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CANADIAN FORCES COLLEGE – COLLÈGE DES FORCES CANADIENNES  
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**Civilians Accompanying the Armed Forces:  
Issues and Considerations when Employing Civilians  
In Support of International Operations**

By/par

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## Abstract

Technology has substantially altered warfare in recent decades. The complexity of the weapons and systems that the military now employ means that increasingly armed conflict as practiced by many states is shifting activities previously performed by military personnel to civilian employees and contractors often required because of their unique expertise. Along with their military counterparts, deployed civilians now face the risk of injury, death or capture.

The laws of war have not caught up to the changing nature of modern warfare. Aimed at protecting civilians from being targets of attacks, the Law of Armed Conflict (LOAC) was developed for an older paradigm of warfare and no longer provides clear guidance in today's forms of conflict. In particular, with regards to the increasing use of civilians in the battlespace, no suitable standards exist for determining what civilians accompanying the armed forces may do and when they may be legitimate targets of attack. As a consequence, LOAC needs to be altered to ensure the principle of distinction while acknowledging that civilians are now an integral part of warfare.

Intentionally placing civilians in harms way in support of combat operations has both domestic and international implications to a state that need to be carefully considered. When developing policies and guidelines for the employment of civilians in support of international deployed operations, a states' responsibility to carefully consider the associated implications and risks of inappropriately employing civilians must be foremost in consideration.

In Canada, use of civilian employees and contractors is still at a nascent stage. However, in keeping with world-wide trends, it is anticipated that the use of civilians in deployed CF operations will grow with time, and civilian casualties and captures are to be expected. As a consequence, policies and doctrines for the employment of civilians in deployed operations must be developed, not from an ad-hoc operational perspective, but from a national strategic perspective. Development of such policy and doctrine within DND is very timely, and should be done in anticipation of the worse case scenario – the death, injury or capture of civilians while supporting the CF abroad.

This paper investigates the key issues within existing LOAC and related considerations when employing DND civilians in support of international military operations. It advocates for the general need to develop clear policies and procedures guiding the deployment and tasking of ALL civilians in support of Canadian government sponsored operations abroad and makes specific recommendations for policy development.

## **INTRODUCTION**

Technology has revolutionized warfare in recent decades. It has expanded the zone of conflict to include new frontiers such as cyberspace while also allowing many forms of highly sophisticated military operations to be conducted remotely. Traditional force-on-force warfare has also given way to asymmetric forms of engagements that further blur the combat spectrum.

Civilians accompanying armies has been around since the dawn of history. In the past, these civilians generally served in support positions of relative safety behind the front lines. Technology has changed that as well. Modern military weapons and systems are highly complex. This means that increasingly armed conflict as practiced by many states is shifting maintenance and support activities previously performed by military personnel to civilian employees and contractors often required because of their unique expertise - a trend called the “civilianization of the battlespace”. The weapons and systems these civilians maintain are high-value targets to opposing forces. The civilian tasks often place them in proximity of military personnel. With the advent of long-range strike capability and remote operations, all deployed personnel, whether military or civilian, face risk of injury and death.

The downsizing of military forces in much of the West over the past three decades has also contributed to the growth of civilians in support of national armed forces. Many Western nations are now employing civilians in considerable numbers. In the US,

civilians are now integral to DOD operations. Civilians perform critical duties across every functional area of combat support and combat service support, including in deployed operations<sup>1</sup>.

Canadian Forces use of civilians in support of international operations, while increasing, can still be considered nascent. DND civilian scientists have been deploying in small numbers for short technical field support visits for many years. Between 2000 and 2003, under the Contract Support Project (CSP), Canada employed civilian contractors on an overseas mission for the first time. The subsequent CANCAP program was, by 2006, employing 120 civilian contractors at Kandahar Air Field alone providing services such as information systems support, health services, logistics, and maintenance, transportation and accommodations management<sup>2</sup>. More recently, the Defence Research and Development Canada, a civilian scientific agency within DND has stepped up its interest in deploying civilian scientists in support of military operations overseas, and is developing operational policies and guidelines for these deployments.

The increase in civilians supporting CF international operations has gone largely unnoticed by the Canadian public. No strategic policy exists in Canada governing the use of civilian contractors, and little exists within DND governing the use of civilian employees. However, using civilians in support of deployed operations brings with it some highly significant problems that need to be carefully thought through at the national strategic level.

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<sup>1</sup> U.S. Air Force Pamphlet (AFPAM) 10-231, *Federal Civilian Deployment Guide*, 1 April 1999, 4.

<sup>2</sup> Perry, David, "Contractors in Kandahar, Eh? Canada's 'Real' Commitment to Afghanistan", *Journal of Military and Strategic Studies*, Summer 2007, vol. 9, issue 4, 15.

International laws governing warfare have not caught up to the changing nature of modern warfare. Aimed at protecting civilians from being targets of attacks, the Law of Armed Conflict (LOAC), also known as the Law of War, attempts to regulate state use of civilians by prohibiting the direct participation of civilians in combat. The LOAC was developed for an older paradigm of simple weapon systems operating at short ranges, with individuals intimately involved in the act of violence. The LOAC no longer provides clear guidance in modern warfare. In particular, with regards to the increasing use of civilians in the battlespace, no suitable standards exist for determining what civilians accompanying the armed forces may do and when they may be legitimate targets of attack.

While the practice of “civilianizing” the battlespace may offer substantial benefits to states in cost-effectiveness, relief to overburdened military trades and access to superior expertise and technology, it brings with it the moral and ethical responsibility to ensure that the use of civilians is in keeping with its obligations to its citizens, the values of its society, and the spirit and intent of the LOAC.

Intentionally placing civilians in harms way in support of combat operations has both domestic and international implications to a state that need to be carefully considered. States that employ civilians in roles that risk being considered combatant in nature run the risk of breaching their obligations under international law. These breaches can have significant ramifications – poor public opinion, international embarrassment, possible

sanctions and legal actions before tribunals like the International Court of Justice. Those responsible for placing civilians in unlawful combatant roles or making them the objects of lawful targeting may also face criminal liabilities. A states' responsibility to carefully consider the associated implications and risks of inappropriately employing civilians in support of military operations must be foremost in consideration. When determining policies and guidelines for deployment of civilians in support of military operations, these considerations must be deliberated not at the military operational level, but at the national strategic level.

This paper consists of two parts. The first part looks at civilian roles relative to the LOAC and the nature of modern warfare with the aim of determining key topics of a national, strategic and operational nature that must be deliberated when deciding upon appropriate policy and doctrine. The second part deals with Canada's experience to date in deploying DND civilian employees and makes recommendations for the development of a civilian deployment policy at the national strategic level.

While this paper restricts itself predominantly to the use of civilian employees of the Department of National Defence accompanying our Armed Forces on international operations, many of the considerations are also applicable to the use of civilians from other Departments, to contractors and foreign nationals in the employ of Canadian government operations abroad.

## **Part I      CIVILIANS ACCOMPANYING THE FORCES**



## **Definition and Status of Civilian Employees and Contractors under the Law of Armed Conflict**

The LOAC is derived from a compilation of both treaty and customary international law. Some of the most significant treaties which reflect the development and codification of LOAC are the Hague Conventions, the Geneva Convention and its associated Protocols and more recently, the Rome Statute of the International Criminal Court, 17 July, 1998 (Rome Statute). Canada is a party to all.

