

„Direct Participation in Hostilities“ and 21st Century Armed Conflict

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With such phenomena as al-Qaeda and Taliban detainees at Guantanamo denied prisoner of war status, CIA conducted Predator strikes during and after Operation Enduring Freedom, and Iraqi irregular attacks on US and British forces during Operation Iraqi Freedom capturing global attention, the notion of „direct participation in hostilities“ is assuming growing importance in early 21st Century warfare. This contribution to the festschrift for my friend and colleague, Dr. Dieter Fleck, stems from an experts meeting on the subject held at the T.M.C. Asser Institute in 2003. Convened on the initiative of the International Committee of the Red Cross, the objective was to preliminarily explore the concept and identify its current and future fault lines. Dr. Fleck participated in the meeting and, as he always does, offered insightful contributions to the dialogue. It is my honor to continue that dialogue in this tribute to his decades of service to Germany and to international humanitarian law.

My task at the Hague, and my goal here, was to consider challenges to the current understandings of „direct participation“ posed by contemporary conflict. Conference organizers cited five that merit particular attention: the nature of modern combat, participation by civilians in hostilities, armed civilians and human shields, counterterrorism, and computer network attack. As will become apparent, current practices are seriously stressing 20th century interpretations of direct participation. Therefore, the international effort to better understand its modern application is particularly well timed and well advised.

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The Normative Architecture

„Direct participation in hostilities“ possesses a normative significance that was recognized over a half-century ago in the post-World War II Hostages Trial judgment.

The rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.¹

These standards were incorporated into the 1977 Protocol Additional I to the Geneva Conventions.² Paralleling the judgment, Article 43.2 defines combatant status through reference to direct participation when it provides that „[m]embers of the armed forces of a Party to the conflict (other than medical personnel and chaplains...) are combatants, that is to say, they have the right to participate directly in hostilities.“ In doing so, the article sets forth what is known as the „combatant privilege“ — so long as a combatant has otherwise complied with humanitarian law, he or she may not be punished for directing acts of violence against the enemy.

Article 51.3 evidences a second context in which direct participation is relevant: „Civilians shall enjoy the protection afforded by this section [entitled Protection of the Civilian Population], unless and for such time as they take a direct part in hostilities.“ Thus, civilians lose their immunity from attack while they are taking a direct part in hostilities.

Finally, the notion bears on various specially protected categories of individuals. Article 43.1 grants a rebuttable presumption of POW status to „[a] person who takes part in hostilities and falls into the power of an adverse Party“ whenever that person claims such status, appears to be entitled to it, or the adverse Party asserts the status for him or her. In the event of doubt, the detaining party is obligated to treat the detainee as a prisoner of war until a tribunal convened pursuant to Article V of the Third Geneva Convention rules on status. The required treatment of children also references direct participation. In particular, Article 77.2 imposes a duty

1 „The Hostages Trial“ XV Law Reports of Trials of War Criminals, United Nations Wartime Commission, (London, 1947–48), at 111.

2 Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 1(2), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 International Legal Materials 1391 (1977).

on Parties to a conflict to „take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities,“ whereas 77.3 preserves the protections of Article 77 for those who nevertheless do participate directly.

Although the aforementioned provisions apply only in international armed conflict, the notion of direct participation also appears in the humanitarian law pertaining to non-international armed conflict. Common Article 3 to the four Geneva Conventions of 1949 applies to „persons taking no active part in hostilities.“³ The very limited nature of the protections set forth in the article were augmented in 1977 by Protocol Additional II to the Geneva Conventions, which provides far more extensive protection to civilians „unless and for such time as they take a direct part in hostilities.“⁴ Although Common Article 3 and Protocol II employ different terminology („active“ and „direct“ respectively), the International Criminal Tribunal for Rwanda reasonably opined in the Akayesu judgment that the terms are so similar they should be treated synonymously.⁵

Unfortunately, the nature of the requisite direct participation, whether in international or non-international armed conflict, is often uncertain when applied to specific cases. Ambiguity exists with reference to two issues. First, it is unclear what activities amount to direct participation in hostilities. At the meeting in the Hague, for instance, there was significant disagreement over whether an individual driving an ammunition truck to the front could be directly targeted because he or she was directly participating or whether the driver was only exposed to proportional incidental injury (or death) during an attack on the truck. Tellingly, this uncertainty was acknowledged by the ICRC Commentary to Article 43:

Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the

- 3 Common Article 3(1) to: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N. T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N. T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N. T.S. 135; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
- 4 Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, art. 13.3, 1125 U.N.T.S. 609, 16 International Legal Materials 1442 (1977).
- 5 ICTR, Prosecutor v. Jean-Paul Akayesu, Case ICTR-96-4-T, Judgment, 2 Sept. 1998, at para. 629.

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entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.⁶

The question, therefore, is where does the line of demarcation between combat and the general war effort lie. One distinguished commentator has usefully discussed this continuum in terms of war effort (which is protected under both customary law and Protocol I), military effort such as military research by civilians (which he suggests is not protected under customary law, but is protected by the Protocol), and military operations (unprotected under either customary or treaty law). Conceived in this manner, he suggests that Protocol I appears to set a fairly high threshold of participation.⁷

In fact, the Commentary thereto supports the assertion: „[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.“⁸ Elsewhere, it describes direct participation as „acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.“⁹ Analogously, the Commentary to Protocol II provides that „[t]he notion of direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.“¹⁰

Direct participation, therefore, seemingly requires „but for“ causation (i.e., the consequences would not have occurred but for the act) and causal proximity to the foreseeable consequences of the act. Returning to the ammunition truck driver, one who transports ammunition from the factory to ammunition depots would clearly not be directly participating; an individual who delivered it to the front lines, however, arguably would.

As is evident, the determination is contextual, one that will typically require a case-by-case analysis. This is the approach usually taken by those tasked with providing workable guidance to warfighters. The US Navy's Commanders Handbook, for example, states that „[c]ombatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based

6 Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, para. 1679 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., Martinus Nijhoff Publ: Geneva, 1987).

