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The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to Targeting Civilians

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**THE THICKEST GREY: ASSESSING THE
STATUS OF THE CIVILIAN RESPONSE CORPS
UNDER THE LAW OF INTERNATIONAL
ARMED CONFLICT AND THE U.S. APPROACH
TO TARGETING CIVILIANS**

DAN E. STIGALL*

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INTRODUCTION

The United States is currently expending significant effort in both Iraq and Afghanistan to shape each respective government and

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transform each country into a stable democracy. This endeavor, in turn, has also shaped—or even transformed—the U.S. approach to armed conflict by forcing policymakers and military commanders to find solutions to the seemingly intractable problems associated with developing countries and their relative instability. This focus on reconstruction and stabilization has led to the rise of “stability operations”—a relatively new addition to the military lexicon.¹

Reconstruction is the process of rebuilding degraded, damaged, or destroyed political, socioeconomic, and physical infrastructure of a country or territory to create the foundation for long-term development. *Stabilization* is the process by which underlying tensions that might lead to resurgence in violence and a breakdown in law and order are managed and reduced, while efforts are made to support preconditions for successful long-term development. Together, reconstruction and stabilization comprise the broad range of activities defined by the Department of Defense as stability operations.²

The Department of Defense (“DoD”) defines “stability operations” as military missions, tasks, or activities conducted in foreign countries and in coordination with other instruments of national power “to maintain or reestablish a safe and secure environment and provide essential government services,” reconstruct emergency infrastructure, and deliver humanitarian relief.³ Concomitant with the ascendance of the concept of stability operations has been an increase in calls from key lawmakers for “a well-organized and strongly led civilian counterpart to the military in post-conflict

1. See Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW., July 2007, at 45.

The doctrine of stability operations is a new peculiarity in military literature typically described in a fashion that at first blush appears to be miscellaneous to the traditional function of the military. The term, in and of itself, connotes military operations which are ‘not war’ and missions seemingly best left to civilian agencies to execute.

Id. at 50. See generally Dan E. Stigall, *Comparative Law and State-Building: The “Organic Minimalist” Approach to Legal Reconstruction*, 29 LOY. L.A. INT'L & COMP. L. REV. 1 (2007) (discussing state-building and legal reconstruction).

2. U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-07: STABILITY OPERATIONS ¶ 1-56 (2008).

3. U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0: JOINT OPERATIONS V-1 (2008).

zones.”⁴ There are numerous reasons to welcome civilian involvement in stability operations. Civilians can offer a degree of expertise in certain technical fields that the military might lack.⁵ Likewise, civilians may sometimes be perceived as less threatening to the developing state and its citizenry. Neither of these reasons, however, holds out as an immutable truth, nor can it be said that military personnel fundamentally lack what civilian personnel may provide.

Moreover, as recent years have demonstrated, stability and reconstruction operations are not confined to peaceful areas of the world. To the contrary, such work is often undertaken in areas of persistent conflict, where reconstruction is taking place amidst the bombing and large-scale destruction wrought by military activity.⁶ It is perhaps the most apparent paradox of modern warfare that this seemingly dissonant combination of simultaneous reconstruction and destruction is, in fact, the confluence of forces toward a common goal: to eliminate those “who pose a threat to U.S. foreign policy, security, or economic interests.”⁷

4. See Senator Richard Lugar, Address at the National Defense University (Mar. 23, 2006), available at <http://lugar.senate.gov/news/record.cfm?id=253067> && (suggesting that the Secretary of State could lead the civilian-side operation to promote inter-agency cooperation and knowledge).

5. See Michèle Flournoy, *Training and Education for Post-Conflict Reconstruction*, in WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION 126, 131 (Robert C. Orr ed., 2004) (arguing that the U.S. military’s civilian-run divisions give the United States the greatest capacity to assist in post-conflict operations).

6. See H.R. COMM. ON ARMED SERV. SUBCOMM. ON OVERSIGHT & INVESTIGATIONS, 110TH CONG., DEPLOYING FEDERAL CIVILIANS TO THE BATTLEFIELD: INCENTIVES, BENEFITS, AND MEDICAL CARE 10 (Comm. Print 2008).

Over the course of more than seven years of war, nearly 10,000 federal civilian employees have been deployed to Iraq or Afghanistan to support security, political, and economic development. While certainly unique in scale and complexity, the stability and reconstruction missions in Iraq and Afghanistan are also unprecedented in their risk to our deployed citizens. Some claim these posts are exposed to such a high level of threat that most civilian personnel would have been evacuated from them in the pre-9/11 era. There are few safe places in countries where terrorists, militia, insurgents, and criminals are seeking power and attempting to undermine efforts to establish legitimate governments.

Id.

7. National Security Presidential Directive 44 on Management of Interagency

The result of this shift in the paradigm of armed conflict has been the creation of a grey zone of activities that are neither clearly civilian nor military in nature. What is now called “stability operations” is a hybrid area that fuses a core military mission with a field of knowledge and experience that is dominated, at least in theory, by civilians. Often the relevant experience for the successful conduct of stability operations is shared between civilians and military. Even when the relevant expertise is civilian in nature, it is generally the military that must provide the security and logistical capabilities to enable the operation.⁸ As a result, strategic parlance is now characterized by references to “integrated civil-military planning teams that establish mechanisms for rapid response.”⁹ Civilians and military personnel now, as never before, find themselves intertwined in a new grey zone that does not fully belong to either of them.

But there are legal ramifications for the civilians who operate within this grey zone. Importantly, there is yet another grey area surrounding the question of what conduct disqualifies a civilian from the protections and immunity traditionally given to civilians during armed conflict. The resultant lack of clarity can translate into significant legal consequences—both for civilians who are mobilized pursuant to such an effort and for U.S. policymakers who seek to criminalize the conduct of terrorists and insurgents.

This article explores the phenomenon of U.S. government civilians who engage in stability and reconstruction operations in conflict zones and their legal status under the law of armed conflict, paying specific attention to the corps of federal civilians being developed for this specific purpose: the Civilian Response Corps. The discussion herein reveals that the field of stability operations is a hybrid area

Efforts Concerning Reconstruction and Stabilization, Office of the Press Sec’y (Dec. 7, 2005) [hereinafter NSPD 44], *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-44.html>.

8. See Jackie Northam, ‘Civilian Surge’ Plan for Afghanistan Hits a Snag (NPR radio broadcast Sept. 20, 2009), *available at* <http://www.npr.org/templates/story/story.php?storyId=112976965> (questioning whether the military succeeds in its task to secure an area and allow the civilian experts to move around the country freely).

9. Int’l Sec. Assistance Force [ISAF], *COMISAF’s Initial Assessment*, at 2-21 (Aug. 30, 2009), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf [hereinafter ISAF].

that requires both civilian and military resources to attain a common objective—a fact that conflates the purposes and goals of both, and necessarily colors the civilians engaging in such work with a military tint. This hue of belligerence can translate into serious liability when considering the rather elastic approach some elements of the U.S. government have taken when determining which activity deprives civilians of their protections under international law. Ultimately, this article posits that the complex nature of civilian operations is such that neither the military nor civilians can be extricated from it. Accordingly, U.S. interests are best served by articulating a single, formal, and more restrictive interpretation of what it means to “directly participate in hostilities.”