In order to understand fully the significance of the LOAC to the determination of appropriate civilian roles in support of combat operations, it is important to note that the Geneva Conventions are applicable only during international conflicts or during total or partial occupation of the territory of one state by another. However, most Western states take the position that they will comply with the LOAC during all armed conflicts and with the intent and spirit of the LOAC during operations of a military nature. This is particularly important because the actions of individuals acting on behalf of a state represent that state in the eyes of its citizens and the international community. To do otherwise risks a very slippery slope across many political and social dimensions. It is also particularly important because many operations, such as the one Canada is currently conducting in Afghanistan, are not state-on-state warfare. Asymmetric operations and Operations Other than War are becoming routine military operations.

LOAC classifies individuals involved in an international armed conflict into one of two primary statuses: civilian or combatant. The central distinction between the two is that combatants are authorized to participate directly in hostilities while civilians are not<sup>3</sup>. Different protections and responsibilities are associated with each of these primary statuses.

### *Definition and Status of Combatants*

The international definition of combatant was codified in the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague Convention).

The Hague convention says that a state's armed forces may consist of combatants and noncombatants. A combatant must be part of a state's armed forces, reservists, militia or volunteer corps.

Combatants are distinguished by the following characteristics:

- 1) They must be under the command of a superior responsible for them and be subject to internal discipline;
- 2) They must have a fixed and distinctive emblem recognizable at a distance;
- 3) They must carry arms openly; and

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<sup>3</sup> There is a third primary status for medical and religious personnel – but this is not considered in text. Can be found in [http://lawofwar.org/naval\\_warfare\\_publication\\_N-114M.htm](http://lawofwar.org/naval_warfare_publication_N-114M.htm) Naval Warfare Publication, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M; Internet.

- 4) They must conduct operations in accordance with the laws and customs of war.

The requirements of having a distinctive emblem and carrying arms openly exist to distinguish combatants from civilians – known commonly as “the principle of distinction”. The requirements of being subject to responsible command and to conduct operations in accordance with the laws of war ensure compliance with international law.

The Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) deals with the protection of Prisoners of War (POWs). As most POWs were combatants that had fallen into enemy hands, Geneva Convention III essentially adopted the Hague Convention definition of combatant. That means that the definition of combatant used today is essentially the same one adopted in 1907 although the nature of warfare has changed dramatically over the past 100 years.

In the 1970s many states felt the need to update the 1949 Geneva Conventions and met at a conference that resulted in the 1977 adoption of two protocols that supplement and update the Geneva Conventions. The *Protocol Additional to the Geneva Conventions of 12 August 1949, and Related to the Protection of Victims of International Armed Conflicts* (Protocol 1) is considered as a codification of existing international law. Protocol 1 has been ratified by over 160 states including Canada<sup>4</sup>.

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<sup>4</sup> The International Committee of the Red Cross maintains a list of countries that have ratified Protocol 1 and other treaties on humanitarian law. The list of treaties that Canada has ratified and/or signed is available at <http://www.icrc.org/ihl.nsf/Pays?ReadForm&C=CA>; Internet

Combatant status under Protocol 1 has been the subject of international debate. Under Protocol 1 members of national liberation movements can qualify for combatant status. Eligibility for combatant status is thus broadly extended to non-state parties. This accession was aimed at meeting the interests of many Third World countries that wanted the legitimacy of armed conflict against colonial powers recognized under international law. Critics have argued that this article offers protection to terrorist groups. Others disagree<sup>5</sup>, stating that Protocol 1 requires adherence to the LOAC for combatant status, and therefore terrorists cannot qualify as combatants.

Combatants may be lawfully targeted by opposing forces during an armed conflict. Combatants who have complied with the LOAC are entitled to POW status upon capture. As a POW, they may not be punished or subject to criminal prosecution for taking part in hostilities as long as they have adhered to the LOAC. By contrast, unlawful combatants, those that are not combatants but take a direct part in hostilities, receive no such protection and may be criminally prosecuted.

### *Civilians vs. Non-Combatants*

The terms “noncombatant” and “civilian” are often confused when discussing civilians affected by war. However, the two terms have very distinct meanings under the LOAC. Noncombatants are members of a state’s armed forces who have primary status as combatants but are prohibited for whatever reason by their state from taking part in

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<sup>5</sup> Heaton, J. Ricou, “Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces”, *Air Force Law Review*, vol. 57, 171.

hostilities. Noncombatants are treated as combatants under the LOAC<sup>6</sup>. They may be targeted as combatants and may take part in hostilities without becoming unlawful combatants. They are entitled to POW status upon capture.

Civilians are defined under Protocol 1 as those persons who are not part of a state's armed forces. This definition includes all civilians who accompany the armed forces<sup>7</sup>. Civilians identified as accompanying civilians must have been authorized to accompany the armed forces and received identification cards indicating this fact. Civilians accompanying the armed forces of a state, unlike other civilians, are entitled to POW status upon capture.

All civilians, whether accompanying the armed forces or not, are generally prohibited from direct participation in hostilities. If they do so they are considered unlawful combatants or belligerents and can be criminally prosecuted.

There are three situations in which civilians can be considered lawful combatants under the LOAC: the levee en masse<sup>8</sup>, police agencies incorporated into the armed forces and

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<sup>6</sup> Ipsen, Knut, "Combatants and Non-Combatants", in *The Handbook of Humanitarian Law in Armed Conflicts*, 84. Notes also that medical and religious personnel have their own special status. Ibid. at 69.

<sup>7</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, art. 4(A) (4).

<sup>8</sup> The levee en masse consists of a spontaneous uprising against an enemy before a territory is occupied. If the participants in such an uprising have obeyed the LOAC and have not had time to organize themselves into a militia, they are entitled to combatant status and POW status upon capture.

as commanders of partisan combat units<sup>9</sup>. In situations in which there is ambiguity over whether someone is a combatant or civilian, they are to be considered a civilian.<sup>10</sup>

A final clarification that needs to be drawn among civilians is between civilian employees of an armed force and contractors. Civilian employees are employees of the state, hired and supervised by the armed forces (by DND in the Canadian context) and having an employment relationship with them. Contractors work for private firms and have a contractual relationship with the armed forces. Despite these differences, the LOAC does not draw a distinction between civilian employees and contractors.

### **Central Issues in the LOAC Pertaining to the Use of Civilians in Warfare**

#### **Dangers of Physical Proximity**

LOAC requires that attacks be focused only on military objectives. The definition of military objective is “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.<sup>11</sup>

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<sup>9</sup> Heaton, J. Ricou, “Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces”, *Air Force Law Review*, vol. 57, 172.

<sup>10</sup> Protocol 1, Art. 50(1). “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

<sup>11</sup> Protocol 1, Art. 52(2)

Specifically targeting civilians is prohibited under LOAC. Parties to a conflict are obliged to remove civilians from military objectives to the extent possible<sup>12</sup>. Unfortunately for accompanying civilians, their physical proximity to battle entails risks of attack, injury and potential capture. The above definition indicates that if civilians happen to be in the proximity of legitimate military targets, they may become “collateral damage”. Their civilian status offers them no immunity.

