The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?

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ARMY PRIVATE Jessica Lynch captured the interest of the entire world when, on 2 April 2003, a special operations team rescued her from captivity in the Saddam Hospital compound in Nasiriya, Iraq.[1] On 23 March, her unit's convoy had taken a wrong turn and was ambushed by Iraqis. Lynch became a prisoner of war (POW) under the law of war—the international body of law principally made up of the Hague Regulations and the Geneva Conventions.[2] Her dramatic rescue brought home one of the realities of war—the potential of enemies to capture U.S. troops during armed conflict.

As a member of the regular Armed Forces, Lynch had the right to be classified as a POW, which should have guaranteed to her a certain level of treatment while in captivity. A second critical right she received is immunity from prosecution under the enemy's law for any lawful, precapture, warlike acts. This important immunity is referred to as "combatant immunity."[3] Thus, if Lynch had shot and killed an Iraqi soldier during the ambush, she could not be tried for murder; she would be "cloaked in a blanket of immunity" for her combatant acts.

Lynch's POW status and the privileges that flow from that status were never in doubt. The real debate as to status lies elsewhere—with civilians on the battlefield. The modern battlefield is increasingly populated with civilians and paramilitary operatives who accompany U.S. forces in support of military operations.

Assume, for a moment, that civilians are in Lynch's convoy. When the firefight ensues, several Iraqis are killed, and the enemy captures two civilians. The Iraqis quickly discover that one civilian is a contractor hired by the Army to maintain power generators; the other is a CIA paramilitary operative responsible for organizing resistance movements within Iraq. The civilian contractor accompanying the force produces an identification card indicating his status as a civilian accompanying the force. The paramilitary operative has no such card. Both wear civilian attire, but the paramilitary operative has a weapon; the civilian accompanying the force is unarmed.

The capture of these civilians brings to the forefront whether they should be afforded the same protections as Lynch received under international law. But, should they be deprived of such protections because their presence on the battlefield somehow violates the principle of "distinction" embedded in the law of war; that is, the principle that civilians must be distinguished from combatants?

The Principle of Distinction

The principle of distinction is fundamental to the law of war and "is the foundation on which the codification of the laws and customs of war rests[.]"[4] Under customary international law (law adhered to by custom) distinction imposes a two-part obligation on the parties to the conflict. First, civilians must be distinguished from combatants. Second, with combatants distinguished from civilians, the parties to a conflict can target *only* combatants and military objectives. This two-part obligation, codified in 1977 by Article 48 of the First Additional Protocol of the Geneva Conventions of 1949, says, "[T]o 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."[5]

To accomplish the first prong of distinction—the distinction between civilians and combatants—a line must be drawn between what constitutes a combatant and what constitutes a civilian. An individual can hold only one status of the two under the law of war: combatant or civilian. A combatant is one who has

"the right to participate directly in hostilities."[6] For example, members of the Armed Forces of a party to the conflict are combatants. The right to participate in hostilities provides them with two important rights on capture: POW status and combatant immunity.

POW status affords the individual certain privileges while being detained by the enemy: humane treatment, equality of treatment, protection from insults, free medical care, and immunity from reprisals. Combatant immunity is immunity from prosecution for precapture or warlike acts. However, unlike POW status, which is accorded to certain civilians, combatant immunity is available only to combatants.[7]

The Third Geneva Convention (Geneva Convention III, relative to the Treatment of Prisoners of War) also identifies members of militias and organized resistance movements belonging to a party to the conflict as having a right to participate in hostilities. Under international law, however, these militia members and members of resistance organizations must meet four conditions to be regarded as combatants:

1. They must be commanded by a person responsible for subordinates.
2. They must have a fixed distinctive sign recognizable at a distance.
3. They must carry their arms openly.
4. They must conduct their operations in accordance with the laws and customs of war.[8]

Regardless of titles, however, all combatants "are obligated to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[9]

On the other hand, the term "civilian" is defined under international law in the negative. In essence, a civilian is any person who is *not* a combatant. Article 50 of the First Additional Protocol to the Geneva Conventions states, "In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[10] Unlike combatants, civilians do not normally receive or require POW status, as they are protected under a different set of international rules—the Fourth Geneva Convention, relative to the Protection of Civilian Persons.[11]

The second prong of distinction, that of targeting only combatants and military objectives, is only made possible when the parties to a conflict have distinguished combatants from civilians. Once distinguished, combatants such as members of the Armed Forces may be lawfully targeted by the enemy, while civilians may not. J.M. Spaight, an early 20th-century scholar observed, "The separation of armies [combatants] and peaceful inhabitants [civilians] into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable."[12] The law of war has historically been focused on this separation.