7 W. Hays Parks, „Air Law and the Law of War,” 32 Air Force Law Review 1, 133 (1994).

8 Commentary to Protocol I (op.cit. footnote 2), para. 1679.

9 Commentary to Protocol I (op.cit. footnote 2), para. 1942.

10 Commentary to Protocol II (op.cit. footnote 4), para. 4787.

on the person's behavior, location and attire, and other information at the time."¹¹ The International Criminal Tribunal for the Former Yugoslavia took an analogous tack in the Tadic case: „It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time."¹²

In my view, the approach which best comports with the purposes of humanitarian law is one which assesses the **criticality** of the act to the **direct** application of violence against the enemy. For example, working in a munitions factory is distant from the direct application of force, whereas providing tactical intelligence is essential and immediate. Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the seminal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted. Although it might seem counter-intuitive to broadly interpret the activities that subject civilians to attack, in fact, doing so is likely to enhance the protection of the civilian population as a whole.

A second issue lacking clarity is the temporal boundary of direct participation. Specifically, when does direct participation cease, such that the individual involved may no longer be directly targeted? Recall the „unless and for such time as“ verbiage of Protocol I's Article 51.3. The Commentary thereto provides that direct participation includes „preparations for combat and return from combat,¹³ but that „[o]nce he ceases to participate, the civilian regains his right to the protection....“¹⁴ Article 13.3 of Protocol II likewise uses the „unless and for such time“ language. In discussing the standard, the Commentary states that protection is de-

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

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

13 *Commentary to Protocol I* (op.cit. footnote 2), para. 1943.

14 *Commentary to Protocol I* (op.cit. footnote 2), para. 1944.

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nied „for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.“¹⁵

This explanation provokes the notorious „revolving door“ debate. Can an individual be a guerrilla by night and a farmer by day? Do illegal combatants regain their immunity from direct attack whenever they successfully return from an operation, only to reenter the fray at a later time?

Again, in humanitarian law one must interpret gray area issues in light of the underlying purposes of the law. If civilians could repeatedly opt in and out of hostilities, combatants victimized by their activities will quickly lose respect for the law, thereby exposing the civilian population as a whole to greater danger. Moreover, the greater their susceptibility to attack, the greater their incentive to stay out of the conflict. The best approach is therefore the only one that is practical in actual combat operations. Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal. Further, since the individual who directly participated did not enjoy any privilege to engage in hostilities, it is reasonable that he or she assume the risk that the other side is unaware of such withdrawal.

Finally, the liberal approach suggested regarding both issues makes particular sense during non-international armed conflict. In international armed conflict, the individual is directly participating in an activity that would be privileged, but for his or her status. However, in non-international armed conflict, the direct participation is unlawful without caveat under (at least) domestic law; status of the individual is irrelevant.

The Nature of Modern Combat

The normative foundation laid, it is appropriate to explore the operative context to which the law will apply. At least when modern military forces are involved, classic battlefields will seldom exist. Instead, battlefields have been transformed into battlespaces and two or even three dimensional warfare has been supplanted by virtual and four-dimensional armed conflict. This reality is transforming the significance of proximity when determining whether an individual is directly participating in hostilities.

When warfare was purely linear (i.e., hostilities grew more intense as the line dividing opposing forces grew nearer), with troops engaging each other across a

15 Commentary to Protocol II (op.cit. footnote 4), para. 4789.

forward edge of the battle area (FEBA), it made great sense to use proximity to the front line as cognitive shorthand for participation in combat. After all, the closer one was to the battlefield, the more likely he or she was to be involved in the hostilities. Those not engaged in combat often fled the immediate area of hostilities, thereby making it more likely that those remaining therein were participating in the fray. Although proximity was not the de jure standard, it served as useful and reliable, often dispositive, evidence of direct participation; recall the discussion of the ammunition transporter. Even today, the notion of proximity to the battlefield remains prominent in most discussions of direct participation.

Yet, conflicts increasingly occur in battlespaces, huge non-linear areas of combat in which concepts such as „rear area“ and „frontline“ no longer make much sense. This new reality results from technological advances that have made possible quantum leaps in battlefield transparency, force mobility, command and control, and accuracy and range of weaponry. Consider Operation Iraqi Freedom. Where was the Iraqi „frontline“ when US and British forces could attack the Iraqi military at will anywhere in the country? True, ground forces engaged each other along a somewhat distinct line of contact, but proximity to that rapidly shifting line hardly drove the application of force. On the contrary, and as in Operations Desert Storm, Allied Force, and Enduring Freedom, strikes far removed from the FEBA had greater operational and strategic impact than those in its immediate vicinity.

The dilemma is that in such an environment, using proximity to the battlefield to ascertain direct participation is no longer as helpful. For instance, an individual providing real-time targeting intelligence to a field commander a continent away is far more „involved“ in the conduct of hostilities than our ammunition truck driver. Moreover, given the vast expanses over which hostilities are conducted, enemy combat operations are seldom geographically well delineated. For example, in a combat environment in which air strikes are being conducted throughout the country, air defenses around a capital city are probably denser, more advanced, and better integrated than those near the „front.“ Those supporting the former defensive grid are participating no less than their forward-based counterparts. And, of course, if the battlespace is everywhere, there may be no place for non-participants to seek refuge from hostilities, thereby complicating an opponent's ability to determine whether a civilian is participating.

A related dynamic of modern conflict that diminishes the usefulness of proximity as a determinant of participation is asymmetry. An enormous divide exists between the technologically advanced militaries of the world and the rest. Given that divide, one side to a conflict may be so technologically advanced relative to its opponent that it can conduct offensive operations with great impunity from very secure areas hundreds, even thousands, of miles away.

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This can create dramatic differences in perception. In one case, aircraft are maintained, loaded, launched, and recovered in dangerous combat conditions. Any civilian involved in the process would appear to be unambiguously involved directly in hostilities. On the other hand, strike aircraft from as far away as the United States may be maintained, loaded, launched, and recovered in conditions where few, other than the aircrews flying the missions, have any personal and direct sense at all that hostilities are underway. A civilian aircraft maintenance technician may drive from her home to the air base, break for lunch at a local fast-food restaurant, and pick her children up from baseball practice on the way home. She is in no way a lesser participant in hostilities than her enemy counterpart, yet somehow it appears that is the case. Thus, not only can proximity fail to assist in determining who is participating, it can actually distort the assessment.