### **Civilians and “Direct Participation in Hostilities”**

Article 43(2) of Protocol 1 allows combatants to engage in combat activities by participating directly in hostilities. Civilians can only lawfully engage in non combat activities. They are not authorized to take “direct part” in hostilities. If they do so they forfeit their protection as civilians, and become “unlawful combatants”<sup>13</sup>. Therefore, to evaluate what are the permissible duties that a civilian is allowed to perform in support of an armed force, the distinction between combat and non-combat activities must first be determined.

Unfortunately, the distinction between combat and non combat activities is not settled in international law. Heaton<sup>14</sup> argues that as a consequence, the prohibition on the use of civilians in hostilities is being undercut by the failure of the LOAC to provide a clear and

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<sup>12</sup> Protocol I, art. 58

<sup>13</sup> Dormann, Knut, “The Legal Situation of Unlawful/Unprivileged Combatants”, *IRRC*, March 2003, vol. 85, no. 849, 73 - notes that Article 75 of Protocol 1 constitutes the minimum protections that apply to ALL persons, including unlawful combatants, in the hands of a Party to an international armed conflict, irrespective of whether they are covered by Geneva Convention IV or not.

<sup>14</sup> Heaton, J. Ricou, “Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces”, *Air Force Law Review*, vol. 57, 193.

unambiguous definition of what constitutes direct participation in combat. States are taking advantage of this ambiguity to increase civilian participation in military activities.

Little historical guidance exists to help distinguish combatant from noncombatant activities, partly because the major revolution in military affairs brought about by technology has been experienced in the past half century. During the Second World War, Canada and some of its Allies, such as the U.S. and U.K. put civilian scientists in uniforms, issued them identity cards indicating they were to be treated as POWs upon capture, and sent them to support the troops in the front lines to perform operational research functions. Guillory notes that one U.K. scientist was even training to parachute behind Japanese lines when the war ended. He states that it was fortunate that none of scientists were captured, as they may have been serving in combatant roles while on the missions<sup>15</sup>.

Traditional civilian activities in support of the war effort are not considered direct participation in hostilities. Guillory interprets this to mean that activities such as arms production, military engineering and military transport are not in themselves hostile acts, although they are ultimately harmful to the enemy.<sup>16</sup> The International Committee of the Red Cross (ICRC) also takes the position that direct participation excludes acts such as

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<sup>15</sup> Guillory, Major Michael E., "Civilianizing the force: is the United States crossing the Rubicon? – role of civilians under the laws of armed conflict", *Air Force Law Review*, Spring, 2001, 3.

<sup>16</sup> *Ibid.*, at 2.



“gathering and transmission of military information, transportation of arms and munitions, provision of supplies, etc.”<sup>17</sup>

However, herein starts the controversy. For example, the US Navy and Air Force disagree with the ICRC and have asserted that being an intelligence agent may constitute direct participation in hostilities.<sup>18</sup> Some legal experts contend that combat activities include intelligence gathering, providing logistical support or maintaining weapons systems.<sup>19</sup> Guillory states that at least one noted legal expert asserts that a strong argument could be made that even a civilian driving an ammunition truck in a combat zone could be included in this category.<sup>20</sup> Civilians performing such functions could be viewed as providing direct support and be legitimately targeted.<sup>21</sup> Turner states that this is the position of the USAF. It asserts that civilians performing duties directly supporting military operations may be subject to attack, as well as civilians providing support in close proximity to legitimate military targets. The US Navy, on the other hand, takes the view that such civilians, while assuming the possible risks of collateral damage, are not to be made subject of direct attack<sup>22</sup>. These differing views within the US alone serve to

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<sup>17</sup> International committee of the Red Cross (ICRC) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (Additional Protocols Commentary), 901.

<sup>18</sup> Guillory, Major Michael E., “Civilianizing the force: is the United States crossing the Rubicon? – role of civilians under the laws of armed conflict”, *Air Force Law Review*, Spring, 2001, 3

<sup>19</sup> Turner, Lisa L., Major, “Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations”, Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001, 15-16

<sup>20</sup> Guillory, Major Michael E., “Civilianizing the force: is the United States crossing the Rubicon? – role of civilians under the laws of armed conflict”, *Air Force Law Review*, Spring, 2001, 3.

<sup>21</sup> States that have ratified Protocol 1 may not directly target supporting civilians. The US has signed but not ratified Protocol 1.

<sup>22</sup> Turner, Lisa L., Major, “Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations”, Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001,

emphasize the fact that there is no consensus on what constitutes direct participation in hostilities.

The problem of interpretation starts with the wording in Protocol 1 itself. Protocol 1 and its Commentary<sup>23</sup> limits combat activities to those in which 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 takes place.”<sup>24</sup> The problem is that in the practice of modern warfare, the term “direct causal relationship” is open to interpretation. The Additional Protocols Commentary appears to say that direct participation is limited to actions that directly cause damage to the enemy either in personnel or equipment, but this view is problematic, in part because the realities of modern warfare have blurred the distinction between what is “direct” and what is “indirect”. The reality is that today’s combatants are only capable of engaging in precise, effective combat because of the indirect support they receive. Effective damage can now be done remotely across great distances with precision guided weapons. A civilian, thousands of miles away and yet directly and intimately involved in the conduct of a remote operation that causes enormous damage to enemy forces is a concept that the original conventions, some of them over a hundred years old, simply did not foresee. Modern warfare has made the distinction between combat and non combat operations often artificial.

Although “direct support to hostilities” has not been clearly defined in the LOAC, a review of different legal opinions on the matter indicates that generally speaking, its

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<sup>23</sup> International committee of the Red Cross (ICRC) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Additional Protocols Commentary)

<sup>24</sup> Ibid, at 516.

definition is not restricted narrowly to civilians engaged in actual fighting. Heaton<sup>25</sup> derives two broad principles from the various views in the literature on what constitutes direct participation in hostilities. The first is that the closer an activity is physically to the fighting, the greater the likelihood that it will be considered a combat activity. In this case roles physically present on the battlefield when fighting is occurring, would be considered combat roles, even if providing support functions<sup>26</sup>.

The second principle is that activities closely associated with the direct infliction of violence are more likely to be considered combat. This second principle is perhaps more useful because it makes physical distance from the battlefield irrelevant and hence more closely aligns with the capabilities of modern warfare, and in particular with remote operations. Heaton notes that in this view, the individual who presses the button to launch long-range munitions is as much a combatant as the soldier firing bullets on a battlefield. This second principle lends credence to the view that functions like intelligence gathering for precision strike may be considered combat activities, as they are directly associated with, and indispensable to the infliction of violence. Following from this, a civilian's distance from the battlefield may not prevent him from being considered an unlawful combatant. As is the case on the battlefield, the legality of civilian involvement in remotely conducted combat operations depends on whether it constitutes direct participation in hostilities.<sup>27</sup>

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<sup>25</sup> Heaton, J. Ricou, "Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 178.

<sup>26</sup> This rule still does not answer the question of how close to the battlefield is close enough to be considered combat.

<sup>27</sup> Protocol 1, art.51(3)

Because the LOAC only prohibits civilians from direct participation in combat, the range of activities that civilians can legitimately participate in is restricted only by how narrowly combat is defined - the narrower the definition of combat, the more roles that civilians can legitimately perform. States that have a strong interest in the flexibility afforded to them, for budgetary purposes or otherwise, in determining the military/civilian mix can do so by ensuring that the narrowest possible interpretation of combat is applied<sup>28</sup>.