I. THE RULES ON TARGETING CIVILIANS

As Professor Yoram Dinstein notes, there are fundamental distinctions between civilians and combatants under the Law of International Armed Conflict.¹⁰ This distinction, first formally articulated in the St. Petersburg Convention, is a “norm of customary international law applicable in both international and non-international armed conflicts.”¹¹ The International Court of Justice has noted that this principle, known as the *principle of distinction*, is one of the “cardinal principles” of the law of international armed conflict.¹²

International treaties also reflect this basic proposition. Article 51(3) of the 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts

10. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27 (2004) (defining combatants as “[m]embers of the armed forces of a belligerent Party (except medical and religious personnel . . .), even if their specific task is not linked to active hostilities” and “[a]ny other persons who take an active part in the hostilities”).

11. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *INT’L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES 3* (2005) (emphasizing the importance of weakening enemy forces during war instead of targeting the civilian population).

12. *Id.* at 5; see also JOSEPH S. NYE, *UNDERSTANDING INTERNATIONAL CONFLICTS: AN INTRODUCTION TO THEORY AND HISTORY* 25 (5th ed. 2005) (“The prohibition against intentionally killing people who pose no harm also helps to identify why terrorism is wrong. Some skeptics argue that ‘one man’s terrorist is just another man’s freedom fighter.’ But under just war doctrine, you can fight for freedom, but you cannot target innocent civilians.”).

("Protocol I") states that civilians enjoy immunity from attack during international armed conflict "unless and for such time as they take a direct part in hostilities."¹³ Such language reflects the general rule that combatants are allowed to attack other combatants and military targets but are prohibited from targeting civilians. The underlying rationale behind this distinction is to "ensure . . . that international armed conflicts be waged solely among the combatants of the belligerent Parties."¹⁴ The operative legal framework for armed conflict, therefore, allows a degree of protection to civilians—but that protection is not absolute. To the contrary, it is tied to the requirement that civilians abstain from active participation in hostilities.¹⁵

As noted, such protection applies similarly in non-international armed conflict, as well as the concomitant caveats. For instance, the protections of Common Article 3 to the four 1949 Geneva Conventions apply only to "persons taking no active part in the hostilities."¹⁶ Likewise, Article 13(3) of 1977 Protocol Additional to the Geneva Conventions relating to the Protection of Victims of Non-international Armed Conflicts ("Protocol II") deprives civilians who participate in hostilities of both the general protection against the dangers arising from military operations and immunity from attack.¹⁷ The loss of such protections is significant because these individuals can then be lethally targeted (i.e., killed), are not entitled to POW status upon capture, and "may be tried by an opposing

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51.3, June 8, 1977, 1125 U.N.T.S. 3.

14. DINSTEIN, *supra* note 10, at 27.

15. *See id.*

Lawful combatants can attack enemy combatants or military objectives, causing death, injury and destruction. In contrast, civilians are not allowed to participate actively in the fighting: if they do, they lose their status as civilians. But as long as they retain that status, civilians 'enjoy general protection against dangers arising from military operations.'

Id.

16. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (applying by its terms to "armed conflict not of an international character").

17. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) arts. 13.1, 13.3, June 8, 1977, 1125 U.N.T.S. 609.

force's judicial system for actions taken while directly participating in hostilities."¹⁸

Violation of the prohibition on targeting civilians has been made punishable by international bodies such as the International Criminal Court, which criminalizes "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."¹⁹ Similarly, such acts have been made punishable by the Military Commissions set up by the United States in the wake of September 11. The Military Commissions Act of 2006 imposes criminal liability on any person subject to its provisions who "intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities."²⁰ In the event that a targeted civilian is killed, Military Commissions can even subject the accused to the death penalty.²¹ There is widespread agreement that violators of this international norm should be prosecuted (at least in some forum) and multiple mechanisms have been created in which to do so.

It must be noted that there are multiple disagreements surrounding various aspects of Article 51(3) of Protocol I and its requirements. Chiefly, there is great dispute regarding the temporal scope of the loss of protection—the question of the duration of the loss of protection once the activity in question is undertaken.²² More expansive readings of this temporal requirement have been criticized

18. See Eric Robert Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 FLA. ST. J. TRANSNAT'L L. & POL'Y (forthcoming 2010) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1398462 (analyzing current interpretations of the phrase "direct participation in hostilities," and asserting that a given entity's chosen interpretation is driven by self-interest).

19. Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 2187 U.N.T.S. 90.

20. Military Commissions Act of 2006, 10 U.S.C.A. § 950t (2) (West 2009).

21. *Id.*

22. See Eric T. Jensen, U.S. Army JAG Corps, *Targeting of Persons and Property*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 37, 48 (Michael W. Lewis ed., 2009).

On one end of the spectrum is the civilian who directly participates one time and then ceases his participation. Is he targetable until the end of hostilities? On the other end of the spectrum is the civilian by day and guerilla by night who carries out a continuous pattern of hostile acts against his foes. Is he only targetable while conducting the actual nighttime raid?

Id.

as providing “light switch” protection or “revolving door” protection to terrorists or insurgents and have, quite understandably, been the source of much criticism and objection.²³ The focus of this article, however, is on a much more basic question in the “direct participation” analysis. Rather than explore the length of time during which protections are lost, this article focuses on what types of activities trigger the loss of protections in the first place.

It is widely acknowledged that the activities in question must have at least three basic elements: the activity must be harmful to a party to the conflict, there must be a direct link between the action and the harm, and there must be a “belligerent nexus” such that the act supports a party to the conflict to the detriment of another.²⁴ As far as which acts serve to throw off the mantle of protection described above, Articles 4(A)(4) and (5) of the Third Geneva Convention provide an illustrative list of activities that are not considered to be direct participation. Those are as follows:

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

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.²⁵

23. *See id.* at 49 (raising the issue of whether certain groups of individuals may be considered constantly involved in hostilities, such as those who take part in hostilities intermittently); *see also* Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 535 (2005) (illustrating this debate with “the image of the civilian who is a guerilla by night and a farmer by day”).

24. *See* Jensen, *supra* note 22, at 47 (arguing that while these criteria are standard and generally accepted, there is much debate over the practical application of these factors).

25. Third Geneva Convention, *supra* note 16, arts. 4A(4)-(5).

But aside from that expressly proscribed area, there is little guidance or agreement on what other sorts of activities would (or would not) divest a civilian of the protections offered by international law. As such, the extent to which civilian participation in hostilities results in the negation of their protected status is not easy to discern. As the International Committee for the Red Cross (“ICRC”) study on customary international humanitarian law flatly notes, “A precise definition of the term ‘direct participation in hostilities’ does not exist.”²⁶ Likewise, other scholars have commented on the pronounced difficulty in defining the extent and limits of “direct participation in hostilities.”²⁷ Dinstein explains:

It is not always easy to define what active participation in hostilities denotes. Usually, the reference is to “direct” participation in hostilities. However, the adjective “direct” does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities. There is a disparity between the latter and a civilian who retrieves intelligence data from satellites or listening posts, working in terminals located in his home country. Needless to say, perhaps, a mere contribution to the general war effort (e.g., by supplying foodstuffs to combatants) is not tantamount to active participation in hostilities.²⁸

There is, therefore, little agreement on anything except the fact that the definition is an unsettled area of international law.²⁹ This state of affairs has led to a degree of latitude in interpretation. But latitude in interpretation is often coterminous with legal indeterminacy. Further, as one scholar has noted, “The more confused a concept, the more it lends itself to opportunistic

26. See HENCKAERTS & DOSWALD-BECK, *supra* note 11, at 22.

27. See Schmitt, *supra* note 23, at 533 (positing that the definition of “direct participation in hostilities” seems require “but for” causation, as well as some knowledge on the civilian’s part that the action would cause harm).

