individual self-defense. Any consideration to arm contingency contractor personnel for their individual self-defense shall be reviewed on a case-by-case basis and approved or denied by the geographic Combatant Commander or designee no lower than the general or flag officer level.

*Id.* at ¶6.3.4.2.

78. *See* Quéguiner, *supra* note 28.

79. *See* Addicott, *supra* note 65, at 333-338.

80. *Id.*; *see also* Editorial, *Privatizing Warfare,* N.Y. TIMES, Apr. 21, 2004, at A22 (quoting Defense Secretary Donald Rumsfeld as looking for ways to "outsource and privatize").

As civilian support to military operations across the conflict spectrum[81] becomes more pervasive, civilian augmentees invariably edge closer to the fight, and questions about their permissible functions take on greater significance.[82] It is therefore imperative that the Department of Defense seek new answers. The Department must develop a new paradigm for employment of civilian augmentees – one that ensures compliance with basic LOAC obligations by prohibiting civilians from performing combatant functions, while providing planners and commanders with a meaningful tool for making effective and legally sound resource allocation decisions.

Unfortunately, there has been no correlation between the increased reliance on civilian augmentees and the understanding of the legal limits on the functions they may perform. Instead, rapid civilianization has created a growing inability of commanders to control the activities of personnel assigned to support their units, along with mounting uncertainty about these commanders' responsibility for the conduct of civilian personnel. Both the United States military legal community and the ICRC meetings of experts have failed in efforts to develop a sufficiently clear understanding of the current direct participation test. Nor has the most recent revision of the Department of Defense policy clarified the range of permissible civilian augmentee functions.[83] Instead, the Pentagon has essentially pushed the resolution of this issue down the chain of command, with the policy mandate that subordinate commanders ensure that any use of civilian contractors complies with international law.[84]

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81. The term "conflict spectrum" is commonly used in military legal instruction to portray a range of military operations in applying combat power. At the extreme non-conflict end of the spectrum are peacekeeping/observer operations. At the extreme opposite end are high intensity international armed conflicts. The former Commandant of the Marine Corps, General Charles Krulak, translated this concept of operating across a spectrum of hostilities into the theory of the "three block war" in 1996:

> In one moment in time, our service members will be feeding and clothing displaced refugees – providing humanitarian assistance. In the next moment, they will be holding two warring tribes apart – conducting peace-keeping operations. Finally, they will be fighting a highly lethal mid-intensity battle. All on the same day, all within three city blocks. It will be what we call the three-block war.

*Quoted in* Floyd J. Usry & Mark J. Gibson, *The New H-1s – Street Fighters To Win the Three Block War*, Marine Corps Gazette, May 2001, at 86.

82. *See* Schmitt, *supra* note 1, for an excellent discussion of the factors resulting in an increased reliance on civilian augmentees by U.S. forces. *See also* Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors,* WASH. POST, May 13, 2004, at A1.

83. *See* DOD Instr. No. 3020.41, *supra* note 53.

84. It might be argued that the current approach preserves maximum operational flexibility. A similar justification has been used for the DOD law of war policy that mandates compliance with the "spirit and principles" of the law of war, without defining these terms. From a national command perspective, such an approach does preserve flexibility by allowing for "case by case" resolution of difficult issues. From an operational perspective, however, this lack of definition renders the policy of little value in defining the limits of permissible conduct. As a result, any flexibility preserved by such an approach comes with significant risk. The

The functional discretion test proposed here addresses a wide range of issues that implicate LOAC compliance. It relies on a stronger analytical foundation than the current test derived from targeting concerns, thus promoting respect for the crucial obligation to distinguish between combatants and others. It restores the symmetry between command authority and command responsibility, which will bolster efforts to assure compliance with the LOAC. Finally, it provides legal advisers with an analytical focus more aligned with their core competencies.

Adopting such a test will undoubtedly require careful analysis and the development of implementing criteria. Doing so will not be easy. Moreover, the functional discretion test is no panacea; it cannot resolve all uncertainty about the permissible role of civilian support for military operations. Nevertheless, a fresh approach is long overdue. With the new test, the Department of Defense can better accommodate the increasingly robust presence of civilians on the battlefield, enhance the reality and perception of LOAC compliance, and set a standard to be followed by other countries.

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operational command charged with establishing limits on the use of civilian augmentees has the most significant "stake in the outcome," thereby increasing the risk of "objective oriented" analysis.