As stated earlier, as a consequence of the unsettled nature of what constitutes legitimate non combat operations for civilians, states have been quick to exploit this ambiguity in determining how civilian employees and contractors are used in military operations. In the case of the United States, the Department of Defence employs almost 700,000 civilian employees that work in key areas such as logistics, weapons system maintenance and intelligence, activities that on the battlefield are particularly problematic in the international community when assessed as to the combat nature of such roles. These civilians run the risk of becoming lawful targets, the risk of possible criminal liability for their actions, and loss of POW status upon capture. Unlike their military counterparts, even those civilians who do not face a serious risk of being targeted or captured may face the risk of criminal liability for their actions long after the conflict has ended.

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<sup>28</sup> Heaton, J. Ricou, "Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 2005, 198.

Heaton brings out another worrisome aspect of this trend.<sup>29</sup> When civilians engage in combat activity, the general civilian population in the conflict zone is also placed at increased risk as the foundational principle of distinction between combatants and civilians as legitimate targets is eroded. This situation may have already developed in Iraq. One Coalition Provisional Authority official is quoted as saying that in Iraq's reconstruction, "the military role and the civilian-contractor role are exactly the same."<sup>30</sup>

In summary, a narrow interpretation of what constitutes combat allows for civilian participation in almost all aspects of military operations as long as a military member takes the action that directly causes kinetic harm to the enemy.

#### **Effect on Military Necessity, Proportionality and Distinction**

The above discussion on what constitutes "direct participation in hostilities" serves to underline one aspect of the existing LOAC that is proving inadequate for the realities and capabilities of modern warfare. There are other significant problems created for the warfighter as well.

Participants in international armed conflicts are not allowed to use force indiscriminately. The LOAC principles of military necessity, distinction and proportionality are used to protect civilians and limit the scope of violence permissible in achieving military objectives.

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<sup>29</sup> Heaton, J. Ricou, "Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 2005, 195.

<sup>30</sup> *Ibid.*, at 198.

Military necessity is the legitimate application of force to obtain a legitimate ‘military objective’. Protocol 1 requires states to avoid targeting civilians when achieving these objectives.<sup>31</sup> The objectives themselves are meant to encompass combatants<sup>32</sup>, not civilians.

Under the principle of proportionality, opposing forces are permitted to carry out attacks against military objectives, even when it is evident that deaths or injury of civilians in proximity to military targets will likely occur. This means that under the LOAC (including the Rome Statute), civilian deaths as a consequence of attaining military objectives are not necessarily war crimes. A crime only occurs if there is an intentional attack directed against civilians<sup>33</sup> or an attack is launched on a military objective knowing that the expected incidental civilian injuries would be excessive in relation to the concrete and direct military advantage anticipated<sup>34</sup>. Along with this, Protocol 1 states that in the context of civilian protection, unlawful indiscriminate attacks include any ‘...which may be expected to cause incidental loss of civilian life ...which would be excessive in relation to the concrete and direct military advantage anticipated’<sup>35</sup>. In other words, military commanders are obligated to consider the results of the attack compared to the advantage anticipated.

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<sup>31</sup> Protocol 1, Articles 48, 51(2), 52(1)

<sup>32</sup> Additional Protocols Commentary, 635

<sup>33</sup> Rome Statute, Article 8(2)(b)(i)

<sup>34</sup> Ibid, at Article 8(2)(b)(iv)

<sup>35</sup> Protocol 1, Article 51(5)(b)

Unfortunately for civilians, this is a highly subjective assessment, and the realities of modern warfare are making necessity, distinction and proportionality increasingly difficult to assess and apply. Civilian and military objects are increasingly dual-purpose in nature. The tasks of civilian personnel are integral and necessary to achieving the overall military effect and yet the LOAC prevents the intentional targeting of accompanying civilians while adding no clarity on how to deal with the essential support they provide to the warfighter. Particularly problematic in this regard, is the modern ability to conduct remote operations. To complicate things further, the general civilian population is often, and sometimes purposefully, intermingled with legitimate military targets.

For the warfighter, tension is created between the targeting standards required to avoid making direct attacks on civilians and the standard of acceptable civilian collateral damage in achieving military aims. Heaton argues that faced with this tension, accompanying civilians will almost always be looked at from the latter standard. This means that civilians working in maintenance or support functions, while they cannot be directly targeted because of their civilian status, can legitimately be indirectly targeted (collateral damage) because of the subjective assessment on the part of the enemy that the depot or headquarters that they work in is a legitimate military target.<sup>36</sup>

### **Uniforms, Badges and Weapons**

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<sup>36</sup> Heaton, J. Ricou, "Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 2005, 197

In order to help protect civilians from hostilities, combatants have to wear fixed and distinctive emblems recognizable at a distance. In US operations in theater today, civilians often wear uniforms in situations where a commander has determined that actual or threatened hostilities necessitates the wearing of uniforms. Uniform wear by DOD civilian employees is governed by service regulations. Insignia differentiating the civilian from military is required. However, Turner states that civilian employees often go without them.<sup>37</sup> By contrast, the US is not required to provide contractors with uniforms unless specified in the contract terms and conditions.

There are two key problems with civilians in uniforms. First, they can become unintentionally targeted, so that while the stated purpose of issuing civilians with uniforms is to protect them by identifying them as members of the civilian component of US Forces, this can work against them for exactly the same reasons especially if their uniforms are only slightly different from those of the armed forces they support. Secondly, wearing of uniforms risks being found an unlawful combatant, as it could be interpreted as indicating that civilians wearing uniforms must be filling military-essential roles. Turner argues that commanders should advise civilians on the dangers of wearing uniforms and ensure they do not wear any insignia, badges or tapes identifying them as members of an armed force<sup>38</sup>.

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<sup>37</sup> Turner, Lisa L., Major, "Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations", Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001, 25

<sup>38</sup> Turner, Lisa L., Major, "Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations", Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001, 26.



Noncombatants are permitted to defend themselves, although even then they may risk loss of POW status upon capture. The Geneva Conventions touch upon the use of weapons in self-defence for medical personnel and those in their care.<sup>39</sup> This is further elaborated upon in the Commanders' Handbook on the Law of Naval Operations: "Possession of small arms for self-protection, for the protection of the wounded and sick and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status."<sup>40</sup> The U.S. military has authorized the issuance of weapons to select civilian employees and contractors, to be used only in self-defence, because of the fear that they may be regarded as combatants by enemy forces.<sup>41</sup>

Turner claims that the US does not believe it is in violation of international law when it allows a civilian employee with an armed force to carry a weapon for self defence.<sup>42</sup> However, this further erodes the principle of distinction.

Providing arms to civilians, in particular uniformed ones, simply exacerbates the very problem it was intended to fix. Who determines what constitutes self-defence and under what circumstances? An enemy may pull the trigger because a civilian is working in proximity to soldiers, is wearing a uniform and is carrying arms openly – to the enemy, the civilian appears to be a combatant. No matter what level of danger a civilian faces

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<sup>39</sup> Geneva Convention I, art. 22(1).

<sup>40</sup> Naval Warfare Publication, *The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, Section 11.7

<sup>41</sup> Heaton, J. Ricou, "Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 2005, 193.