28. DINSTEIN, *supra* note 10, at 27-28.

29. See Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 28 (2001) (emphasizing that common belief does not limit “direct part” to actual fighting, but can also include harm to personnel or equipment).

appropriation.”³⁰ Accordingly, and quite predictably, international actors with varying agendas and equities have articulated significantly different interpretive views of what it means to directly participate in hostilities. These views can be roughly separated into two schools of thought existing at polar ends of a conceptual continuum: (1) a restrictive view that seeks to limit the range of activity by which a civilian loses legal protections, and (2) an expansive view that seeks to permit the targeting of a wider range of civilians.

A. THE RESTRICTIVE VIEW

The more restrictive approach to interpreting Article 51(3) and the meaning of “direct participation” posits that the only acts by civilians which qualify as direct participation in hostilities are those that “cause ‘actual harm’ to personnel and equipment where there is a ‘direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity occurs.’”³¹ Urging such a restrictive position, the ICRC has proposed that the definition of direct participation be limited to civilians who “carry out acts, which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy’s military operations or capacity.”³² Professor Michael N. Schmitt, in noting the high threshold for an act to qualify as “direct participation,” has posited that this approach implies a direct link between the activity in question and its immediate consequences, and that “[p]erhaps the best tack when analyzing a particular act is assessing the criticality of the act to the direct application of violence against the enemy.”³³ Even so, it is important to note that not all

30. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 3 (2006).

31. Douglas W. Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, *ARMY LAW.*, July 2009, at 1, 20 (quoting CLAUDE PILLOUD ET AL., *COMMENTARY OF THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, at 516 (Yves Sandoz et al eds., 1987)).

32. ICRC, *Direct Participation in Hostilities: Questions and Answers*, Feb. 6, 2009, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-faq-020609>.

33. Schmitt, *supra* note 23, at 534 (contrasting activities such as the “provi[sion] of strategic analysis” with others such as the “creation, analysis, and dissemination of tactical intelligence” for particular military targets, and

activities in question must be related to the application of deadly force against the enemy. In fact, Professor Schmitt has argued that using a “kill chain” as an analytic tool for determining “direct participation” is too restrictive because “not all military operations seek to weaken the enemy in this fashion.”³⁴

B. THE EXPANSIVE VIEW

The expansive view of “direct participation in hostilities” would permit a broader range of civilians to be legitimately targeted based on a wider range of activity. Although there is not yet a fully coherent U.S. position on the matter, it is clear that the United States—which is not a party to Protocol I³⁵—takes a broader view of “direct participation” and, therefore, extends the range of civilians who may be lawfully targeted. As one U.S. Navy Judge Advocate (“JAG”) has noted, “The United States interprets ‘direct part[icipation]’ more broadly than the Additional Protocol I signatories, and does so through the prism of self-defense.”³⁶ The U.S. DoD Law of War Working Group has opined that U.S. civilians may divest themselves of their immunity from intentional attack “if there is: ‘(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy.’”³⁷ That same group has chosen “active part[icipation]” as their preferred term to describe the point at which a civilian becomes at

suggesting that the former should not be considered critical to efforts in the same way as the latter).

34. *Id.* at 533 n.89.

35. See ICRC, Additional Protocol I Ratifications, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited May 31, 2010) (listing States Parties to Protocol I); see also Michael J. Matheson, *Opening Remarks at 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*, 2 AM. U. J. INT’L L. & POL’Y 415, 420 (1987) (noting that certain portions of Protocol I are considered by the U.S. to reflect customary international law).

36. Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 82, 89.

37. *Id.* at 89 (quoting INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, & OPERATIONAL LAW VOL. II I-10 (2006)).

risk from intentional attack, and has defined “active” participation as “[e]ntering the theatre of operations in support or operation of sensitive, high value equipment, such as a weapon system.”³⁸ Such a view, while fairly constrained, is still broader than the ICRC’s position that the civilian must be directly causing harm (death, injury, or destruction) to another party or “directly harming the enemy’s military operations or capacity.”³⁹

Still, certain elements of the U.S. military have advocated for an even more expansive “functionality test,” which does not turn on whether actual harm resulted from the civilian action in question and does not measure geographic or temporal distance from the conflict. Instead, the “functionality test” assesses the validity of the civilian target “based upon the importance and level of functions carried out by civilians on the battlefield.”⁴⁰ Accordingly, “[t]aking part in hostilities . . . is not regarded as limited to civilians who engage in actual fighting,”⁴¹ and certain mission-essential civilians working on a military base during an international armed conflict could be subject to direct attack.⁴² Likewise, pursuant to such a view, a “civilian entering the theater of operations in support or operation of sensitive, high Value [sic] equipment, such as a weapon system” has directly participated in hostilities and has lost his or her protection.⁴³ A U.S. Army JAG has even opined that “[t]his permissive theory makes it conceivable that journalists who are in direct support of modern military operations could lose their immunity like other civilians accompanying the force.”⁴⁴ Lisa L. Turner and Lynn G. Norton noted the creeping prominence of this view:

38. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK 143 (Keith E. Puls ed., 2004), available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2004.pdf.

39. ICRC, *supra* note 32.

40. See Moore, *supra* note 31, at 21 (expanding the definition of belligerents to include civilians who “direct[ly] support” enemy hostile operations).

41. U.S. DEP'T OF THE ARMY, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE 6 (1995), available at http://www.apd.army.mil/pdf/p690_47.pdf.

42. Turner & Norton, *supra* note 29, at 31.

43. Memorandum from W. Hays Parks, Special Ass't for Law of War Matters, U.S. Dep't of the Army, Regarding the Law of War Status of Civilians Accompanying Military Forces in the Field, § 3(a) (May 6, 1999) (on file with The American University International Law Review) [hereinafter Parks Memo].

44. See Moore, *supra* note 31, at 21 (detailing just how broad the U.S.'s

The Judge Advocate General School of the Army recently adopted this view teaching “the contract technical advisor 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.”⁴⁵

Such a view seems to have found a role in Afghanistan, where reports indicate that certain drug traffickers with ties to the insurgency are now being targeted in the same manner as combatants. A recent report by the Congressional Research Institute notes that the United States is interpreting international law in such a way as to allow military commanders “to put drug traffickers with proven links to the insurgency on a kill list, called the joint integrated prioritized target list.”⁴⁶ Such a broad interpretation of “direct participation in hostilities” practically equates facilitation of the military effort (in this case financing) with direct participation.