„Civilianization“ of the Military

Modern war has raised, and, in some respects, left unresolved the problem of reconciling the fundamental distinction between combatants and noncombatants with the advent of new weapons and with the increase of the numbers of both combatants and noncombatants engaged in work of vital importance for the war effort.¹⁶

This description penned six decades ago in the British Yearbook of International Law by Hersch Lauterpacht demonstrates that civilianization is not an unprecedented phenomenon. Indeed, both the 1907 Hague Regulations and the 1949 Third Geneva Convention address civilians accompanying the armed forces, granting them POW treatment if captured.¹⁷ The latter instrument specifically cites civilian aircrew, correspondents, supply contractors, members of labor units, and those attached to services responsible for the welfare of the armed forces.

What is new is civilianization's scale and scope. Three factors underlie this trend. The first, cost, is the primary driver. Defense budgets continue to shrink in many countries, a propensity forcefully kicked off by the demise of the Cold War and dreams of an enormous „peace dividend.“ Even in those States newly sensitized to emerging threats, such as transnational terrorism and the spread of weapons of mass destruction, the demand is typically to do more with less.

¹⁶ *Hersch Lauterpacht*, „The Law of Nations and the Punishment of War Crimes,“ 21 *British Yearbook of International Law* 58, 74–75 (1944).

¹⁷ *Regulations Respecting the Laws and Customs of War on Land*, annex to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 13, 36 Stat. 2277, 1 *Bevans* 631; *Geneva Convention III* (op.cit. footnote 3), art. 4A(4).

Civilianization is especially appealing in this fiscal environment. Simply put, civilians are cheap. For instance, because the armed forces need not „grow“ their own civilian leadership structure as they must with military personnel, they can avoid having to repeatedly move civilians to positions of greater responsibility in order to develop the requisite experience for advancement. For the same reason, the armed forces invest far less time and money in the training and education of the civilian workforce than in the military personnel being groomed for sequential promotion. Additionally, the civilian workforce operates without the elaborate support structure (ranging from medical facilities to dining halls and barracks) that exists for its uniformed counterpart.

A second, and closely related, factor is the demand for downsizing militaries. Downsizing is principally motivated by a simple desire to save money. However, it is also underpinned by a sense that smaller, mobile, and more highly trained forces are better suited to the current threat environment, in which massive interstate conflict is perceived as unlikely. Of particular note in this regard are the militaries of Eastern Europe and the former Soviet Union, most of which remain inflated, combat-ineffective, de facto social welfare systems. The populations of these countries correctly contest the usefulness of these Cold War legacy forces, particularly given the vicious budgetary competition for scarce government resources.

Technology is the third driver. The technology of warfare is outpacing the ability of most militaries to train and field operators and maintenance personnel. In many cases, weapons systems acquisitions are package deals that include maintenance, training, and, sometimes, even operation. This is particularly true in technology intense C4ISR – command, control, communications, computers, intelligence, surveillance, and reconnaissance. The search for ever-greater asymmetrical advantage over one’s opponents through technological superiority inescapably increases reliance on civilians.

Narrow interpretations of the term „direct participation“ will only hasten the civilianization trend. To the extent that such interpretations legitimize the use of civilians in all but direct application of force during hostilities, governments will find it appealing to save money, downsize, and enhance technological wherewithal by increasingly turning to civilians for functions previously performed by uniformed personnel.

It is important to understand that the civilians employed by the military are hardly all desk workers sitting in various ministries of defense. For instance, over 14,000 civilians deployed to the Middle East in support of Operations Desert Shield and Storm in 1990–91; military forces in the region numbered roughly 500,000. That ratio climbs when hostilities are less intense. During Operation Joint Endeavor in Bosnia and Herzegovina, for example, one in ten deployed per-

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sonnel were civilian, whereas, during counterdrug operations in Colombia, the ratio rose to one in five.¹⁸

Civilianization can occur in one of two ways – through direct hiring and by contract. As the United States leads in the use of civilians in both categories, it is instructive to consider its practices.

In March 2003, the Department of Defense employed over 664,000 civilians, compared to roughly 1.3 million active duty personnel.¹⁹ Obviously, many of them will never come close to combat, let alone participate in hostilities in any meaningful way. However, the Defense Department, recognizing its dependency on civilians even in combat operations, has developed a system for the use of certain civilians in „emergency“ situations.

The first step is to designate various positions as „emergency essential.“²⁰ An emergency essential employee is one who serves outside the United States or:

would be transferred overseas during a crisis situation, or which requires the incumbent to deploy or to perform temporary duty assignments overseas during a crisis in support of a military operation. That position is required to ensure the success of combat operations or to support combat-essential systems subsequent to mobilization, an evacuation order, or some other type of military crisis. That position cannot be converted to a military position because it requires uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems.²¹

The responsibilities of emergency essential employees can be summarized as „critical duties in virtually every functional area of combat support and combat service support,“ and „any position where the person isn't going into combat.“²² Although many duties unquestionably fall outside the scope of direct participation, some are open to interpretive disagreement.

18 *Lisa L. Turner & Lynn G. Norton*, „Civilians at the Tip of the Spear,” 51 *Air Force Law Review* 1, 4 (2001).

19 Department of Defense, *Defense Almanac* (April 2001), available at <http://www.defenselink.mil/pubs/almanac/>.

20 Department of Defense Directive 1404.10, *Emergency-Essential (E-E) DOD U.S. Citizen Civilian Employees PC.1* (10 Apr. 1992).

21 Directive 1404.10 (op.cit. footnote 20), at para E2.1.5.

22 *Air Force Pamphlet 10-231*, *Federal Civilian Deployment Guide* (Apr. 1, 1999), at 1.1; *Kathleen Rehm*, „Civilians Vital to DoD Mission,” *Armed Forces Information Service*, 5 June 2000, http://www.defenselink.mil/news/Jun2000/n06052000_20006051.html, quoting *Diane Disney*, Deputy Assistant Secretary of Defense for Civilian Personnel Policy.