<sup>42</sup> Turner, Lisa L., Major, "Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations", Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001, 26.

because of their location, participation in combatant activities is forbidden by international law. Civilians are also subject to host nation laws, including on carrying arms, even when military members are not so subject. If the civilian fires back, albeit in self-defence, but is captured, that civilian could easily find themselves prosecuted whereas a military member would not. The commander may have the authority and responsibility to allow a civilian to arm themselves, but the civilian lives with the attendant risks of death, injury or capture. Turner argues that there is a grave danger in arming civilians and further argues that authorization for a civilian to carry weapons should be strongly resisted except in the most extreme circumstances<sup>43</sup>.

#### **Issues with command and Control over Civilians**

The reliance on a growing pool of civilians who are increasingly placed in harm's way and for whom they are responsible is worrisome to commanders. Civilians can pose significant problems that need to be well understood. Commanders must realize that with no consensus in the international community on what constitutes direct participation in hostilities, these civilians could be targeted or possibly captured. If captured, there is a real risk that these civilians could find themselves on trial for hostile acts.

U.S. Joint doctrine dictates that civilians "cannot lawfully perform military functions and should not be working in scenarios that involve military combat operation where they

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<sup>43</sup> Ibid., at 28

might be conceived as combatants”.<sup>44</sup> Commanders are to consider several criteria in an effort to ensure that civilians who accompany the force do not lose their right to be accorded POW status and are not subject to trial for hostile acts. Maxwell notes that the goal of these criteria, such as not wearing military uniforms, is to ensure compliance with the obligation of distinction, addressing a civilians’ appearance, not actions. It does not address the functions that civilians might legitimately perform without being considered unlawful combatants. He states that effective, realistic guidance in this area is woefully lacking.<sup>45</sup>

Also, commanders must recognize and plan for possible failure to perform and assess potential tasks against possible risk of failure. Placing civilians in mission-essential positions must be done with a full knowledge of the inherent risks.

### **Required Changes to the LOAC and the Status of Accompanying Civilians**

The previous sections looked at the civilianization of warfare and the inherent problems that states, and in particular the U.S., are starting to experience when attempting to interpret the LOAC as it pertains to use of civilians accompanying armed forces. The realities of modern warfare are such that states will continue to use civilians in support of military operations. This is not a trend that is likely to go away. Hence, solutions to the ambiguities of the LOAC in their use when interpreting use of accompanying civilians in support of military operations cannot be based upon restricting states from employing

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<sup>44</sup> Maxwell, Mark D., “The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?”, *Military Review* 17, Volume 84, Issue 5, @ Bell and Howell Information and Learning Company, 2004, 3.

<sup>45</sup> *Ibid.*, at 4.

them. Such restrictions are unrealistic and would likely be met with strong resistance. A better approach must be found that takes into account the spectrum of activities that civilians are currently involved in and better regulates their use by military organizations.

Guillory offers up the view that civilians may support and participate in military activities as long as they are not integrated into combat operations.<sup>46</sup> Along these lines Heaton advocates changes whose addition to the LOAC would largely mitigate many of the problems in the employment of civilians discussed to date<sup>47</sup>:

- 1) Clarifying which activities constitute direct participation in hostilities.
- 2) Readdressing the status of accompanying civilians.

**Clarifying activities constituting direct participation in hostilities**

Heaton highlights four activities that should collectively define direct participation: 1) direct infliction of damage to enemy personnel or equipment; 2) operation of a weapons system; 3) gathering intelligence for the immediate purpose of target selection or assisting in the planning of military combat operations; 4) directing or advising on the conduct of military operations. Under the current LOAC, only (1) unambiguously qualifies as direct participation.

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<sup>46</sup> Guillory, Major Michael E., "Civilianizing the force: is the United States crossing the Rubicon? – role of civilians under the laws of armed conflict", *Air Force Law Review*, Spring, 2001, 8

<sup>47</sup> Heaton, J. Ricou, "Civilians At War: Reexamining the Status of Civilians Accompanying the Armed Forces", *Air Force Law Review*, vol. 57, 2005, 201.

Heaton argues that these 4 activities constitute direct participation because all of them deal with the indispensable and immediate precursors to the infliction of violence<sup>48</sup>. Participants in these four types of activities may have to make judgments on the use of force. Therefore, restricting these four activities to combatants is consistent with and in fact encourages compliance with the LOAC, because only combatants receive the right use force lawfully and the attendant responsibility for compliance with the LOAC. Heaton further ties the need for restricting these activities to combatants to the profession of arms. “The law of war can best serve its purpose of protecting the general civilian population if the people making decisions about when and how to attack an enemy receive combatant status with its attendant heightened obligation to respect and be trained in the principles of military necessity, distinction and proportionality.”<sup>49</sup>

### **Readdressing the Status of Accompanying Civilians**

Along with clarifying which activities constitute “direct participation in hostilities”, the legal status of accompanying civilians must be addressed. Their legal status must be changed to better reflect the realities of the roles they occupy in modern warfare.

In this, individual states have some control because states themselves can declare civilian support personnel to be combatants as under international law the composition of an armed force is determined by the individual state. In this case, the issue of volunteer vs. involuntary conversion becomes an issue, as involuntary conversion of civilian personnel

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid, at 202.

would likely result in strong resistance from unions, employees themselves, etc. A special case of this pertains to civilians conducting remote operations. States should be able to designate civilian employees as remote combatants, authorized to participate in combat away from the battlefield.

Designating civilians as combatants when required has several advantages to civilians involved in military operations: 1) it eliminates the possibility of their becoming unlawful combatants; 2) it addresses the legitimate state need for civilian expertise in the conduct of combat operations.

Another required change to the LOAC advocated by Heaton is that accompanying civilians who direct and provide essential support to combat operations should be recognized as legitimate targets for attack<sup>50</sup>. While this may appear non-intuitive, authorizing the targeting of such civilians could potentially strengthen the intent of LOAC by removing the tension between protection owed civilians under the LOAC and the military necessity to attack accompanying civilians providing direct support. Authorizing the targeting of accompanying civilians reestablishes the intent of the principle of distinction by distinguishing accompanying civilians from the general civilian population and thereby making the prohibition against attacking the general civilian population stronger. As such a rule would also provide a disincentive to narrow interpretations of direct support to hostilities, it would also remove the temptation to staff essential support positions with civilians rather than military personnel.

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<sup>50</sup> Ibid., at 206

## **Part II Civilians Accompanying the Canadian Forces – Issues and Recommendations**

To date, while the CF has several years of experience in the deployment of contractors through the CSP and CANCAP programs, it has not employed DND civilians in large numbers in support of its international operations. Most DND employees who go on assignment in support of the CF in international operations are few in number, and hold very specialized skills such as defence scientists, analysts, IT and Communication specialists, engineers, and mechanical specialists.

Because of the limited number of civilian employees accompanying our armed forces to date, policies and procedures dealing with the operational employment and compensation of DND civilian employees in this capacity can still be considered nascent, and no policies or procedures guiding the appropriateness of civilian roles in support of deployed military operations appear to exist at all<sup>51</sup>, despite a Chief Review Service (CRS) report on the CANCAP program that highlighted the need for a DND policy on the use of contractors.<sup>52</sup>

The trend in the use of DND civilians and contractors can be expected to continue and in fact increase in support of CF international operations in the future. Along with this, Canada's commitment to a Whole of Government approach when conducting operations in failed and failing states can be expected to further increase the number of Canadian

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<sup>51</sup> Two separate literature searches by CFC and DRDC CORA produced nil results on this topic.