Although this issue will be addressed in detail below, it is worth noting here that a legal analysis equating mere financing of an insurgency or war effort with “direct participation” is problematic on a number of levels. Emphasizing the complexity of this issue and the problems with so broad an interpretation are recent reports that NGOs working in Afghanistan, as well as certain U.S. contractors, have been paying mafia-style protection money to Taliban and tribal warlords.⁴⁷ Although such conduct obviously merits punishment, it

“functionality test” might be).

45. Turner & Norton, *supra* note 29, at 31 (quoting *Protecting Human Rights During Military Operations*, 48TH GRADUATE COURSE DESKBOOK 15-3 (Int’l & Operational L. Dep’t, The Judge Advocate General’s School, United States Army, 2000)); *see also* Jensen, *supra* note 22, at 55 (implying that this view also applies to non-international armed conflicts, during which “government forces routinely treat[] organized opposition groups as much like an ‘enemy’ as they would the armed forces of opposing States during international armed conflicts”).

46. *See* CHRISTOPHER M. BLANCHARD, CONG. RES. SERV., AFGHANISTAN: NARCOTICS AND U.S. POLICY 16 (2009), available at <http://www.fas.org/sgp/crs/row/RL32686.pdf> (“The military places no restrictions on the use of force with these selected targets, which means they can be killed or captured on the battlefield.”).

47. *See Congress to Probe Private Military Contractors in Afghanistan*, CNN.COM, Dec. 17, 2009, <http://www.cnn.com/2009/WORLD/asiapcf/12/17/afghanistan.contractors.probe/index.html> (questioning whether parts of a nearly \$2.2 billion contract in Afghanistan were diverted to pay local warlords and the Taliban “for security”); William Dowell, *Analysis: Rising Threat to Aid Agencies*

would seem rather extreme to argue that such persons are no longer protected civilians and could, therefore, be attacked with impunity.

Nonetheless, in the end, there remains a divergence of conflicting and competing opinions as to what “direct participation” entails. The concept remains fluid and open to interpretation. As such, whether a civilian becomes a lawful target based on certain activity is subject to debate and will depend upon both the facts of the individual case and the analytical framework chosen. Whatever the case, it is apparent that use of the functionality analysis represents an extremely broad view and permits the targeting of civilians for a much broader range of activity than that permitted under Protocol I.

II. STABILITY OPERATIONS AND CIVILIAN PRIMACY

The reconstruction seen taking place amidst such large-scale destruction in modern conflicts is not the only paradox associated with stability operations. Another is the fact that civilian agencies are ostensibly at the helm of stability operations—even though such operations are now considered a “core U.S. military mission.”⁴⁸ On December 7, 2005, President George W. Bush issued National Security Presidential Directive 44 (“NSPD 44”), which was designed “to promote the security of the United States through improved coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.”⁴⁹ This directive signaled the official recognition that failed or failing states posed a threat to U.S.

in Afghanistan, GLOBAL POST, Sept. 18, 2009, <http://www.globalpost.com/dispatch/worldview/090916/rising-threat-aid-agencies-afghanistan> (discussing investigations into payments by international contractors to the Taliban, via Afghan subcontractors, in exchange for guarantees of safety in Taliban-controlled regions); Justin Huggler, *Afghan Candidate Calls for Expulsion of ‘Corrupt’ NGOs*, EZILON INFOBASE, Sept. 13, 2005, http://www.ezilon.com/information/article_9624.shtml (quoting an Afghan political candidate’s allegations that “[a]bout 20 per cent of all the funding to NGOs is spent on ‘commissions’ which are bribes to government officials to win contracts”).

48. U.S. DEP’T OF DEF., DIRECTIVE 3000.05: MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS ¶ 4.1 (2005) [hereinafter DOD DIRECTIVE 3000.05], available at http://faculty.nps.edu/dl/HFN/documents/DoD_Directive_d300005p.pdf.

49. NSPD 44, *supra* note 7.

national security interests—a threat that U.S. government agencies would need to mitigate or counter. The directive declares that:

The United States has a significant stake in enhancing the capacity to assist in stabilizing and reconstructing countries or regions, especially those at risk of, in, or in transition from conflict or civil strife, and to help them establish a sustainable path toward peaceful societies, democracies, and market economies. The United States should work with other countries and organizations to anticipate state failure, avoid it whenever possible, and respond quickly and effectively when necessary and appropriate to promote peace, security, development, democratic practices, market economies, and the rule of law. Such work should aim to enable governments abroad to exercise sovereignty over their own territories and to prevent those territories from being used as a base of operations or safe haven for extremists, terrorists, organized crime groups, or others who pose a threat to U.S. foreign policy, security, or economic interests.⁵⁰

A notable aspect of this effort, designed to prevent “territories from being used as a base of operations or safe haven for extremists, terrorists, organized crime groups, or others who pose a threat to U.S. foreign policy, security, or economic interests[,]”⁵¹ was the recognition that civilians would play the lead role in such efforts. NSPD 44 expressly states, “[t]he Secretary of State shall coordinate and lead integrated United States Government efforts . . . to prepare, plan for, and conduct stabilization and reconstruction activities.”⁵² Accordingly, the Department of State—a civilian agency—is theoretically in the lead role for such initiatives.⁵³

50. *Id.*

51. *Id.*

52. *Id.*

53. *See id.* (assigning primary responsibility for carrying out NSPD 44 to the Department of State, and proclaiming that efforts shall be coordinated with the Secretary of Defense “to ensure harmonization with any planned or ongoing U.S. military operations across the spectrum of conflict”). *But see* Richard Weitz, *Obstacles to a Successful Civilian Surge in Afghanistan*, CENT. ASIA-CAUCASUS INST. ANALYST, Apr. 8, 2009, <http://www.cacianalyst.org/?q=node/5077> (suggesting that the Obama administration and its NATO allies will struggle to staff a civilian “surge” in Afghanistan because “the State Department is seeking to hire only a few hundred more development experts for Afghanistan,” leaving the U.S. military to make up the shortfall with tens of thousands more troops on the ground).

Military doctrine, as one might expect, conforms to NSPD 44 and reflects the primacy of civilian leadership in stability operations. As one U.S. Army Field Manual notes, “[t]he Department of State is charged with leading and coordinating U.S. Government efforts to conduct reconstruction and stabilization operations.”⁵⁴ Nonetheless, in spite of the civilian lead, stability operations have been made a central part of the modern military’s functional competence. The U.S. military has historically performed such operations with regularity,⁵⁵ but in recent years, the ascendance of stability operations has been both revolutionary and rapid. In November 2005, the Deputy Secretary of Defense issued DoD Directive 3000.05, entitled “Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations.”⁵⁶ The directive expressly declares that “[s]tability operations are a core U.S. military mission that the [military] shall be prepared to conduct and support.”⁵⁷ That same directive notes that, during times of armed conflict, stability operations “shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities.”⁵⁸ For purposes of the U.S. military, stability operations are consequently “on par with combat operations.”⁵⁹

But the role of civilian leadership is not limited to backseat coordination from the comfort of a federal office building. U.S. government civilians are actually putting their boots (or loafers) on the ground in areas of persistent conflict and conducting the difficult, hands-on work of stability operations.⁶⁰ This civilian involvement

54. U.S. DEP’T OF THE ARMY, FIELD MANUAL 1-04: LEGAL SUPPORT TO THE OPERATIONAL ARMY app. D ¶ D-7 (2009).

55. See Tasikas, *supra* note 1, at 49 (“Since the early 1990’s, the United States has been involved in seven post-conflict stability operations—roughly one nation-building mission every two years.”).