Civilians serve in an extremely wide variety of positions: firefighters, engineers, information and electronic warfare operators, space operators, operations planners, maintenance and logistics experts, computer and communications technicians, aircrew members aboard command and control aircraft, and so forth. An illustrative example is the ESSC (Electronic Sustainment Support Center) during Operation Joint Endeavor. Composed of a team of six US Army civilians and 22 contractors, it deployed to support 14 different weapons systems. The ESSC is part of a larger organization called an LSE, Logistic Support Element.²³ An LSE brings together military personnel, Army civilians, and contractors to deliver home base technical capabilities and resources to deployed units. As an example, during Operation Desert Storm, the LSE upgraded 1,000 M1 tanks to the more capable M1A1 configuration, repainted 10,000 vehicles with chemical resistant desert camouflage paint, and repaired 43,000 items, including 9,000 weapon systems.²⁴

Clearly, civilian employees carry out activities without which advanced combat operations could not be mounted. Complicating matters is the manner in which they conduct themselves while deployed. Department of the Army regulations, for instance, allow deployed civilians to be issued BDUs (battle dress uniforms), NBC (nuclear, biological, chemical) equipment, Kevlar helmets, and load-bearing personal equipment when „necessary for their ready identification, comfort, protection, and safety.“²⁵ The uniforms have special insignia intended to identify the wearer as a civilian. In the Air Force, that insignia is an „olive green triangular patch with US in the center on their left shoulder.“²⁶ Perhaps even more telling is the fact that the combatant commander may authorize the issue of sidearms to civilians for personal protection.²⁷

As should be apparent, in modern armed conflict, civilians are increasingly appearing and acting as if they are members of the military. This contributes to the interpretive disquiet surrounding the notion of direct participation. So too does the pervasive use of contractors to perform functions traditionally performed by military personnel. In the Department of Defense, a variety of schemes exists. Privatization involves the transfer of facilities, equipment, and other government assets to a civilian company to perform functions previously performed by the military. As

23 Department of the Army, Field Manual 63-11, Logistics Support Element: Tactics, Techniques, and Procedures (8 Oct. 1996).

24 FM 63-11 (op.cit. footnote 23), at 1-10.

25 Department of the Army, Pamphlet 690-47, DA Civilian Employee Deployment Guide (1 Nov. 1995), at para. 1-13.

26 Department of the Air Force, Instruction 36-801, Personnel, Uniforms For Civilian Employees (29 Apr. 1994), at para. 6.7.

27 DA Pham. 690-47 (op.cit. footnote 25), at para. 1-12.

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an example, the housing of military personnel and their families is increasingly privatized. By contrast, outsourcing is the transfer of a function, but not assets, to a contractor. Typical examples include airfield operation or the management of military dining facilities.

The third form of contracting, system support, is especially relevant in a discussion of direct participation. Here, contractors provide support, including spare parts and maintenance, for a particular weapon system throughout that system's life cycle and regardless of the genre of the military operation in which it is being employed. The F-117 Nighthawk, the Predator unmanned aerial vehicle, and TOW Improved Target Acquisition System (ITAS) are prominent beneficiaries of systems support contracts.

Huge companies exist to perform defense contracting. Halliburton, for instance, publicly advertises the following services for the Department of Defense and UK Ministry of Defense: facilities operation and maintenance, ownership and operation of defense facilities, construction of major military infrastructure, contingency worldwide deployment and support, submarine and surface ship maintenance and support, aircraft and vehicle maintenance and support, and logistics support at remote locations.²⁸ As an example, the company is managing owner of the Devonport Royal Dockyards, where British surface combatants and nuclear submarines are refueled and refitted.

Many times, contractors directly participate in combat operations. The use of contractor personnel aboard JSTARS (Joint Surveillance and Target Attack Radar System) during Operation Desert Storm in 1991 captured significant attention. Contract personnel have also flown on JSTARS during operations in the Balkans. JSTARS offers an airborne, standoff range, surveillance, and target acquisition radar and a command and control center to those managing a conflict. It possesses secure data links with air operations centers, army mobile ground stations, and other military command, control, and intelligence assets. Essentially, it contributes to the ground battle in much the same way that its well-known cousin, the AWACS (airborne warning and control system) does to the air battle. Contractors have also been used to provide direct systems support to numerous other systems during hostilities, including the B-2, F-117, F-22, Global Hawk unmanned aerial vehicle, and TOW anti-tank system.

As with civilian employees, it is often difficult to distinguish contractors from members of the armed forces when they commingle during operations. Although there are no service regulations on the wear of uniforms by contractors, US joint doctrine permits it when „camouflage integrity or other military necessity dic-

28 See generally, Halliburton website at <http://www.halliburton.com/>.

tates.²⁹ Some limited service guidance exists that permits contractors to wear military uniforms and equipment for safety or security, for instance during cold weather operations.³⁰ There is also a general policy against contractors being armed, although the Combatant Commander can grant approval to the contrary. When that occurs, contractors may only be armed with military specification weapons and ammunition; possession of personally owned weapons is disallowed.³¹

One nagging dilemma with the use of civilian contractors is a general inability to discipline them effectively. The supervisory chain of command allows some control over the actions of government-employed civilians; moreover, they are subject to the civil service disciplinary system (although it is not judicial in nature). In contrast, the contracting officer, not the commander, exercises control over contractors. The sanction for misconduct is not punishment of the contract employee, but rather contract penalties against the contractor. The fact that commanders cannot exercise effective authority over contract personnel involved in combat operations should cause one pause before interpreting direct participation narrowly. Disciplinary control over those participating in a conflict is an effective tool to ensure compliance with humanitarian and human rights law. Thus, during hostilities, it is sensible to limit the use of individuals who lie outside the disciplinary reach of the commander.

The United States took a remedial step in 2000 when Congress passed the Military Extraterritorial Jurisdiction Act.³² The act subjects those persons employed by the US armed forces abroad (including contractors) to federal criminal prosecution. However, the act is but a half step because it does not subject them to military jurisdiction; this being so, the commander may not use it to enforce his orders.

Given the challenges posed by the involvement of contractors in military operations, in June 2002 the Assistant Secretary of the Army for Acquisitions, Logistics, and Technology issued a memorandum which urged product managers to „strive to develop systems that do not require the routine assignment of contractor personnel in the ground maneuver area forward of the Division Rear...or Interme-

29 Joint Chiefs of Staff, Joint Publication 4-0, Doctrine for Logistic Support of Joint Operations (6 Apr. 2000), at V-7.