<sup>52</sup> DND, Evaluation of the Canadian Forces Contractor Augmentation Program (CANCAP), June 2006, 18.

civilians placed in hostile environments and exacerbate the problems surrounding such civilians even further.

The whole of government approach rests on the belief that the security and the reconstruction of failed states such as Afghanistan can be achieved only through a comprehensive approach that includes, among other things, coordinated parallel efforts across the broad domains of defence, diplomacy, and development – the “3D” approach<sup>53</sup>. This approach was based on an evolution in thinking within both Canada and the international community regarding the nature of state security as intrinsically linked to development. As a consequence, DND and CF will increasingly be working not just with civilians providing direct support to military operations, as is the subject of this paper, but in fact with civilians from other Canadian government departments, agencies and NGOs that will have a critical and integral role to play in meeting Canada’s international objectives.

The military will be expected to interact with and support civilians from other government departments and agencies that may not be under military control and that likely have little or no experience or training in hostile environments.

With this increase in number of deployed civilians will come inevitable casualties, possible instances of capture, and possible civilian misconduct that may have serious implications for Canada both domestically and abroad. Hence all the attendant issues and

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<sup>53</sup>Phillips, Karen., Afghanistan: “Canadian Diplomatic Engagement”, [www.parl.ca/information/library/PRBpubs/prb0738-e.htm#approach](http://www.parl.ca/information/library/PRBpubs/prb0738-e.htm#approach)



considerations discussed in Part I must be carefully evaluated when determining policies and procedures for their deployment in support of international operations.

It is therefore particularly relevant at this time to evaluate the issues discussed in Part I of this paper with the objective of ensuring that significant issues are addressed before DND experiences its first civilian casualty or capture. These considerations will be discussed in this section.

### **Existing Policies and Guidelines**

DAOD 5028-0, “Deployment of DND Employees in Support of Deputy Chief of the Defence Staff Controlled International Operations” is the directive within DND that applies to accompanying DND civilian employees and to the CF members who manage and supervise them.

DAOD 5028-0 acknowledges that the deployment of DND civilians may be necessary in support of international operations. The policy statement within the DAOD indicates that DND and the CF are committed to deploying DND employees to provide support to CF<sup>54</sup> international operations if: there is an operational need to do so; or their unique skills are deemed essential to the success of the mission. It also commits DND and the CF to ensuring that to the extent possible, the assignment of DND employees is voluntary, and that DND employees are unarmed.

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<sup>54</sup> Document says specifically “DCDS controlled operations” – DCDS position disappeared over two years ago with CF Transformation.

Further guidance and details on the deployment of DND employees in support of international operations is provided by the DCDS Direction for International Operations (DDIO)<sup>55</sup>.

### **Current Status and Practice**

Currently, decisions to employ civilians in international deployed contexts are determined on an ad hoc basis. CEFCOM or SJS staff select the type(s) of skills that they require to support any given operation and include these skills in their Table of Organization and Equipment (TO&E) for the operation. The activities that civilians are likely to perform in theater are thought through from the perspective of ensuring that they are consistent with existing policies and standard operating procedures. Both the Judge Advocate General (JAG) and the Chief of the Defence Staff (CDS) approval is required before these positions are authorized. Specific personnel with the desired skills for the operation are then identified by the Force Generator (the home unit).

DND civilian assignments in support of the CF are volunteer in nature. The incumbent is screened before final selection to go on the operation is made.

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<sup>55</sup> A review of the DDIO Chapters 1-19 produced no guidelines on acceptable use of civilians in support of operations.

As part of ADM HR CIV, The Director General Labour Relations and Compensation (DGLRC) oversees the benefits and compensations for civilian employees supporting CF international operations.

To date, DGLRC, working with input and feedback from DRDC and other organizations in DND who supply civilians to deployed operations, have predominantly looked at compensatory issues associated with civilian deployments aimed at ensuring that civilians accompanying the forces are compensated in a manner similar to their CF colleagues. This has included improvements such as the addition of an operational risk and hazards allowance and life insurance.<sup>56</sup>

The authority for this allowance and benefits package derives primarily from Foreign Service Directive (FSD) 3 - Military Foreign Service Instructions (MFSI) Section 3, Treasury Board and NJC Directives and Collective Agreements

Responsibility for civilian employee pre-deployment preparation rests with the Force Generator (home unit) based on guidance and direction provided by CEFCOM. Home units are responsible for providing support to the deploying civilian up to the time when they join the operational team. To date, this preparation is entirely logistical in nature, dealing with compensation and benefits, medical and dental requirements, storage of furniture and effects, etc.

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<sup>56</sup> DGLRC has produced a document titled “DND Civilian Employees in Support of the CF in International Operations – Questions and Answers”, that is meant to address the most common questions asked when a DND employee is preparing for selection and deployment in support of CF international operations. It exists as a working draft at this time.

Training for these deployments is done through the Peace Support Training Center (PSTC) in Kingston. Canadian Expeditionary Forces Command (CEFCOM) representatives advise the home unit on what specialized training may be required, but it remains the responsibility of the home unit to provide the training arrangements.

Currently, civilians get pre-deployment training that consists of courses on: standard first aid, allowances and benefits, personal protective equipment (PPE) familiarization as well as PSTC Basic Course (5 day Package) including Theatre Mission Specific Training (TMST) and Cultural Awareness Training (through DFAIT or other source) on Intelligence, Threat, Environmental Health Hazards and Mine Awareness.

### **Issues with Current Practice and Approach**

#### **Lack of strategic national policy**

In his article, “Putting Public Servants in Harm’s Way: Dilemmas of the Democratic State in a Violent and Uncertain World”<sup>57</sup>, author Denis Stairs reflects upon the death of Mr. Glyn Berry, a senior Canadian diplomat, on January 15, 2006. Mr. Berry, a victim of a suicide attack, became the first Canadian diplomat to die as a direct result of a hostile act of political violence. Stairs asks whether Canada’s interests in

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<sup>57</sup> Stairs, Denis, “Putting Civilians in Harm’s Way”, Dilemmas of the Democratic State in a Violent and Uncertain World”, Canadian Defence and Foreign Affairs Institute Dispatch: Spring 2006, vol 4, issue 1.

Afghanistan were carefully evaluated by the Government and deemed to be sufficient to justify putting public servants in harm's way.

Without wading into the circumstances surrounding the rationale and decisions made to place Mr. Berry where he was on that fateful day, the question that Mr. Stairs poses is a crucial one that applies to the placement, on the part of our Government, of any Canadian, civilian or military, in harm's way. Fundamental to this is an evaluation of the motives, context and circumstances behind such decisions. Is achievement of objectives worth the possible cost? The consequence of so doing needs to be carefully weighed.

Under Protocol 1, art. 58, parties to a conflict have an obligation to remove civilians from conflict areas to the extent feasible. Purposefully placing civilians in the vicinity of legitimate military targets is counter to this principle. Having signed and ratified Protocol 1, Canada needs to carefully consider the use of civilian employees relative to the principles espoused in Protocol 1.