56. DOD DIRECTIVE 3000.05, *supra* note 48.

57. *Id.* ¶ 4.1.

58. *Id.*

59. See Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Re-construction Operations*, ARMY LAW., Oct. 2008, at 1, 1 (detailing how the DoD “elevated stability operations to a core military mission” as part of a response to strong public criticism of early stabilization efforts in Iraq).

60. See, e.g., U.S. Dep’t of State, Provincial Reconstruction Teams (PRTs), <http://www.state.gov/p/nea/ci/iz/c21830.htm> (last visited Apr. 18, 2010) [hereinafter U.S. DoS PRTs].

has assumed numerous forms, such as the Provincial Reconstruction Teams (“PRTs”) in Iraq and Afghanistan,⁶¹ and has led to the repurposing of more agency-specific initiatives, including the use of the Department of Justice’s Office of Overseas Prosecutorial Development, Assistance, and Training (“OPDAT”) ⁶² and other Department of Justice personnel in those same theatres of operation.⁶³ Likewise, myriad other federal agencies are contributing personnel to operations overseas in which the U.S. government is *waging stability*.⁶⁴

Most notably, civilian participation in stability operations is evolving into a more coherent and organized force. In addition to its other effects, NSPD 44 created the Office of the Coordinator for Reconstruction and Stabilization (“S/CRS”). S/CRS’s core mission

The front-line operatives in the campaign to stabilize Iraq are the American and Coalition members who comprise the Provincial Reconstruction Teams, or PRTs. These are relatively small operational units comprised not just of diplomats, but military officers, development policy experts (from the U.S. Agency for International Development, the Department of Agriculture, and the Department of Justice), and other specialists (in fields such as rule of law, engineering, and oil industry operations) who work closely with Iraqi provincial leaders and the Iraqi communities that they serve. While PRTs dispense money for reconstruction projects, the strategic purpose of these civil-military field teams is both political and economic. By building provincial governments’ ability to deliver essential services and other key development projects to local Iraqis, PRTs help to extend the reach of the Iraqi government to all corners of the country and help build the stability necessary to complete the transition to full-Iraqi control.

Id.

61. *Id.*

62. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985, 1005 (2007) (remarking that OPDAT focuses on providing assistance to other states as a means to engender “foreign cooperation” with U.S. efforts to combat various threats).

63. See Press Release, U.S. Dep’t of Justice, Department of Justice Sends 25 Advisors to Iraq in Support of Provisional Authority Effort to Reconstruct Criminal System (May 20, 2003), *available at* http://www.justice.gov/opa/pr/2003/May/03_ag_267.htm (announcing the deployment of civilian lawyers, judges, and court administrators to Iraq to assist with restoration of law and order).

64. See U.S. DoS PRTs, *supra* note 60 (listing other government agencies that conduct reconstruction efforts in Iraq, such as the U.S. Agency for International Development and the Department of Agriculture); see also KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 180-81 (2009) (discussing the “blurring of military and criminal justice efforts” post-9/11, in that military technology was increasingly used to respond to domestic crime).

“is to lead, coordinate and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife, so they can reach a sustainable path toward peace, democracy and a market economy.”⁶⁵ To accomplish this mission, S/CRS has begun assembling the U.S. Civilian Reserve Corps (“CRC”)—a corps of civilians who will rapidly be deployed overseas in order to respond to “critical international crises.”⁶⁶ This civilian “corps,” which is designed to work closely with the military,⁶⁷ will be comprised of civilian experts who will be able to assist with projects involving engineering, public administration, economics, and the rule of law. The CRC is designed to perform its function in post-conflict situations, as well as in areas of persistent conflict.⁶⁸ Like the military, the CRC will possess both active and reserve branches.⁶⁹

Though the CRC had broad bipartisan support, Congress delayed funding the initiative until 2008, when the Supplemental Appropriations Act for Iraq and Afghanistan (PL 110-252) allotted a mere \$55 million for the program.⁷⁰ For the 2010 fiscal year, the House of Representatives passed the State, Foreign Operations, and

65. U.S. Dep’t of State, Office of the Coordinator for Reconstruction & Stabilization, <http://www.state.gov/s/crs/about/index.htm> (last visited May 31, 2010).

66. See Melanne A. Civic, U.S. Dep’t of State, A U.S. Government Coordinated Civilian Stabilization Initiative, http://www.ndu.edu/ctnsp/Stab_Ops/Civic%2017%20Apr.pdf (reviewing the expectations of the NSPD 44 and explaining how the creation of the CRC will assist in meeting those expectations).

67. See *id.* (stating that the CRC is intended to “work with U.S. military” to help create stability).

68. *Cf. id.* (noting that the State Department’s pilot team of civilian responders has “deployed to Iraq, Afghanistan, Sudan/Darfur, Chad, Nepal, Liberia, Lebanon, and Kosovo”).

69. See U.S. Dep’t of State, Civilian Response Operations (July 15, 2008), <http://www.state.gov/s/crs/107027.htm> (describing the active component as comprised of full-time, direct-hire employees of the State Department, and the standby component as comprised of federal employees who “maintain their current position but can be called to deploy . . . to unconventional, challenging environments”).

70. See SCOTT CARLSON & MICHAEL DZIEDZIC, U.S. INST. OF PEACE, RECRUITMENT OF RULE OF LAW SPECIALISTS FOR THE CIVILIAN RESPONSE CORPS 2 (2009), available at http://www.usip.org/files/resources/USIP_0109_2.PDF (outlining the creation of the S/CRS, which was intended to address a need for rule of law development specialists by providing funding to civilian-military initiatives).

Related Programs appropriations bill,⁷¹ which includes \$125 million for the program⁷²—a significant increase that is, in all likelihood, indicative of the increasing popularity of the program.⁷³

What is important to note about the CRC is that its mission is not purely humanitarian in nature. To the contrary, the mission of the CRC is indissolubly bound to U.S. national security, which is apparent not only in the method of its inception (through a National Security Presidential Directive) and in its sources of funding (through bills passed for “war funding”),⁷⁴ but also in the sort of training its members receive. CRC training includes a course at a U.S. Marine base, which covers “weapons familiarization,” “hostage survival,” “mission planning,” “land navigation,” and “high-threat . . . road driving techniques.”⁷⁵

Comments from the CRC’s leadership also evidence the Corps’ concern for national security. For instance, Ambassador John Herbst, coordinator for Reconstruction and Stabilization, in comments delivered to students at the Command and General Staff College at Fort Leavenworth, recently noted that “[the CRC’s] ability to respond to countries in chaos is an essential part of protecting the United States.”⁷⁶ Citing threats to global security posed by

71. H.R. 3081, 111th Cong. (2009).

72. See H.R. REP. NO. 111-187, at 6 (2009) (stipulating that the funds be used “[f]or necessary expenses to establish, support, maintain, mobilize, and deploy a civilian response corps”).

73. See Robin Wright, *Civilian Response Corps Gains Ground*, WASH. POST, Feb. 15, 2008, at A19 (noting the increase in funding reflects the government’s goal “to avoid repeating the disastrous U.S. experience in [reconstruction and stabilization] during the early days” in Iraq).