30 Department of the Army, Regulation 715-9 (29 Oct. 1999), at para. 3-3e.

31 Department of the Army, Field Manual 100-21, Contractors on the Battlefield (March 2000) at para. 3-5.

32 Military Extraterritorial Jurisdiction Act, 10 U.S.C. 3261 (22 Nov. 2000).

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diate Staging Base.³³ Discomfort with the role of civilians in modern military operations is also apparent in numerous military publications. Most notably, a US Army Judge Advocate General School guide states that „the contract technical adviser that spends each day working with members of an armed force to make a weapon system more effective...is integrated with [the] force, [and taking an] active role in hostilities, [and therefore] may be targeted.“³⁴ Although no uniform guidance exists across the services, other examples of direct participation cited include serving as a lookout or guard (many US facilities are presently guarded by contract security firms), gathering and transmitting military intelligence, serving as a member of a weapon system crew or on a military aircraft, and conducting search and rescue. As Mr. Hays Parks accurately noted over a decade ago, the „work of some civilians has become so critical to military success that those individuals are civilians in name and garb only.“³⁵

An interesting sidebar to the discussion on the use of civilians is participation in hostilities by government intelligence agencies, such as the CIA, DIA, NSA, and National Reconnaissance Office. Although military personnel are assigned to each, the intelligence community is predominately civilian in composition.

Given 21st century technology, it would be impossible to conduct the types of operations US forces engage in without the intelligence gathered by these agencies. Consider cruise missiles, which may be launched with great precision against urban targets hundreds of miles away. In an era in which shooters no longer need „eyes on target“ in order to strike their objective, the criticality of intelligence, particularly real-time intelligence, to the direct and immediate application of force against the enemy has grown immeasurably.

Interestingly, military manuals still typically characterize civilians who engage in traditional intelligence gathering as direct participants in hostilities. These references were the product of past paradigms of intelligence gathering, not the current one in which a civilian analyst sitting in Washington can provide real-time tactical targeting data to operators continents away. Paradoxically, these modern civilian intelligence officers are far more essential to the application of force than their more stylized traditional counterparts. Nevertheless, there is no State practice, or

33 Cited in AMSEL-LG Point Paper, „The Status of Contractors on the Battlefield“ (1 Nov. 2002), available at http://www.amc.army.mil/amc/command_counsel/resources/documentsw/newsletter03-2/encl01.pdf.

34 Protecting Human Rights During Military Operations, 48TH Graduate Course Deskbook (International & Operational Law Department, The Judge Advocate General's School, United States Army, 2000), at 15-3, cited in *Turner and Norton* (op.cit footnote 18), at 31.

35 *Parks* (op.cit. footnote 7), at 132.

even weight of scholarly opinion, that would treat them as direct participants, nor any serious suggestion that they be so characterized.

That said, some intelligence operatives are clearly participating directly in hostilities. The best known recent examples involve the use of Predator unmanned aerial vehicles armed with Hellfire missiles. For instance, in December 2001, „a Predator supplied real-time video pictures of a nighttime Taliban convoy stopping at a hotel, enabling nearby F-15s to attack the building. The Predator . . . then tracked fleeing Taliban vehicles and destroyed them with its own Hellfire missiles, apparently before the victims realized they were being followed.“³⁶ At the time, both the Air Force and CIA fielded Predators armed with Hellfires, but the Air Force had reported that theirs had not yet been used.³⁷ In another attack in February 2002, a Predator with Hellfires was used to target Osama bin Laden at an area suspected of being an al-Qaeda tunnel complex. It would be hard to imagine a participation in hostilities more direct than these examples.

Armed Civilians and Human Shields

A third issue bearing on direct participation is how to characterize armed civilians. Specifically, under what circumstances does the possession or use of a weapon amount to direct participation? This is certainly not a new phenomenon. For instance, during the Vietnam War, the North Vietnamese government issued weapons to its population to use against US aircraft; the resulting small arms barrages were quite effective against low flying aircraft. Such actions plainly constitute direct participation.

However, in many circumstances, civilians in the area of hostilities arm themselves for reasons other than attacking combatants. In some countries, the possession of weapons is a cultural feature. Alternatively, weapons simply may be necessary to protect oneself and one's family from lawlessness. The mere possession of weapons by civilians has no normative significance in humanitarian law; rather that possession must be tied to particular conduct, i.e., the use of the weapon (or intended/attempted use).

The critical factor in any humanitarian law analysis of weapons possession and use by civilians is motivation. Most significantly, possession or use for self-defense, defense of others and, perhaps, defense of property against looters and

36 *Joseph Fitchett*, „High-Tech Weapons Change the Dynamics and the Scope of Battle; War in the Computer Age,” *International Herald Tribune*, 28 Dec. 2001, at 1.

37 See <http://cdi.org/terrorism/predator.cfm>.

others engaged in criminal activity does not render an individual a direct participant in hostilities. Indeed, even defense against unlawful acts committed by combatants would not do so. It would be absurd to hold that the law disallows defense against illegal actions by the victims thereof.

„Defense“ against the lawful use of force by combatants would amount to direct participation. For instance, if individual citizens took up arms to fight an invading force, they would be direct participants in hostilities. The sole situation in which they are privileged to do so is the *levee en masse*. Pursuant to Article 4(a)(6) of the Third Geneva Convention, citizens, acting collectively, may take up arms against an invading force when they do not have time to organize regular armed forces. If they do so, they must carry their arms openly and respect the laws and customs of war.

What if the State arms its citizens? Recall the situation cited above in Vietnam. Or consider the village self-defense organizations formed by the Turkish government during the Kurdish insurrection. Again, characterization of those who are armed depends on the underlying motivation for the arming. The State might be arming citizens to enable them to legitimately protect themselves in situations where the State itself cannot offer sufficient security or maintain order. It does not matter whether this is done on an individual or group basis. Nevertheless, if such individuals or groups engage in either offensive or defensive operations against combatants who are not engaged in unlawful activities against them, they will be directly participating.

As is always the case, analysis must be case-specific. One likely situation involves a civilian population that is regularly attacked by a particular band during a conflict. If the population organizes and goes on the offensive against the group, it will still not be participating in hostilities as a matter of law if its motivation is simply to put an end to the attacks. On the other hand, if that motivation is, or becomes, to affect the course of hostilities in favor of one of the parties, then the actions will have entered the realm of direct participation.