Today's highly complex security environment is very different from the traditional state-on-state conflicts. This makes it very difficult to determine when risking Canadian lives is necessary and acceptable as a particular military campaign may have strategic impact indirectly and unexpectedly, so that it is difficult to predict all of the cause and effect linkages between the intervention and its often ambiguous consequences. These sorts of interrelated, complex situations unfortunately also present a tough sell to the Canadian public. Canadians may not always see, or agree, with the reasoning behind the decision to

send troops, let alone accompanying civilians, especially when the threat to Canadian security is unclear or indirect and civilian casualties occur.

First and foremost, the Canadian government has a duty to ascertain that a vital Canadian interest is at stake before they can reasonably authorize the deployment of its personnel, military or civilian, to dangerous environments abroad. The risk of placing Canadian lives in harm's way can only be acceptable when it is necessary to ensure national security and the most fundamental interests of Canadians. The corollary of this from an accompanying civilian perspective is that the risk of sending civilian employees into harm's way in support of an overseas military mission can only be acceptable when the tasks they are performing are essential to the operation and cannot be performed either by reach back to the civilian home unit in Canada or by military personnel.

The actions and fate of civilians accompanying the forces reflect directly upon those forces and the nation that sends them into areas of conflict. Deaths and injuries of civilians, improper conduct and or possible crimes committed on their part while deployed will all be scrutinized both at home and internationally. Questions will be asked across a broad spectrum of issues ranging from why they were sent there in the first place to were they properly trained and protected while there. DND and the CF have to anticipate the range of possible outcomes associated with employing civilians, plan accordingly, and bear up under scrutiny, whatever the circumstances. At present, decisions to employ DND civilian employees in support of deployed operations is made

on a case-by-case basis, and primarily from a military operational perspective. Given that civilian deployments in support of the CF can have grave consequences to the CF, DND and the Government of Canada both domestically and internationally, policies and doctrine cannot start from the operational level. Decisions to place public servants, whether military or civilian in harms way must be founded on national and strategic policy and doctrine. They must be based on an assessment of real necessity and associated risks and guided by the fundamental values and interests of the Canadian public. Such national/strategic level policy and doctrine are currently lacking in Canada. If Canada is going to continue deploying civilians in support of international operations, this policy and doctrine needs to be developed.

#### **Determination of Tasks Constituting Direct Support to Hostilities**

Facing increasing pressures to employ civilians, one of the most fundamental policy decisions DND and the CF need to grapple with is the determination and subsequent publication and communication of which functions and roles must be military, and which ones can be civilian.

DAOD 5028-0 says nothing about acceptable roles for civilians while supporting the armed forces. No policy or doctrine exists in Canada to determining the acceptable noncombatant roles that civilians may carry out while accompanying the armed forces on international operations. It is unclear as to whether the need to develop clear policies and guidelines on this issue is even being seriously debated within DND/CF at this time.

The lack of clear policy and doctrine around the issue of appropriate civilian tasks is problematic for two reasons. Firstly, no published guidelines to commanders on the proper employment of civilians in support of deployed operations appear to exist. Commanders are cautioned on the dangers of inappropriately tasking civilians. Such general cautions are inadequate, and shirk senior DND and CF responsibility to both the commander and to the civilians under his/her command. Because of the inherent issues associated with commanding civilians, it is neither reasonable nor ethical for the Canadian government to continue with the practice of allowing commanders to make the decisions on civilian activities under their command based upon simple admonitions to ensure that civilian noncombatant status is not jeopardized.

Secondly, all civilian employees contemplating deployment in support of CF operations are asked to sign a letter of informed consent. This letter signifies the employee's acknowledgement that they have been briefed on pertinent issues related to the assignment/deployment.

Conversations with DRDC personnel currently developing an overall S&T support to deployed operations strategy for Defence Research and Development Canada (DRDC) on this issue, indicates that generally speaking, the civilians entering the theater of operations are not aware of the ambiguities, differing interpretations and subsequent implications surrounding the LOAC on tasks that could be considered combatant in



nature. It is recommended that increased emphasis be placed on this aspect in the development of an appropriate departmental strategy.

Given the possibility of individuals entering the operational theater unaware of the possible implications around being considered to be performing combatant tasks, signing a letter of informed consent becomes problematic, as there is a responsibility on DND to ensure that its civilians are aware of the issues and ambiguities around their assigned tasks that may affect their safety and their perceived liabilities.

Have, in fact, civilians supporting deployed CF operations been performing tasks that could potentially be considered direct support to hostilities? An inquiry into the sorts of functions that some DND civilians have been performing in theater indicates that, given the sorts of tasks currently under debate in the international arena, the answer is probably yes<sup>58</sup>. Care in the employment of civilians, and in particular technical experts, must be carefully weighed against the possibility that these civilians could find themselves liable to being considered unlawful combatants.

In keeping with the suggestions made by Heaton, DND/CF should determine the activities that it will consider to collectively define direct participation in combat operations, and ensure that such functions are performed only by military personnel. The four that Heaton advocates: 1) direct infliction of damage to enemy personnel or equipment; 2) operation of a weapons system; 3) gathering intelligence for the immediate

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<sup>58</sup> Author's opinion on this issue formed through discussions with various staff on the sorts of functions performed while supporting operations.

purpose of target selection or assisting in the planning of military combat operations and 4) directing or advising on the conduct of military operations, have the advantage of mitigating much of the ambiguity and controversy that exists internationally around the issue of legitimate civilian roles. Whatever these roles turn out to be from a Canadian perspective, clear policies and guidelines, available to both the military commander, the civilian in question and the civilian home unit must be produced on what will constitute acceptable activities for accompanying civilians to perform. Accompanying this is a requirement for policies and guidelines on roles, responsibilities and accountabilities of both commanders and civilian home organizations in the event of casualty, capture or breach of appropriate conduct by the civilians in question.

Civilian home units must also be given the right and accompanying responsibility to evaluate the required task in question and raise concerns, constraints, etc. when asked to provide civilian support. Without such policies and guidelines in place, most of the consequences for potentially poor decision making are borne by the civilian upon injury or capture.

Essential (EE) positions<sup>59</sup>. This identifies the employee and the position they occupy as meeting the EE designation, and outlining the requirement to remain in theater until relieved by appropriate authority. The designation of EE requires that the position have the following attributes:

- 1) It is required to ensure the success of combat operations or to support combat-essential systems subsequent to mobilization, and evacuation order, or some other type of military crisis
- 2) The position cannot be converted to a military position because it requires uninterrupted performance to provide immediate and continuing support for combat operations and/or support maintenance and repair of combat-essential systems.

This last aspect – designated essential non-military combat support positions is itself problematic when determining the line between combat and non-combat roles. Subjective assessments of this line coupled with a narrow interpretation of “combatant” has resulted in civilian employees performing tasks once exclusively held by military members. Turner suggests that the US forces using civilian employees in such roles have or are very nearly crossing the line into using civilians for combatant activities.<sup>60</sup>

No category similar to EE exists in the Canadian context. In the case of the Defence Science community supporting operations, DND is primarily deploying people on an ad hoc basis under the Technical Assistance Visit (TAV) status, even though some of these

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<sup>59</sup> Turner, Lisa L., Major, “Civilians at the Tip of the Spear: Civilian Issues Commanders Encounter During Deployed Operations”, Research Report, Air University, Maxwell Air Force Base, Alabama, April 2001, 4

<sup>60</sup> Ibid., at 11.

deployments are for many months in duration, and are now being repeatedly requested. This aspect alone needs to be reconsidered.