74. See, e.g., Friends Comm. on Nat’l Leg. [FCNL], War Bill Includes Money for Civilian Peacebuilders (July 10, 2008), http://www.fcnl.org/issues/item.php?item_id=3375&issue_id=130 (advocating for the Civilian Response Corps as a way for the U.S. to prevent and resolve violent conflict around the world by increasing the capability of the US to re-build during the peace process).

75. See Eythan Sontag, *Summertime SNOE: Fieldcraft Training for the Civilian Response Corps*, DIPNOTE: U.S. DEP’T OF STATE OFFICIAL BLOG, Aug. 31, 2009, http://blogs.state.gov/index.php/entries/fieldcraft_training_civilian_response_corps/ (describing the State Department’s training program as “atypical” but intended to train civilians to effectively and safely work in the “unconventional and austere environments” where CRC employees are deployed).

76. Will King, *Ambassador Discusses Role of Civilian Response Corps*, FORT LEAVENWORTH LAMP, Sept. 10, 2009, <http://www.ftleavenworthlamp.com/articles>

international terrorism, narco-terrorists, piracy, and the proliferation of weapons of mass destruction to demonstrate the need for an entity like the CRC, the Ambassador further noted that, “[t]oday, an ungoverned space thousands of miles away can represent a national security challenge to the United States.”⁷⁷ As the CRC’s website states, “[i]f U.S. national security interests are at stake, we must be prepared to respond quickly with the right civilian experts.”⁷⁸ The CRC is, therefore, properly viewed as a U.S. national security instrument.

III. THE STATUS OF THE CIVILIAN RESPONSE CORPS

Under a normal interpretation of the law of armed conflict, the CRC’s members are immune from attack and cannot be made lawful targets. As such, any attack on a member of the CRC would constitute an international crime punishable under any of the international justice mechanisms designed to regulate such conduct. As previously discussed, however, a civilian who engages in certain behavior loses immunity from attack, thus rendering the targeting of the civilian legitimate and defensible. Given the noted lack of determinacy in the definition of “direct participation in hostilities,” the status of members of the CRC will depend on the actions undertaken by this nascent entity, and on the analytical framework used to evaluate those actions.

A. STATUS OF THE CRC UNDER THE RESTRICTIVE VIEW

Under the more restrictive view of “direct participation,” the activities of the CRC are evaluated to determine if they cause “actual harm” to personnel and equipment and if “there is a ‘direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity occurs.’”⁷⁹ The

/2009/09/10/news/news3.txt.

77. *Id.*

78. U.S. Dep’t of State, Introduction to the Civilian Response Corps, <http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4QRB> (last visited May 31, 2010).

79. *See Moore, supra* note 31, at 20 (quoting Parks Memo, *supra* note 43). Moore asserts that this approach does the most to protect civilians accompanying armed forces from being lawfully and intentionally targeted by the enemy.

range of activities that the CRC will undertake is strikingly broad. The Corps currently lists five “core organizational functions:”⁸⁰ conflict prevention, planning, civilian response operations, strategic communication, and resource management.⁸¹ Each of these categories is broad enough to encompass a vast swath of activities, all of which are geared toward building and maintaining governments in areas of crisis.

Given the conflation of stability operations with military objectives, one could potentially argue that there is no distinction between providing reconstruction or state-building assistance and pursuing a military objective. But key to this analysis is the requirement of “actual harm.” Under a more restrictive analysis, nothing that the CRC does would constitute direct participation in hostilities because nothing that the CRC does results in actual harm. All of its activities are designed to be reconstructive, as opposed to destructive. Rather than cause harm to personnel or materiel, the CRC’s focus is on the broad set of activities required to rebuild and help manage states.⁸² The CRC’s mission does not envision the commission of acts of force or violence against the enemy, nor would any of its activities directly link to some destructive consequence.⁸³ Accordingly, pursuant to that restrictive view, civilian members of the CRC are not lawful targets under the law of armed conflict.

B. STATUS OF THE CRC UNDER THE EXPANSIVE VIEW

The analysis becomes more problematic when viewing the activities of the CRC under the more expansive view, to which the U.S. adheres. Using the “geographic, functional, and temporal ‘direct part’ determination” articulated by the U.S. DoD Law of War Working Group, the CRC members would likely retain their

80. U.S. Dep’t of State, Core Organizational Functions, <http://www.state.gov/s/crs/c15213.htm> (last visited May 31, 2010).

81. *Id.*

82. See Wright, *supra* note 73 (describing the Corps’ role as taking charge of “entities including local police, courts, the banking system and airports after states collapse or governments are defeated”).

83. CRC, Mission Statement, <http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4QXJ> (last visited May 31, 2010) (stating that the CRC’s mission is aimed at “post-conflict situations,” transition, stabilization, and reconstruction).

protected status as civilians. While there may be geographic proximity of service, it would be difficult to characterize the CRC's work as "provided to units in contact with the enemy."⁸⁴ Further, there would be little in the way of "proximity of relationship" between services provided and harm resulting to the enemy, given that most of the "services provided" would be reconstructive efforts not geared toward causing any destructive effect. Finally, because any link between the reconstructive work and a disadvantage to the enemy would be speculative at best, there would be no real temporal relationship between the support given by the CRC and the resultant harm to the enemy.⁸⁵ Such a test would, therefore, yield the same result as the more restrictive ICRC approach.

However, if we approach the CRC's activities using a "functionality test," which assesses the validity of the civilian target "based upon the importance and level of functions carried out by civilians on the battlefield,"⁸⁶ then the status of civilian members of the CRC is far less clear given the previously discussed link of the CRC to the war effort. In addition, the importance of civilian personnel in counterinsurgency has been repeatedly and publicly described as essential to defeating insurgents such as the Taliban.⁸⁷ For instance, General Stanley A. McChrystal, Commander of U.S. and NATO forces in Afghanistan, was unequivocal in a recent statement:

[The International Security Assistance Force] cannot succeed without a corresponding cadre of civilian experts to support the change in strategy and capitalize on the expansion and acceleration of counterinsurgency efforts. Effective civilian capabilities and resourcing mechanisms are critical to

84. See Janin, *supra* note 36, at 89 (citing the DoD Law of War Working Group's "direct part" test and its requirement that a civilian have geographic proximity to such units).

85. See *id.* (referencing the DoD Law of War Working Group's requirement that there be a temporal relationship between the civilian's services and actual harm to the enemy before that civilian's immunity from attack is compromised).

86. Moore, *supra* note 31, at 21.

87. See, e.g., ISAF, *supra* note 9, at 2-21 (describing how effective civilian reconstruction efforts are necessary to support and capitalize on the counterinsurgency achievements); Weitz, *supra* note 53 (describing the new Obama administration's strategy for winning the war in Afghanistan, which includes an increase in civilian personnel to "improve governance and rule of law throughout the country").

achieving demonstrable progress. The relative level of civilian resources must be balanced with security forces, lest gains in security outpace civilian capacity for governance and economic improvements. In particular, ensuring alignment of resources for immediate and rapid expansion into newly secured areas will require integrated civil-military planning teams that establish mechanisms for rapid response.⁸⁸

The effort to defeat the enemy, therefore, necessarily relies, in General McChrystal's assessment, on the presence of civilians who work alongside the military toward a common goal. It is important to underscore that the objective of the mission, to which General McChrystal refers, is to "disrupt," "dismantle," and ultimately "defeat" the enemies of U.S. and NATO forces in Afghanistan.⁸⁹ In this effort, civilian and military goals are conjoined. The role of civilian reconstruction is thus inseparably linked to the enemy's insuccess.