The practical problem in situations involving armed civilians during hostilities is crafting effective rules of engagement (ROE). The intent of the civilian carrying the weapon may be very difficult to ascertain, particularly where civilians have been wrongfully attacking one's forces or where soldiers have donned civilian attire in order to conduct attacks. Requiring a demonstration of „hostile intent“ could prove extremely risky to troops in complex, confused combat environments. On the other hand, simply declaring anyone with a weapon „hostile“ may well be excessive in situations where civilians legitimately need weapons to protect themselves from lawlessness. The ROE will have to be carefully tailored to the situation at hand, providing for an equitable balance between effective force protection and safeguarding the civilian population.

A somewhat related issue is that of human shields. The use by a State of involuntary human shields to deter attacks on valid military objectives does not render those individuals direct participants in hostilities. Rather, they remain protected civilians, and any likely death or injury to them during an attack on the objective they are shielding must be factored into the required proportionality calculation. The principle of proportionality prohibits attacks that „may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.“³⁸

This is the approach taken by the United States. Joint Publication 3-60 specifically provides that

Civilians may not be used as human shields in an attempt to protect, conceal, or render military objects immune from military operations. Neither may civilians be forced to leave their homes or shelters to disrupt the movement of an adversary. Joint force responsibilities during such situations are driven by the **principle of proportionality** as mentioned above. When an adversary employs illegal means to shield legitimate targets, the decision to attack should be reviewed by higher authority in light of military considerations, international law, and precedent.³⁹

This position is consistent with that set forth in Protocol I, which provides in Article 51.8 that „any violation of these prohibitions [in this context, the obligation of States to separate civilians from military objectives] shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians [i.e., proportionality]“ Given the mandate to include involuntary human shields in the proportionality equation, it is apparent that they are not direct participants in hostilities.

Human Rights Watch has suggested that **voluntary** shields are similarly not directly participating in hostilities because „their actions do not pose a direct risk to opposing forces“ and they are not „directly engaged in hostilities.“⁴⁰ This interpretation of direct participation is excessively narrow. Most importantly, the standard is participation in hostilities, not engagement therein. In this particular case, the human shields are deliberately attempting to preserve a valid military objective for use by the enemy. In essence, they are no different from, for instance, point air defenses, which are employed more to protect the target than to destroy attacking

38 Protocol I (op.cit. footnote 2), at arts. 51.5(a) & 57.2(a)(iii) & (b).

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

40 Human Rights Watch, International Humanitarian Law Issues in a Potential War with Iraq (20 Feb. 2003), available at <http://www.hrw.org/backgrounders/arms/iraq0202003.htm>.

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aircraft. Indeed, to suggest otherwise would actually run counter to the underlying purposes of humanitarian law in that it would encourage voluntary shields by minimizing the risk they assumed by their actions. This would heighten, in turn, the risk to the civilian population generally by disrupting humanitarian law's delicate balance between military necessity and protection of civilians.

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

Counterterrorism

An excellent example of employing civilians to conduct operations against transnational terrorists occurred in November 2002 when the CIA used a Predator armed with Hellfire missiles to destroy the car carrying Qaed Senyan al-Harhi, al-Qaeda's senior operative in Yemen, and an individual tied to the bombing of the USS Cole. The CIA conducted the strike in cooperation with Yemeni security forces. Given the President's declaration of a „war“ on terrorism, did this strike (and will likely future strikes) amount to the direct participation by civilians in hostilities?

There seems to be a consensus that terrorist attacks on a significant scale, such as those that occurred on September 11th, are „armed attacks“ under Article 51 of the United Nations Charter (and customary international law). This being so, robust military responses thereto are completely appropriate, even though the terrorist attacks were committed by non-State actors.⁴¹ However, the fact that the *ad bellum* norms of self-defense apply to a situation has little bearing on the applicability of *jus in bello* norms, such as those concerning direct participation. Instead, the correct inquiry is whether an „armed conflict“ of the requisite nature exists, for such a conflict is the condition precedent for the application of international humanitarian law. In the absence of an armed conflict, relevant law includes that of the State conducting the counterterrorist operation, the law of the State in which it

41 On the issue of the present norms governing counterterrorist operations, see *Michael N. Schmitt*, „Counter-terrorism and the Use of Force in International Law,“ *Israel Yearbook on Human Rights* 53 (2003); *Terrorism and International Law: Challenges and Responses* (Michael N. Schmitt & Gian Luca Beruto eds., Sanremo: International Institute of Humanitarian Law, 2003).

occurs (with various caveats), international agreements between that State and the State carrying it out, and human rights law.

Beyond the issue of the applicability of humanitarian law as a general matter, counterterrorist operations against transnational terrorists will often fall outside the reach of key humanitarian law treaties by their own terms. In the non-international context, Common Article 3 to the Geneva Conventions specifically applies to an „armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.“ In other words, it envisages an internal, vice transnational, conflict. The Commentary to the article further clarifies the nature of the group acting against the government: „the party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory.“⁴² Protocol II adopts a similar approach by addressing conflict „which takes place in the territory of a high contracting Party between its armed forces and dissident armed forces [that] . . . exercise control over a part of its territory.“⁴³ Neither the Common Article nor the Protocol applies, therefore, to a conflict in which a shadowy group of terrorists from multiple countries targets a government or its citizens globally.

Nor do the normative prescriptions covering international armed conflict usually pertain to transnational terrorism. By Common Article 2, the Geneva Conventions apply only to conflicts „between two or more of the high contracting Parties,“ i.e., conflicts between States. Protocol I simply refers back to Common Article 2.⁴⁴ Although it does extend coverage to wars of national liberation – a term of art referring to „armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination“⁴⁵ – such wars do not include the transnational terrorism against which the „global war on terrorism“ is being waged.

Therefore, the bulk of international humanitarian law, including that involving direct participation in hostilities, is inapplicable to counterterrorist operations occurring outside the confines of either a non-international or an international armed conflict. Certain fundamental principles of humanitarian law such as necessity and proportionality would apply generally to the use of force, as would human rights norms, but it would be overreaching to suggest the notion of direct participation does. Of course, States may apply humanitarian law to their operations as a matter of policy, but they are not obligated to do so as a matter of law.