As early as the mid-19th century, targeting civilians was implicitly forbidden: "The only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy."[13] In fact, "distinction between belligerents [combatants] and the civilian population ha[s] found acceptance as a self-evident rule of customary law in the second half of the 19th century."[14] During the 20th century, the Hague Regulations and Geneva Conventions and their additional protocols "explicitly confirm[ed] the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities."[15]

The real push to prohibit explicitly the direct targeting of civilians came in the aftermath of World War II and the vast amount of destruction dealt the European and Asian continents. As Article 51 of the First Additional Protocol states, "The civilian population . . . shall not be the object of attack."[16] The official commentary to this article boldly pronounces, "Article 51 is one of the most important articles in the Protocol."[17]

Civilians Accompanying the Force

Protecting the civilian population is a goal of international law. If wars must occur, they must be fought between military forces. Distinction between combatants and civilians is crucial to accomplishing this goal. While, inevitably, combatants will kill or injure civilians, the hope is that international law will make such loss unintended and much less likely than if civilians were not protected.

No direct or active participation. W. Hays Parks, a scholar of international armed conflict, has noted, "Civilians and the civilian population are protected from intentional attack, so long as they do not take an active part in hostilities."[18] Protocol I says, civilians "are not authorized to participate directly in hostile actions."[19] Under the law of war, direct or active participation in hostilities is defined as action taken "to cause actual harm to the personnel and equipment of the enemy armed forces."[20] Although a seemingly bright-line test, this clarity is now blurred by civilians who accompany forces into areas of combat operations.

Geneva Convention III identifies some limited categories of civilians who might be held on the cessation of hostilities but who, in return, are to be afforded

POW status, even though they are not combatants. This group of individuals are "[p]ersons who accompany the armed force without actually being members" of the Armed Forces.[21] To be afforded POW status, these civilians can take no direct or active part in hostilities: "[C]ivilian members of the military aircraft crews . . . , supply contractors, [and] members of labor units or of services responsible for the welfare of the armed force" are examples of civilians who qualify as lawful civilians accompanying the force.[22]

Some commentators, understanding the different nature of "general population" civilians and civilians who accompany the force, have referred to the latter category as "quasi-combatants."[23] Yet, there is no mention of this distinction in international law. In fact, a special quasi-combatant status was proposed during the drafting of the Additional Protocol and was specifically rejected.[24] International law continues to recognize only two valid status labels: combatants and civilians.

Under international law, if any civilian commits a hostile act; that is, takes a direct or active role in hostilities, that civilian is subject to attack. Furthermore, if the same civilian is captured, the civilian can be tried for such hostile acts. The effect of this rule is clear: a civilian accompanying the force who engages in a hostile act receives little protection, either with regard to targeting decisions the enemy makes or in being afforded immunity from trial for warlike acts. The goal for commanders, therefore, is to ensure that civilians under their command are not placed in positions of jeopardy, but that if they are, they understand the risks they assume when they engage in activities that constitute or might be construed as constituting direct or active participation in hostilities.

General guidelines for commanders. Even though the principle of distinction is a bedrock principle of the law of war, the number of civilians accompanying the force has steadily increased. In part, this is because of the personnel reduction and cost-cutting efforts the Pentagon has undertaken since the early 1990s to privatize and outsource many functions military personnel previously performed. The driving force behind this effort is the assumption that civilian contractors can perform certain tasks just as or more effectively and efficiently than can military combat support or combat service support personnel, thus preserving military billets for "trigger pullers." For better or for worse, this effort has "made the Armed Forces dependent on civilian specialist[s.]"[25]

A Polish contractor wearing body armor in Al Tufail, Iraq, 28 June 2004.

US Army

When any unit now deploys, the ratio of civilians to combatants is increased in terms of the *numbers* of civilians who deploy; "[t]he *tasks* [of civilians accompanying the force] have changed as well."[26] While some civilians perform traditional support roles, such as building airfields and providing billeting support and food services, an increasing number of civilians are providing frontline troops with technical support on state-of-the-art weapons systems.[27]

For commanders the result is an increased pool of civilians who are increasingly placed in harm's way and for whom they are responsible. While the commander is responsibe for protecting frontline civilians, the civilians, while not actually pulling the trigger, are working hand-in-hand with combatants to ensure that soldiers *can* pull the trigger. The result might well mean an enemy could justifiably conclude that civilians have directly or actively taken part in hostilities "to cause actual harm to the personnel and equipment of the enemy armed forces."[28]