According to an expansive "functionality" test, how does one classify a group of civilians who are funded through a war appropriations bill, receive training at a military base, expressly see U.S. national security as the impetus for their missions, and work alongside the military in conflict zones toward a common goal of vanquishing the enemy? Further, how does one classify such a group when its field of operation is considered a "core military mission" and top military commanders deem that group's participation essential to secure the enemy's submission?

It seems that the functionality test allows targeting of the CRC under such circumstances. If, as with Afghan drug traffickers, mere facilitation and "direct participation" are considered coterminous, then civilians working to further a U.S. military objective cannot retain their protected status. The alignment of their purpose with the military goal, the critical role they play in the success of the military mission, and their "comingled" status (through funding, training, etc.) make them as much a target as any other facilitator or mission-essential civilian in an armed conflict. As a result, if adherence to the functionality test is legitimate, targeting members of the CRC would likewise be legitimate. Accordingly, none of the desirable results of

88. ISAF, *supra* note 9, at 2-21.

89. *Id.* at 1-1.

prohibiting attacks on civilians would inure to the CRC's benefit. For instance, those who target civilian members of the CRC would have a strong defense if tried before entities like the U.S. Military Commissions—at least if prosecuted for the crime of “intentionally engag[ing] in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities.”⁹⁰

IV. MOVING THE CRC FROM BENEATH THE SHADOW OF BELLIGERENCE

As the discussion above demonstrates, the combined “grey zones” of stability operations and what constitutes “direct participation in hostilities” leave civilians in something of a quandary. The field of stability operations in which civilians work is now a core military mission—meaning success in their objective is coextensive with military success. Likewise, due to the lack of a formal, unified view of what constitutes “direct participation in hostilities,” myriad actors in the U.S. government have posited competing positions, some of which are strikingly broad and would serve to deprive civilians working in stability operations (including in the CRC) of their protected status under international law. So what can be done to resolve this conundrum and to move the CRC out of the shadow of belligerence and back into a clearly protected status?

A. INSTITUTIONAL SOLUTIONS: THE IMPOSSIBILITY OF DISENTANGLEMENT

It is tempting to seek to resolve this quandary at the institutional level and attempt to “dissipate the grey” by somehow disentangling stability operations, the role of the military, and the work of the CRC. For instance, funding for the CRC could instead come from a civilian source unassociated with armed conflict, rather than from the war supplementals, which now fund its operations. Likewise, its mission statement and the rhetoric of its directors could place less emphasis on national security and adopt a more humanitarian tone. But there does not seem to be much room beyond such superficial measures for meaningful disentanglement because the complex field of stability operations in areas of persistent conflict requires the intensive use of both military and civilian resources.

90. Military Commissions Act of 2006, 10 U.S.C.A. § 950t (2) (West 2009).

In that regard, the topic of the relative role of civilians and military personnel in stability operations has been a salient one in recent years. Specifically, the assumption of critical roles in U.S. foreign affairs by the military has been the subject of angst in some quarters and, within the parlance of this popular conversation,⁹¹ has been referred to as the “‘militarization’ of diplomacy.”⁹² Commentators have attributed this phenomenon to the lack of administrative capacity on the part of civilian agencies. A report by the American Academy of Diplomacy notes:

[O]ur foreign affairs capacity is hobbled by a human capital crisis. We do not have enough people to meet our current responsibilities. Looking forward, requirements are expanding. Increased diplomatic needs in Iraq, Afghanistan and “the next” crisis area, as well as global challenges in finance, the environment, terrorism and other areas have not been supported by increased staffing. Those positions that do exist have vacancy rates approaching 15% at our Embassies and Consulates abroad and at the State Department in Washington, DC. USAID’s situation is even more dire. Today, significant portions of the nation’s foreign affairs business simply are not accomplished.⁹³

Some of this current discussion has been critical of the increasing role of the military, arguing that the military lacks the expertise necessary for stability operations.⁹⁴ But recent experience has demonstrated that the contractors frequently employed by civilian agencies, such as those employed by the Department of State to make up for its lack of organic capacity, lack the expertise or

91. See, e.g., Matt Armstrong, *Pushing Humpty Dumpty: The Rebuilding of State*, MOUNTAINRUNNER.US, http://mountainrunner.us/2009/08/humpty_dumpty.html (Aug. 21, 2009, 12:03 EST) (questioning whether the militarization of U.S. diplomacy efforts is a positive development); Posting of Tony Carson to Carsons Post, <http://carsonspost.wordpress.com/2007/11/07/us-militarization-of-diplomacy/> (Nov. 7, 2007) (examining the economic cost to the U.S. of the “militarization of diplomacy”).

92. AM. ACAD. OF DIPLOMACY, A FOREIGN AFFAIRS BUDGET FOR THE FUTURE: FIXING THE CRISIS IN DIPLOMATIC READINESS 1 (2008), available at http://www.academyofdiplomacy.org/publications/FAB_report_2008.pdf.

93. *Id.*

94. See *id.* (asserting that the military lacks “sufficient experience [and] knowledge” to complete tasks that should be the responsibility of as-yet-understaffed civilian agencies like the State Department).

training necessary for success in such endeavors. As one recent newspaper report noted, “[n]early two-thirds of the 276 Foreign Service members who volunteered to serve in Iraq next year were found unqualified for the jobs, aggravating a shortage that has left the State Department scrambling to fully staff its embassy and other operations in the country.”⁹⁵ Likewise, in the face of potential deployments into Iraq and Afghanistan, the Department of State endured a minor revolt among many of its members who refused to go to such conflict zones, creating serious staffing problems.⁹⁶ Moreover, after years of conflict in Iraq and Afghanistan, civilian agencies still lack the administrative and logistical capacity to deploy into those areas.⁹⁷ In September 2009, John Nagl, president of the Center for a New American Security, a Washington, D.C.-based defense think tank, opined:

I think that quite simply there is not sufficient civilian capacity in the U.S. government to do what needs to be done. And we have not built that capacity. The civilian side still needs to develop some of the doctrine, some of the organization, some of the force structure that’s required to meet the demands.⁹⁸

One potential reason U.S. civilian agencies lack the relevant expertise and are not prepared—culturally or administratively—for such operations may lie in the fundamental nature of stability operations in areas of persistent conflict. Given the discussion above, it is worth considering whether the issue is not actually the militarization of diplomacy but, to the contrary, the civilianization of stability operations. Otherwise stated, it could be argued that the tasks associated with stability operations—a core mission of the U.S. military—are properly seen as so intrinsically military in nature, especially in the context of persistent conflict, that their function

95. Nicholas Kralev, *Bidders Unready for Jobs in Iraq; Move Volunteers Seen Unqualified*, WASH. TIMES, Dec. 14, 2006, at A1.