42 Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Jean Pictet ed., ICRC: Geneva, 1952), at 49.

43 Protocol II (op.cit. footnote 4), art. 1.

44 Protocol I (op.cit. footnote 2), art. 1(3).

45 Protocol I (op.cit. footnote 2), art. 1(4).

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Because the direct participation standard does not apply to purely counterterrorist operations, such operations may be conducted by other than the armed forces. For instance, the US President has reportedly given the CIA authority to conduct lethal operations against al-Qaeda. To the extent that the war on terrorism is not an armed conflict as that term is used in international humanitarian law, granting such authority does not violate any of that law's tenets.

Further, absent applicability of the direct participation standard, the limitation to attacking only those directly participating in hostilities does not come into play. For instance, there need be no concern about whether or not a terrorist is engaging in hostilities at the moment he or she is targeted; there is no revolving door issue in situations short of an armed conflict.

That being so, who can be attacked? The answer is found in the principle of necessity, which relates to operations conducted pursuant to the right to self-defense, the *ad bellum* basis for counterterrorist operations. Applied in that context, the principle permits counterterrorist forces to strike anyone in the terrorist organization that cannot be otherwise neutralized (e.g., through arrest) if there is a reasonable belief that doing so is necessary to defeat either an ongoing or future attack. Logically, this would include individuals providing logistics support if cutting the logistics chain would defeat such attacks. Thus, decision-makers considering counterterrorist operations must assess both the degree of certainty that those attacked are part and parcel of an ongoing/future attack and the degree of certainty that no other less forceful alternatives exist to conducting the attack. As the approach is based on the necessity principle of the law of self-defense, it does not legitimize so-called „extra-judicial killings.“

Finally, since this analysis contemplates participation in counterterrorist operations by other than the armed forces against individuals not directly participating in hostilities, it is important to define the temporal limits to these operations. Self-defense is permissible either in the face of an ongoing attack or in response to one that is imminent.⁴⁶ Imminency should not be measured by the temporal proximity to the terrorist attack itself, but rather *vis-à-vis* the point when mounting an effective defense would no longer be viable. In other words, defensive actions in advance of an attack may occur no earlier than the last reasonable window of opportunity for that defense to be effective. And in the context of counterterrorism, the last window of opportunity to effectively deter a terrorist attack may be long before that attack is actually planned to occur.

⁴⁶ On self-defense, see generally *Yoram Dinstein, War, Aggression and Self-Defense* (Cambridge: Cambridge University Press, 3rd ed. 2001).

Once the initial attack has occurred, it is permissible to conduct counterterrorist operations against the perpetrators for as long as it is reasonable to conclude that the first attack was but one in a series of such attacks that together constitute a single terrorist campaign. In other words, there is no longer a requirement to assess imminency of follow-on attacks because the campaign is ongoing.

Computer Network Attack

A nascent question raised by the advent of new technologies is the applicability of the direct participation standard to information operations, especially a subspecies labeled computer network attack. Information operations are „actions taken to affect adversary information and information systems while defending one’s own information and information systems.“⁴⁷ They seek to discover, alter, destroy, disrupt, or transfer data stored in, manipulated by, or transmitted through a computer. Information operations can occur during peacetime or crises, and at the strategic, operational, or tactical levels of armed conflict. A subset of information operations is information warfare, which simply indicates those information operations „conducted during time of crisis or conflict to achieve or promote specific objectives over a specific adversary or adversaries.“⁴⁸

Computer network attacks (CNA), which can be mounted during peacetime or during periods of crisis or conflict, are „operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.“⁴⁹ In other words, CNA relies on a data stream to execute the attack. Methods include, inter alia, gaining access to a computer system so as to acquire control over it, transmitting viruses to destroy or alter data, using logic bombs that sit idle in a system until triggered on the occasion of a particular occurrence or at a set time, inserting worms that reproduce themselves

47 Joint Chiefs of Staff, Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (12 April 2001), at 203. Operations that might constitute information operations include operations security, psychological operations, military deception, electronic warfare, physical attack, and computer network attack. See Joint Chiefs of Staff, Joint Publication 3-13, Joint Doctrine for Information Operations (9 Oct. 1998), at I-9.

48 JP 1-02 (op.cit. footnote 47), at 203.

49 JP 1-02 (op.cit. footnote 47), at 88. On CNA and the jus in bellum, see *Michael N. Schmitt*, „Wired Warfare: Computer Network Attack and International Law,” 84 (No. 846) *International Review of the Red Cross* 365 (June 2002). On the subject generally, see, *Computer Network Attack and International Law* (Michael N. Schmitt & Brian T. O’Donnell eds., Newport, R.I.: Naval War College International Law Studies, 2002).

upon entry to a system thereby overloading the network, and employing sniffers to monitor and/or seize data.

CNA raises several questions bearing on direct participation. To begin with, since CNA does not involve the launching of a kinetic force, would a computer network attack that occurred outside the context of traditional hostilities nevertheless constitute a state of armed conflict? If not, the direct participation standard would be, as discussed above, inapplicable.

Whether CNA creates a state of armed conflict depends on the results of the attack. After all, most humanitarian law centers not on the methods and means of warfare used, but rather on consequences, whether they befall combatants (e.g., unnecessary suffering) or noncombatants (e.g., disproportionate injury).

Non-kinetic attacks can have horrendous physical consequences, in many cases more severe than those resulting from attacks using traditional weaponry. For instance, imagine computer network attacks that targeted railway control systems by altering switching instructions, manipulated water treatment for a large urban area, or changed data such as blood type or allergies in a computerized medical records system. Indeed, no one would deny that a non-kinetic biological or chemical attack against another State would produce an international armed conflict.

Thus, humanitarian law norms apply whenever computer network attacks attributable to a State are more than merely sporadic and isolated incidents and are either intended to cause injury, death, damage, or destruction (and analogous effects), or such consequences are foreseeable. This is so even if the attacks are unrelated to the classic use of military force. However, because the foreseeable consequences would not include injury, death, damage, or destruction, attacks such as disrupting a civilian intranet, altering financial records, or cyber-espionage would not amount to an „armed“ attack, even if conducted by government agents.