Accordingly, the commander must understand that a real risk exists that civilians for whom he is responsible will be targeted and, if captured, subject to trial by the enemy for hostile acts. This reality results from the fact that, aside from the "actual harm to the enemy" test found in the law of war, there is no bright-line test as to what constitutes direct or active participation in hostilities. One commentator aptly stated, "The current practice of merely warning commanders with generalities not to jeopardize civilian status is insufficient."[29]

Several policies have been promulgated in an effort to prevent civilians accompanying the force from

becoming direct or active participants in hostilities. Joint doctrine dictates that civilians "cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants."[30] The thrust of this doctrine is to ensure that the first prong of the principle of distinction—the distinction between civilians and combatants—is honored.

From a policy and doctrinal perspective, commanders are to consider, at a minimum, five enumerated areas in an effort to ensure that civilians who accompany the force do not lose their right to be accorded POW status and are not subjected to trial for engaging in the following hostile acts:

- Use of arms. Civilians will not be armed, unless approved in the limited, by-exception basis of personal defense by the combatant commander.[31]
- Force protection. Civilians will not perform force-protection functions like, but not limited to, fortification construction and guarding checkpoints.[32]

Civilians will be provided and carry on their person a Geneva Convention Identification Card identifying them as civilians "authorized to accompany military forces in the field and entitling [them] to be treated, if captured, as prisoners of war."[33] Generally, civilians will be assigned duties at echelons-above-division in an effort to minimize their exposure to harm.[34] Also, civilians will normally not wear distinctive U.S. military uniforms unless the combatant commander or his service component commander authorizes them to do so. Regardless of their clothing, however, civilians will wear a symbol that establishes their civilian status.[35]

The goal of this doctrine is to ensure compliance with the obligation of distinction; that is, to ensure the protected status of civilians accompanying the force. The more civilians look like service members (wearing uniforms, carrying arms, performing assignments near the engagement area, functioning as force providers, or carrying no proof of their status as civilians accompanying the force), the greater their risk of losing POW status and becoming liable to prosecution if they are captured.

These general guidelines, with the possible exception of force protection, address only a civilian's appearance, not his actions. The guidance does not address the functions that a civilian accompanying the force might perform before crossing the line into direct or active participation in hostilities. As a result, civilians accompanying the force, regardless of their appearance and documentation, run the risk of engaging in actions that might be viewed as violations of the law of war. Effective, realistic guidance dealing with this issue remains woefully lacking.

Paramilitary Operatives

While guidance for commanders pertaining to the appropriate missions civilians who accompany the force can perform lacks clarity, guidance dealing with the use of paramilitary operatives is virtually nonexistent. The international law landscape becomes even more treacherous when a civilian is not accompanying the force but is a paramilitary operative intentionally engaging clearly hostile acts.

During World War II, the Roosevelt Administration created the Office of Strategic Services (OSS), the precursor to the CIA. OSS operatives focused on "espionage, sabotage, and partisan support."[36] Some operatives, who were military members, worked for the theater commander and, on occasion, wore civilian clothing when conducting military missions.[37] If captured in civilian clothing, regardless of their military or nonmilitary status, these operatives received few, if any, protections. Their deaths were virtually certain.

In 1947, the CIA was created, and according to its enabling legislation, it can conduct "special activities approved by the President," including, but not limited to, covert actions; that is, "activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."[38]

CIA covert operations have evolved into "military actions" in the form of CIA paramilitary operations. A driving purpose behind the use of paramilitary operatives, much as with civilians accompanying the force, is one of perceived effectiveness and efficiency. Their use frees up military resources and is an effective way to gather intelligence and influence the enemy. CIA paramilitary operatives, all donning civilian clothing in the conduct of hostilities, have fought in virtually every international conflict since 1947: the Korean conflict, the Vietnam war, Operations Desert Shield and Desert Storm, Operation Enduring Freedom in Afghanistan, and most recently, Operation Iraqi Freedom.[39]

Paramilitary operatives do not meet any of the prerequisites necessary to be considered lawful combatants. They are not members of a militia or a resistance organization because they fail to meet any of the four defining criteria. Likewise, paramilitary operatives are not members of the Armed Forces and cannot be incorporated into the force by some

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Military Police and civilian contractors react to an ambush from anticoalition forces while traveling in a convoy through Baghdad, 28 May 2004.

procedural fiat. Under congressional dicta, an individual must meet specific criteria to be a member of the U.S. Armed Forces and binds himself, via contract, to certain obligations.[40] Unlike CIA paramilitary operatives, members of the Armed Forces are subject to the worldwide jurisdiction of the *Uniform Code of Military Justice*.[41]

Under international law, if the paramilitary operative is not a combatant, then he is a civilian. He is not, however, a civilian accompanying the force, for three separate and distinct reasons:

1. The U.S. Government does not assert that paramilitary operatives are civilians accompanying the force, as evidenced by the fact that they are not issued appropriate identification cards.