96. *E.g.*, HARRY W. KOPP & CHARLES A. GILLESPIE, CAREER DIPLOMACY: LIFE AND WORK IN THE U.S. FOREIGN SERVICE 83-84 (2008) (describing the State Department’s serious difficulty in filling staff positions for Arabic speakers and for personnel prepared to serve in the Iraq and Afghanistan conflict areas).

97. *See* Northam, *supra* note 8 (noting further that the State Department faces the challenge of finding personnel who are both qualified and “willing to stay in Afghanistan for a yearlong deployment”).

98. *Id.*

should necessarily be carried out by military personnel. According to such a view, the remittance of such tasks to the military was neither an unnatural event nor a shameful act of abandonment by the U.S. State Department, but the natural assumption by the military of tasks proper to its functional competence.

In evaluating the issue through this prism, phenomena such as the inability of civilian agencies to staff positions in conflict zones, the lack of expertise on the part of the contractors hired to fill those positions, and the conclusion that conducting stability operations equates to “direct participation in hostilities” could be viewed as the predictable corollaries of a certain consistent logic. This logic revolves around the premise that stability operations in conflict zones are more military than civilian in nature.

Such a view, however, is challenged by the urgency with which military commanders have pressed for greater civilian involvement.⁹⁹ Civilians now occupy an obviously important role in counterinsurgency and cannot be excluded from the equation without sacrificing a key resource that U.S. commanders desperately need. But if “there is not sufficient civilian capacity in the U.S. government to do what needs to be done,”¹⁰⁰ and the military “cannot succeed without a corresponding cadre of civilian experts,”¹⁰¹ then there is little that can—or should—be done at the institutional level to unbundle this mass of government capabilities. The civil-military symbiosis that characterizes stability operations is appropriate and compelled by the complex nature of state-building and the sundry capabilities that must be brought to bear in order to attain success in such endeavors. Disentanglement is simply not an option.

B . FORMALLY ABANDON THE FUNCTIONALITY TEST

If solutions to this quandary cannot be found at the institutional level, then another option that should be considered is the abandonment of the functionality test by the U.S. government and the formal adoption of a singular, alternate, and more restrictive interpretation of “direct participation in hostilities”—a position that

99. See ISAF, *supra* note 9, at 2-21 (arguing that success is not possible without civilian resources).

100. Northam, *supra* note 8.

101. ISAF, *supra* note 9, at 2-21.

applies throughout every part of government and crystallizes the U.S. position on the matter. This interpretation could be an approach to direct participation in hostilities that is more in line with the “Protocol I” approach.¹⁰² Alternatively, the U.S. government could formally and expressly adopt the DoD Law of War Working Group’s “geographic, functional, and temporal” test as the standard for all civilians across the board, supplanting the use of the functionality test and restoring a degree of ideological purity to the U.S. approach.

While this test would certainly restrict the spectrum of potential targets, there would also be some advantages. For instance, the articulation of such an approach would serve to increase U.S. military interoperability with other nations that have ratified Protocol I or that have adopted similarly restrictive views. In addition, such a move would serve to reinforce the protections the United States wishes to preserve for its growing body of contractors and other civilians who accompany the U.S. military into conflict zones. Importantly, this test would also limit the ideological dissonance (and lack of clarity) in U.S. policy on this matter and enable a less Janus-faced approach. As one commentator has suggested:

Just as it is in the United States’ interest to argue for a narrow interpretation of [direct participation in hostilities] in order to protect its civilians and contractors from attack, it is also in the United States’ interest to also argue for a broad interpretation of [direct participation in hostilities] in order to more easily justify the targeting and attacking of terrorists. It appears as if the United States is trying to have its cake and eat it, too.¹⁰³

Abandoning the functionality approach and formally articulating either a “Protocol I” approach or a “geographic, functional, and temporal” test would simultaneously bring an end to the current schizophrenic policy position, foster greater protection for U.S. civilians working in conflict zones, allow military commanders clear guidance on targeting civilians, and deprive terrorists and insurgents of defenses to their conduct when they target U.S. civilians. It would also put an end to the creeping prominence of the functionality approach, an approach which is too broad to serve as a legitimate

102. See *supra* notes 13-15 and accompanying text.

103. See Christensen, *supra* note 18, at 18.

standard to safeguard civilians and far too malleable to legitimately uphold the principle of distinction under the law of international armed conflict.¹⁰⁴

CONCLUSION

Contemporary armed conflict is characterized as a seemingly dissonant combination of simultaneous reconstruction and destruction in order to eliminate those “who pose a threat to [a nation’s] foreign policy, security, or economic interests.”¹⁰⁵ This paradigm necessarily entails a symbiotic relationship between civilians and the military—a relationship in which both entities lend various resources and expertise to a common mission in order to attain a common goal. In this grey area, which is neither fully civilian nor military in nature, actors operate under a legal framework in which their legal status is somewhat indeterminate. This is especially true for the CRC, a corps of government civilians whose mission is intimately linked with that of the U.S. military and national security concerns.

Another grey area exists in the varied U.S. approaches to interpreting “direct participation in hostilities.” While a more restrictive interpretation would preserve the privileged status and protections to which civilians (like those in the CRC) are entitled under international law, the more expansive views recently posited—specifically the functionality approach—would serve to deprive them

104. See HENCKAERTS & DOSWALD-BECK, *supra* note 11, at 5 (noting the invocation of the “principle of distinction” in several International Court of Justice cases to protect the distinction between military combatants and non-military civilians). Numerous other scholars are actively writing on this issue and proposing new ways to view the targeting of civilians. See, e.g., Eric T. Jensen, *Direct Participation in Hostilities: A Concept Broad Enough for Today’s Targeting Decisions*, in *NEW BATTLEFIELDS/OLD LAWS: CRITICAL DEBATES FROM THE HAGUE CONVENTIONS TO ASYMMETRIC WARFARE* (William C. Banks ed., forthcoming 2010) (proposing that the important threshold question for “targeting principles” relates to the nature of the actors in the conflict, not the type of conflict itself); Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SECURITY J. (forthcoming 2010) (manuscript at 5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1507291 (reviewing the distinction between an “innocent civilian” and a “legitimate target,” and suggesting that the current method of warfare expands the definition of the latter).

105. NSPD 44, *supra* note 7.

of those protections. This combination of grey areas—the hybrid nature of stability operations and an unclear approach to targeting civilians—leaves entities like the CRC without definite protections and provides potential legal defenses to insurgents or terrorists who might otherwise be prosecuted for targeting civilians.

Abandoning the functionality approach would remedy the problems caused by this conceptual fog and strengthen the protections of U.S. civilians and the civilians of other nations working in zones of conflict. As Professor Dinstein has noted, “[p]recisely because of the desire to confer on civilians in wartime maximum protection, the international community must tenaciously oppose any and all attempts to devitalize the principle of distinction.”¹⁰⁶ As a vibrant member of that community, and because of the many interests at stake, the United States should posit a clearly defined interpretation of “direct participation in hostilities,” which is broad enough to enable effective engagement of insurgents yet restrictive enough to uphold this cardinal principle. Acting otherwise will only further hinder civilian involvement in stability operations by leaving them to operate in the conceptual mire of two grey zones—the thickest grey.

106. DINSTEIN, *supra* note 10, at 256.