This analysis must not be confused with situations in which computer network attacks are conducted to „prepare the battlefield“ for an imminent attack using traditional military forces. A typical example would be a computer network attack against an air defense grid. To the extent that such operations are intricately related to the imminent launch of a kinetic attack, they mark the commencement of an armed conflict. There is no need for the computer network attack to cause either human injury or physical damage because the attack is already an integral component of one that will do so.

Cognizant of the fact that CNA may implicate humanitarian law norms, how does the notion of direct participation play out in a conflict employing computer network attack? First, since computer network attack can cause actual injury, death, damage, or destruction to enemy forces (as well as protected objects and individuals), those conducting operations producing such effects are unquestionably direct participants in hostilities. Direct participation also reasonably encom-

passes computer network attacks directed against the enemy's immediate war fighting capabilities. For instance, involvement in a computer network attack directed against enemy command and control facilities, surface-to-air missile systems, and combat communications nets would constitute direct participation in hostilities. Indeed, to the extent a valid military objective can be neutralized or diminished in capabilities, the individual directing the attack upon it has directly participated.

This issue was addressed more fully above in the context of civilianization. In information warfare, the dilemma discussed there is exceptionally severe. Although some States, including the United States, do field uniformed information warfare units, in most cases civilians are responsible for the conduct of information operations, particularly CNA. Indeed, one former commander of the Pentagon's Global Network Operations Center has been quoted as stating that civilian contractors were involved in every aspect of information operations, an assertion presumably extending to offensive operations.⁵⁰

The reasons for heavy civilian representation in information operations are two-fold. First, such operations, especially CNA, require very specialized knowledge; it is simply not cost effective to train the small number of military personnel that would be needed to field the CNA capabilities that most States possess. Second, the nature of the technology is such that it has not become standard inventory in most armed forces. It is too specialized, too limited, and often in the throes of research and development. Despite the very practical reasons for turning to civilians and contractors to conduct CNA, many of the information warfare activities they are likely to engage in during armed conflict will incontrovertibly amount to direct participation.

The second major question regarding CNA and direct participation is who may be targeted. Obviously, combatants and military objectives are legitimate targets. But beyond that, can computer network attacks only be launched against those civilians directly participating in hostilities?

In fact, there is no prohibition on launching computer network attacks against those not directly participating in hostilities unless such attacks injure or kill them or damage or destroy their property (or are intended to do so). This conclusion derives from the meaning of the term „attack“ in humanitarian law. Although Article 48 of Protocol I, the basic rule governing the protection of the civilian population, provides that „Parties to the conflict . . . shall direct their operations only against military objectives,“ subsequent articles express this general proscription in terms of „attacks.“ Thus, „the civilian population as such, as well as individual civilians,

50 Cited in *Michael E. Guillery*, „Civilianizing the Force: Is the United States Crossing the Rubicon“ 51 *Air Force Law Review* 111, 127 (2001).

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shall not be the object of attack;⁵¹ „civilian objects shall not be the object of attack;⁵² „indiscriminate attacks are forbidden;⁵³ „attacks shall be limited strictly to military objectives;⁵⁴ and so forth. Article 49 expressly defines attacks as „acts of violence against the adversary, whether in offence or in defence.“

As is apparent, the prohibition is not on targeting civilians and civilian objects per se, but rather on **attacking** them, specifically through the use of violence. Article 51 supports this interpretation in setting forth the principle that the „civilian population and individual civilians shall enjoy general protection against **dangers** arising from military operations,“ and prohibiting „acts or threats of **violence** the primary purpose of which is to spread terror among the civilian population.“⁵⁵

This analysis should not be misinterpreted as suggesting computer network attacks fall outside the ambit of „attacks“ because they do not employ violence. In much the same way that the concept of „armed conflict“ can include CNA, „attack“ must be understood in terms of consequences, rather than the nature of the instrument causing them. This is the only reasonable interpretation of provisions intended to shield protected individuals from injury or death and protected objects from damage or destruction. Thus, computer network attacks on individuals who are not directly participating in hostilities are not prohibited if they merely inconvenience, harass, or diminish quality of life; some human suffering must be likely before CNA becomes restricted to combatants and others directly participating in hostilities.⁵⁶

Concluding Thoughts

The issue of direct participation is becoming increasingly relevant in 21st century warfare as fiscal realities, the exponential growth in the technological complexity of warfare, such as the advent of computer network attack, and new paradigms of warfighting shift the context in which the notion is applied. Given such challenges,

51 Protocol I (op.cit. footnote 2), art. 51.2.

52 Protocol I (op.cit. footnote 2), art. 52.1.

53 Protocol I (op.cit. footnote 2), art. 51.4.

54 Protocol I (op.cit. footnote 2), art. 52.2.

55 Protocol I (op.cit. footnote 2), arts. 51.1 & 51.2 (emphasis added). In addition, the Commentary to Article 48 notes that „the word ‘operation’ should be understood in the context of the whole of the Section; it refers to military operations during which violence is used.” Commentary to Protocol I (op.cit. footnote 2), para. 1875.

56 Other articles within the section sustain this reading. For instance, the rules of proportionality speak of „loss of civilian life, injury to civilians, damage to civilians objects, or a combination thereof,” Protocol I (op.cit. footnote 2), arts. 51.5(b); 57.2(a)(iii); 57.2(b).

the efforts of the International Committee of the Red Cross to clarify emergent understandings of the concept are to be commended. Strong differences of opinion exist over how to proceed. For my part, I suggest that narrowly interpreting direct participation in hostilities, although appearing to expand the protection of humanitarian law to greater numbers of individuals, actually increases the risk to the civilian population. Narrow interpretations both sow confusion, and, much more nefariously, encourage disrespect for the principle among those who suffer militarily from the actions of those said not to be directly participating. In particular, in modern combat it is illogical to tie participation to the direct release of kinetic forces. Not only may non-kinetic force be deadlier, but activities far from the „battlefield“ may be as important, perhaps more so, than actually „pulling the trigger.“ Therefore, in my mind, an individual performing an indispensable function in making possible the application of force against the enemy is directly participating. In other words, the appropriate test is whether that individual is an integral facet of the uninterrupted process of defeating the enemy. If so, participation should be at his or her own risk. This approach best preserves the underlying values resident in humanitarian law.