2. Paramilitary operatives do not function in the traditional roles of civilians accompanying the force, such as supply or system supporters.

3. A paramilitary operative's purpose is to take an active or direct part in hostilities, contrary to the bright-line restriction articulated by the law of war.

Like a civilian in the general population, a paramilitary operative who has participated in hostilities by taking up arms can be punished for the sole reason of taking up arms: "[A]nyone whose status as a member of the Armed Forces is recognized, is entitled to be treated as a prisoner of war in the event that he is captured; anyone who takes up arms without being able to claim this status will be left to be dealt with by the enemy and its military tribunals in the event that he is captured."[42]

Paramilitary operatives who take an active and direct part in hostilities are unlawful combatants; that is, civilians illegally committing warlike acts in an international armed conflict. As unlawful combatants, what protections, if any, do they possess if captured by the enemy? The simple answer is that existing protections are minimal. Paramilitary operatives do not receive POW status. Instead, the legal rights to be afforded paramilitary operatives are merely procedural: they have the right to be tried by "an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedures."[43] These procedural rights include, at a minimum—

- The right to know the charges against them.
- The right to be presumed innocent until proven guilty.
- The right to an attorney.
- The right to a bar against being tried twice for the same crime (double jeopardy).

Paramilitary operatives could be tried in an enemy's court system for domestic criminal violations stemming from their warlike acts. Murder of an enemy soldier, for example, would constitute a domestic-law violation. Also, paramilitary operatives could be tried for perfidy, an international-law violation.[44] Among other things, perfidy is the treacherous killing, injuring, or capturing of an enemy by feigning civilian or noncombatant status. That is, an individual who intentionally feigns civilian status while conducting military operations can be tried for

US Air Force

An Air Force crew chief and Lockheed Martin contractor repair an aircraft's antenna during Operation Iraqi Freedom, 11 April 2003.

violating international law, regardless of whether such an action is deemed a domestic-law violation.

The use of paramilitary operatives to conduct military operations during international armed conflict appears to violate international law. The question remains, however, whether such conduct violates U.S. law. U.S. courts have had few opportunities to grapple with the issue of civilians who have committed hostile acts during an armed conflict because U.S. courts normally do not exercise jurisdiction over crimes committed outside the borders of the U.S. (where most of the Nation's wars have been fought). And even if jurisdiction exists, the question has not often come before the courts because the U.S. has historically provided captives the full protections afforded prisoners of war unless a competent tribunal (known as an Article 5 Tribunal) determines otherwise.[45] If the Article 5 Tribunal finds that an individual in question is an unlawful combatant—a civilian committing a warlike act, for example—he is not accorded POW status.[46]

In one landmark case, however, the U.S. courts did exercise jurisdiction because the hostile acts occurred on American soil. In that case *(Ex Parte Quirin)*, which the U.S. Supreme Court heard and decided in the midst of World War II, the accused were denied POW status.[47] In June 1942, eight Nazi saboteurs came to the U.S. with explosives, fuzes, and incendiary and timing devices to destroy key railroad installations, aluminum factories, power plants, bridges, and canal locks. The plan, devised by Adolf Hitler himself, was "to demonstrate America's vulnerability and the reach of Nazi power."[48] The team of Nazi troopers infiltrated the U.S. and donned civilian attire, but through a comedy of errors, was caught by the FBI within days.

In July 1942, President Franklin D. Roosevelt ordered a military commission to try the Nazi saboteurs for, among other crimes, violations of the law of war for acting as unlawful belligerents. The saboteurs appealed to the U.S. Supreme Court, which found that the conduct of the Nazi saboteurs was a violation of the law of war and, therefore, neither POW protections nor combatant immunity applied. Chief Justice Harlan Fisk Stone wrote for the Court: "By passing our boundaries for such purposes without uniform or other emblem signifying their belligerent [combatant] status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."[49]

The Court's decision did not just decree the Nazi saboteurs to be stripped of POW status and tried for their warlike acts, its decision was much more expansive: individuals who don civilian clothing to engage the enemy violate both the law of nations, as codified in the law of war, *and* U.S. law. The Court states, "This precept of law of war had been so recognized in practice both here *and abroad*, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war *recognized by this Government*" [emphasis added].[50]

The breadth of the Court's decision has two ramifications: the enemy can try Americans who wear civilian clothing to conduct military operations for violating the law of war, regardless of whether their conduct was a violation of the enemy's domestic law, and the same individuals would be lawfully subject with few protections to the domestic law of the capturing state.[51]

In short, conducting hostilities in civilian attire is a war crime—perfidy. At its essence, this is the intentional negation of the principle of distinction. Many law-of-war scholars conclude that "any tendency to blur the distinction must be sanctioned heavily by the international community;

otherwise the whole system based on the concept of distinction will break down."[52]

Leadership at Tactical and Strategic Levels

The obligation to protect civilians accompanying the force falls mainly to the tactical commander. The theory behind this obligation is that at the unit level the command has the greatest say in which operations civilians who accompany the force will be involved. The commander can therefore control such civilians' appearance and tasks. Yet the international obligation persists: conduct by civilians who accompany the force that amounts to direct or active participation in combatant activity is *forbidden*.

In the absence of specific guidelines that clearly delineate this conduct, tactical commanders should apply a common-sense test: "[C]ivilians may support and participate in military activities as long as they are not integrated into combat operations."[53] Joint doctrine supports this proposed position.[54] Moreover, the Navy's policy closely parallels this position, defining more precisely the conduct that triggers the forbidden direct or active participation as "support by civilians to those actually participating in battle or directly supporting battle action, and military work done by civilians in the midst of an ongoing engagement."[55] The Department of Defense's (DOD's) Law of War Working Group has offered a broad reaffirmation of this demarcation: "A civilian accompanying the Armed Forces in the field may not engage in or be ordered to engage in activities inconsistent with his or her civilian status."[56] The Army and Air Force, however, appear to accept the notion that civilians can and do perform "duties directly supporting military operations [and thereby] may be subject to direct, intentional attack."[57] The problem with this position is, of course, that it potentially runs afoul of international law: civilians who trip the "direct or active participation" wire might be targeted and exposed to criminal prosecution if captured, and their conduct might also violate international law.

In his thesis, "Contractors on the Battlefield: Distinction Makes a Difference," Paul E. Kantwell correctly concludes that "[a]s the trend to replace uniformed troops with civilian augmentees continues, the United States must evaluate obligations to those civilians under the principle of distinction."[58] Absent more concrete guidance, the most a tactical commander can do to protect civilians accompanying the force is to ensure that, to the extent possible, he does not place them in positions of jeopardy; that they give the appearance of being civilians; and that they understand that the more involved they become in the actual prosecution of combat operations, the more tenuous their postcapture protections.

The time has come for military leaders to deal with this fundamentally important issue at the policy-development stage, before the tactical execution of future operations. If U.S. policy focuses only on appearance, military leaders will never grapple with the larger policy issue. During military operations, what type of conduct is off-limits to civilians accompanying the force? The tradeoff is clear, as is the dilemma, if civilians' conduct is restricted to the extent that it comports with international law, many of their current responsibilities will fall to military members. Outsourcing and privatization, even if efficient and effective, will be curtailed. Such a step, however, would require at least a partial reversal of current trends in U.S. military thinking.

If military leaders need to *grapple* with policy considerations for civilians accompanying the force, then these same leaders need to *create* a policy for paramilitary operatives. Unlike civilians accompanying the force, the tactical commander is not directly responsible for paramilitary operatives. Military commanders do not control the appearance and tasks of paramilitary operatives who generally answer to other U.S. agencies. Yet the danger of intermingling civilians accompanying the force with paramilitary operatives is real: paramilitary operatives eviscerate the line of distinction between civilians and combatants. Eliminating this line leads to two potential undesirable results for *all* civilians; in particular, civilians who accompany the force. These civilians become lawful targets and, if captured, face criminal prosecution. If U.S. enemies cannot distinguish between these two groups of civilians during captivity, they might choose to deny all civilians, including civilians accompanying the force, POW status and to prosecute all as war or domestic criminals.

If the U.S. uses un-uniformed civilians to conduct military operations, an enemy might not be able—or might not choose—to distinguish a civilian accompanying the force from a paramilitary operative. Absent this ability to distinguish between lawful civilians and unlawful combatants, an enemy might well be left with one of two targeting choices: do not engage any civilians, even though some are engaging its forces, or engage every enemy civilian on the battlefield. The latter choice will likely prevail. Thus, through its own actions, the U.S. has vitiated the concept of distinction. If asked to justify its conduct, an enemy will likely cite the U.S. violation of the prin-

ciple of distinction and claim a legitimate right of self-defense.

The cases of the enemy conducting the criminal prosecution of a captured civilian who was accompanying the force on the battlefield and the prosecution of a paramilitary operative who has no legal status are equally problematic. In theory, an enemy must conduct an Article 5 Tribunal to determine a civilian's status, if this status is in doubt. Unfortunately, the civilian accompanying the force might well be faced with evidence that he was engaged in direct or active hostilities—proximity to the conflict; participating in military operations in which unlawful combatants (paramilitary operatives) were involved; and the U.S. abandonment of the principle of distinction. The result could be criminal trials for civilians accompanying the force or, worse yet, the treatment of all civilians as unlawful combatants.

The rationale offered by an enemy for its actions would be straightforward: U.S. forces are not "conduct[ing] operations in accordance with the laws and customs of war" and, therefore, cannot benefit from these laws and customs.[59] If the U.S. were to object to a civilian's postcapture treatment, the problem, from the international community's perspective, would be one of credibility: the U.S. is willing to intentionally violate the principle of distinction (its use of CIA paramilitary operatives in military operations), yet concurrently, complain bitterly when another state violates this same principle (Iraq's use of fighters dressed in civilian clothing: the Fedayeen Saddam militia).[60]

Regardless of the benefits the use of paramilitary operatives might achieve, we must carefully consider the associated risks posed to civilians accompanying the force and U.S. credibility regarding compliance to the law. Commanders at every level, with the assistance of their judge advocates, must act to ensure, to the fullest extent possible, that civilians accompanying the force do not become targets and, if captured, prosecuted.

If paramilitary operatives who engage in combat activities are assigned to a commander's area of operation, the affected commander must ensure that his leadership chain understands the inherent risks and potential law of war violations associated with their presence.[61] If leaders are willing to assume these risks, commanders can then act to minimize the danger to affected nonparamilitary civilians. A risk assessment, although only a stopgap measure, will at least ensure that the placement of civilians accompanying the force in the area of operation will be made with the full knowledge of the potential dangers posed.

The matter our strategic military leaders must deal with is straightforward: the practice of intermingling paramilitary operatives with U.S. military forces, especially civilians accompanying the force, in international armed conflict is both illegal and poses significant dangers to the civilians concerned. As one commentator noted, the U.S. "must be careful to maintain a well-delineated separation between the CIA and DOD when they integrate their battlefield operations."[62]

During international armed conflict, national military leaders must establish a bright-line rule prohibiting the intermingling of paramilitary operatives and traditional military forces. Covert operations might be effective and efficient and result in benefits to U.S. national interest, but when the U.S. is engaged in an international armed conflict, the law of war, along with its rules and responsibilities, is triggered. Once triggered, the U.S., as a Nation based on the rule of law, must abide by this law.

Scenario Revisited

Returning now to the hypothetical situation of the two captured civilians—one accompanying the force, the other a paramilitary operative—the question is whether they are to be afforded the same protections as Lynch under international law. At the Article 5 Tribunal conducted to determine the status of each, the answers are now clearer. The paramilitary operative is not immune from being targeted or from criminal prosecution. Once captured, he can be tried as a domestic criminal (for murder) or a war criminal (for perfidy). In either case, his prosecution and his execution will be rapid and certain.

The civilian accompanying the force, on the other hand, should not be specifically targeted and, once captured, should be given POW status, unless it can be demonstrated that he played an active or direct role in ongoing hostilities. He certainly appears to be a civilian: he carries an official identification card; he wears no military uniform; he carries no weapon. As for the civilian's conduct, he maintains a power generator. The Article 5 Tribunal will focus on this conduct in determining whether it constitutes taking a direct or active part in hostilities. In this case, the textbook answer to this question should be "no." The civilian's act of maintaining a power generator was not intended to cause (directly or actively) *actual* harm to the personnel and equipment of the enemy armed forces. The bogeyman persists, however: the lawful civilian was in proximity to an

unlawful combatant (the paramilitary operative).[63]

In this hypothetical situation, the U.S. would be violating the law by using unlawful combatants. Violating this fundamental principle of distinction, the U.S. would place in jeopardy the status claim of any U.S. civilian. Through its apparent violation of the law of war or, at a minimum, its cavalier approach to using paramilitary personnel, the U.S. would be increasing the risk to *all* members of the force. Put differently, the presumption of status for many civilians accompanying U.S. forces under international law might be negated, if not reversed, by the intentional violation by the U.S. of the principle of distinction.

A nation's conduct in war speaks volumes of its collective character. This conduct is judged, in large measure, by its adherence to the law of war. Our military leaders should not condone operational tactics that trump the law of war. When we use unlawful combatants on the battlefield, regardless of the perceived tactical advantage to be gained, we abandon the rule of law and place U.S. civilian personnel in jeopardy. Moreover, with this abandonment, we lose legal as well as moral authority. The result is a profound and unmistakable loss of U.S. leadership within the community of nations. ***MR***

NOTES

1. John M. Broder, "Commandos Rescue P.O.W. and Locate Bodies," *New York Times*, 3 April 2003, A Nation at War Section, 1.
2. Hague Convention No. IV, Respecting the Laws and Customs of War on Land (1907), in *Documents on the Laws of War,* ed. Adam Roberts and Richard Guelff (Great Britain: Oxford University Press, 2002), 67-84; Geneva Convention III, relative to the Treatment of Prisoners of War (1949), in *Documents on the Laws of War,* 243-98 [Geneva Convention III].
3. Geoffrey S. Corn and Michael L. Smidt, "'To Be or Not to Be, That is the Question,' Contemporary Military Operations and the Status of Captured Personnel," *The Army Lawyer* (June 1999): 13-14.
4. Commentary to the First Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflict, 8 June 1977, ed. Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (International Committee for the Red Cross), 598 [Commentary to Protocol I]. The U.S. has never ratified the First Additional Protocol of 1977 but considers a number of its provisions to be reflective of customary international law. The provisions of the Protocol discussed in this paper—Articles [art.] 37, 48, 50, 51(1) through subsection (3), and 75—are considered customary international law and accepted, as such, by the U.S. Government. Michael J. Matheson, remarks on The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, "The Sixth Annual American Red Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *The American University Journal of International Law and Policy* 2, no. 2 (Fall 1987): 419-27. This speech by then-U.S. State Department Deputy Legal Advisor Matheson enumerated which principles enshrined in the First Additional Protocol were considered part of customary international law by the U.S.
5. Protocol I, 447.
6. I bid., 444, art. 43(2).
7. Corn and Smidt,-9-15.
8. Geneva Convention III, 246, art. 4 (A)(2)(a)-(d).
9. Protocol I, 444, art. 44(3).
10. Ibid., 448, art. 50(1).
11. Geneva Convention IV, relative to the Protection of Civilian Persons in Time of War (1949), in *Documents on the Laws of War,* 301-69.
12. J.M. Spaight, *War Rights on Land* (London: MacMillan, 1911), 37, quoted in W. Hays Parks, "Special Forces' Wear of Non-Standard Uniforms," *Chicago Journal of International Law* 4 (Fall 2003): 514.
13. Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, The St. Petersburg Declaration of 1868, quoted in the Commentary to Protocol I, 598.
14. Fritz Kalshoven, *The Laws of Warfare* (Geneva: A.W. Sijthoff, 1973), 31.
15. Commentary to Protocol I, 615.
16. Protocol I, 448, art. 51(2).
17. Commentary to Protocol I, 615.
18. Parks, "Law of War Status of Civilians Accompanying Military Forces in the Field," Memorandum of Law for the Office of the Judge Advocate General, U.S. Army, 6 May 1999, 1.
19. Protocol I, 448, art. 51(3).
20. Commentary to Protocol I, 618.
21. Geneva Convention III, 246, art. 4(A)(4).
22. Ibid., 245, art. 3(1). Unlike the Geneva Conventions of 1949's use of "active," the First Additional Protocol states that civilians cannot take a "direct part in hostilities" (Protocol I, 448, art. 51(3)). For the purposes of this paper, the terms "active" and "direct" as synonymous. Geneva Convention III, 246, art. 4(A)(4).
23. Michael E. Guillory, "Civilianizing the Force: Is the United States Crossing the Rubicon?" *Air Force Law Review* 51 (2001): 115-16. Guillory contains an excellent discussion of the quasi-combatant status.
24. Commentary to Protocol I, 515.
25. Guillory, 111.
26. Ibid., 112.
27. Joint Publication (JP) 4-0, *Doctrine for Logistics Support of Joint Operations* (Washington, DC: U.S. Government Printing Office [GPO], 6 April 2000), chap. 5, outlines the three types of contracts for logistics.
28. Commentary to Protocol I, 618.
29. Guillory, 132.
30. JP 4-0, V-1.
31. Office of the Assistant Secretary of the Army, *Army Contractors Accompanying the Force (CAF)(AKA Contractors on the Battlefield) Guidebook* (Washington, DC: GPO, 8 September 2003), 33; U.S. Department of Defense (DOD) Directive (DODD) 1404.10, "Emergency-Essential (E-E) DOD U.S. Citizen Civilian Employees," 10 April 1992, P6.9.8.
32. U.S. Army Field Manual (FM) 3-100.21, *Contractors on the Battlefield* (Washington, DC: GPO, January 2003), chap. 6.
33. Kenneth J. Oscar and Alma B. Moore, "Policy Memorandum—Contractors on the Battlefield," 12 December 1997, 3.
34. Ibid., 1.
35. JP 4-0, V-7; Office of the Assistant Secretary of the Army, 33.
36. Parks, 532.
37. Ibid., 532-35.
38. Kathryn Stone, "'All Necessary Means'—Employing CIA Operatives in a Warfighting Role Alongside Special Operations Forces," Strategy Research Project for the U.S. Army War College, Carlisle, Pennsylvania, 7 April 2003, 7, on-line at <www.fas.org/irp/eprint/stone.pdf>; Executive Order 12333, "United States Intelligence Activities," para. 1.8, 46 Federal Register 59941, 1981.
39. Stone, 10, citing Charles D. Ameringer, *U.S. Foreign Intelligence—The Secret Side of American History* (Lexington, MA: Lexington Books, 1990), 168.
40. *U.S. Code,* Title 10, chap. 31 (Enlistments), secs. 501-20, 2002.
41. Ibid., *U.S. Uniform Code of Military Justice*, secs. 801 and others, 2003.
42. Commentary to Protocol I, 509, citing Hague Convention.
43. Protocol I, 464, art. 75(4).
44. Ibid., 442, art. 37.
45. Geneva Convention III, 247.
46. During the Persian Gulf war, for example, Article 5 Tribunals were conducted to verify a captive's status. Judge Advocate General's School, U.S. Army, *Judge Advocate General Operational Law Handbook*, ed. William O'Brien (2003), 22, note 2.
47. *Ex Parte Quirin*, 317 U.S.1 (1942).
48. George Lardner, Jr., "Nazi Saboteurs Captured! FDR Orders Secret Tribunal; 1942 Precedent Invoked by Bush Against al Qaeda," *Washington Post Magazine* (13 January 2002): 2.
49. *Ex Parte Quirin,* 37.
50. Ibid., 35-6.
51. For an excellent discussion of *Ex Parte Quirin* and perfidy, see William H. Ferrell III, "No Shirt; No Shoes; No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict," *The Military Law Review* 178 (Winter 2003): 94. *Ex Parte Quirin* has been criticized by law of war scholars. The main criticism of the Court's "law of war scholarship" has been its nondelineation between military personnel in civilian attire and civilians taking a direct part in hostilities. Some scholars contend that military members in civilian attire are not in violation of the law of war. What seems not to be in contention from the Court's decision is that civilians taking a direct part in hostilities are in violation of the law of war. This is the standard, both in international law circles and, since the law of war is part and parcel of U.S. Federal law, in the U.S. as well.
52. *The Handbook of Humanitarian Law in Armed Conflict,* ed. Dieter Fleck, Michael Bothe, Horst Fischer, Christopher Greenwood, Karl Josef Partsch, Walter Rabus (Great Britain: Oxford University Press, 1995), 471.
53. Guillory, 134.
54. JP 4-0.
55. Annotated Supplement to the *Commander's Handbook on the Law of Naval Operations*, ed. A.R. Thomas and James C. Duncan (1999), 484, note 14.
56. Quote from the DOD Working Group is cited by one of its members in the Parks Memorandum of Law, 4.
57. Ibid., 4; Lisa L. Turner and Lynn G. Norton, "Civilians at the Tip of the Spear," *Air Force Law Review* 51 (2001): 30-31.
58. Paul E. Kantwill, "Contractors on the Battlefield: Distinction Makes a Difference," unpublished thesis presented to The Judge Advocate General's School, U.S. Army, April 1999, 75.
59. Geneva Convention III, 246, art. 4(A)(2)(d).
60. Bill Gertz, "Fedayeen Saddam 'Essentially Terrorist,'" *Washington Times,* 26 March 2003, 1. As Secretary of Defense Donald Rumsfeld correctly concluded: "I'm not going to call [the Fedayeen] troops, because they're traveling in civilian clothes and they're essentially terrorists."
61. DODD 5100.77, "DOD Law of War Program," 9 December 1998, dictates that law of war violations be reported up the chain of command.
62. Stone, 16.
63. Our current detention of alleged hostiles in Guantanamo Bay, Cuba, from Operation Enduring Freedom (Afghanistan) is but one example of individuals claiming they were not committing warlike acts but, rather, were civilians in the wrong place at the wrong time.

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