All DND accompanying civilians are volunteers. The rationale for why accompanying civilian positions are volunteer in nature could not be found while conducting research on this topic. However, it is reasonable to assume that the policy for volunteers on the civilian side comes about both because of opposition to designating these positions essential by both unions and civilian employees, and for liability purposes on the part of DND in the event of injury or death. Volunteer positions are also in keeping with the fact that Canada has a volunteer-based Armed Force.

That these positions are currently volunteer in nature presents a problem different to the one that Turner presents, but no less worrisome. At present with only a few civilian employee positions in question, there have not been any problems with meeting the demand for support on a voluntary basis. However, if the demand for civilian support to theater operations continues to grow, so that the demand for such positions outstrips the civilians volunteering to deploy, this policy will need to be reconsidered. This will be particularly important if the functions performed are critical to operational success. And if the functions are critical to operations, should civilians be filling them in the first place or should we be thinking of ensuring military personnel fill them to begin with?

In the development of a policy on appropriate civilian functions in support of international operations, the US approach to determining EE position designation has

some merit, in that it provides a key to an important discriminant – the designation of some essential element to the civilian role that is both required and can be justified in some appropriate way as being properly and justifiably performed by a civilian as opposed to a military member. Doing so both in anticipation of likely types of engagements and systematically as opposed to the current ad hoc and largely reactive basis means that in most cases, the requirement for such positions can be identified well before deployments arise, and be planned for. This would help turn the currently reactive process into a proactive one. It could be argued that the CF has tried to take this approach on the contractor logistics services support side, in aiming, through the CANCAP program, for a contingency-based, flexible program that could be deployed anywhere in the world.

An assessment methodology should be developed and consistently employed to evaluate the need for civilian positions in anticipation of the kinds of deployed operations that the military expects to conduct in future. The following sorts of questions need to be asked:

- 1) What sorts of skill sets and associated tasks are likely to be required in theater?
- 2) Are the military capable of performing them?
- 3) Are these appropriately civilian tasks or are they questionable in terms of direct participation in hostilities?
- 4) What are the associated risks and mitigation strategies?
- 5) Does the civilian need to physically be in theater, or can the expertise/advice be provided in another way?

- 6) Should there be military training in the area of expertise as a solution instead?

These and other questions must be thought through and asked against probable operational requirements as a consistent basis upon which to make such determinations. Such a methodology towards the identification of required tasks and associated skill sets would go a long way to ensure consistency of thought is applied to employing civilians in support of deployed operations. A carefully determined and well established set of selection criteria would allow for anticipatory planning around the required skill sets that may be required in support of future needs.

Creating a special pool of technical reservists with the required expertise might be an interesting option as a way to retain a pool of skilled technical professionals available for deployment as members of the armed forces while allowing them to pursue their civilian day jobs.

### **Uniforms and Use of Weapons**

DND civilians have, in the past, worn uniforms while supporting international operations. In the case of support to the Kosovo campaign in 1999, some civilian scientists were issued with military uniforms. Civilian personnel, out of necessity, are also provided with protective military equipment, such as flame-retardant clothing, depending on the hazards of the job they are to support. While acknowledging that civilians must at times be outfitted with protective military equipment for their safety, to the extent possible, use

of uniforms for civilian personnel should be discouraged in order to ensure the LOAC principle of distinction is adhered to.

Accompanying civilians have been issued weapons in the past for self-protection under certain circumstances. As discussed in Section 1, the problems and risks associated with so doing are significant and unfortunately borne by the civilian upon possible capture. The ramifications of improper use of arms by civilians could be highly damaging and embarrassing to the Canadian government, both nationally and abroad. Such decisions cannot be left ad hoc in nature. Clear policy and guidelines governing the use of weapons by civilians need to be developed and communicated. It is recommended that the issuing weapons to civilians should be strongly discouraged except in the most extreme of circumstances.

### *Civilians and the Professions of Arms in Canada*

One aspect of the civilianization of the battlespace that has not been dealt with much in the literature but that has fundamental ramifications to the military is its impact of the profession of arms.

“The profession of arms in Canada is composed of military members dedicated to the defence of Canada and its interests, as directed by the Government of Canada. The profession of arms is distinguished by the concept of service before self, the lawful, ordered application of military force and the acceptance of the concept of unlimited

liability. Its members possess a systematic and specialized body of military knowledge and skills acquired through education, training and experience, and they apply this expertise competently and objectively in the accomplishment of their missions. Members of the Canadian profession of arms share a set of core values and beliefs found in the military ethos that guides them in the performance of their duty and allows a special relationship of trust to be maintained with Canadian Society.”<sup>61</sup>

The above quote is taken directly from “Duty with Honour, the Profession of Arms in Canada”<sup>62</sup>, and succinctly depicts the principal attributes expected of a member of the Canadian Armed Forces.

Disciplined soldiers are not created overnight. They learn by practicing their trade and by the subsequent transfer of knowledge of superiors and veterans. They learn by trial and error in controlled and repeated exercises. It takes time to train and mold a group of people into an effective functional unit and to imbue them with common values and a sense of shared responsibilities.

The Canadian military ethos clarifies how members view their responsibilities as individuals and collectively. It identifies and explains common military core values that ultimately reside in fundamental Canadian core values. This military ethos serves to shape and guide conduct within the membership, distinguishing a member of the Canadian profession of arms from ill-disciplined irregulars and mercenaries, and

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<sup>61</sup> Duty with Honour, the Profession of Arms in Canada @Her Majesty the Queen in Right of Canada, 2003, 10

<sup>62</sup> Ibid



ultimately legitimizes the Canadian Armed Forces in the eyes of the Canadian public. It is essential to meeting Canadian's expectations that their military professionals will perform their duty to defend the nation with honour.

One unique feature of the profession of arms in Canada is that the stewardship of the profession rests with the military themselves. The National Defence Act and Queens Regulations & Orders also address the values and basic principles of service life which distinguish the military from civilian society. These principles include: an unlimited liability for service combined with a requirement to be present for duty when ordered; the obligation to obey all lawful commands, including those which might lead to death or serious injury and the potential to be penalized for failing to do so; subordination to those in authority; enforcement of discipline; and welfare of subordinates.

One of the main problems accompanying the civilianization of the forces is that the collective nature of military action is no longer consistently and cohesively applied exclusively by military professionals. Without proper policies and careful consideration, the civilianization of military functions could place the profession of arms, and therefore Canadian's trust in that profession, in jeopardy.

One interesting concept worthy of further exploration as civilian participation increases in support of military operations is an evolution of the concept of the profession of arms to a more expansive concept - that of a "defence profession"<sup>63</sup> in Canada, of which the profession of arms could remain a specific subset. Professional development and training aimed at development of a broader "defence ethos", based to a significant extent on a

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<sup>63</sup> Dr. Alan Okros, RMC, email, May 1, 2008.

common core value set now espoused by the military and inculcated in the broader membership could ensure that same consistency and cohesion to future operations that the profession of arms brings today.<sup>64</sup>

The concept of a “defence profession”, or possibly even a “defence and security profession” that encompasses the broader security provider community in Canada, is a particularly interesting concept when considered against Canada’s commitment to a Whole of Government approach in support of international operations in failed and failing states. Developing such a concept of a broad profession of defence and security practitioners based on an appropriate expansion of key elements of the military ethos would ensure a consistent culture of professionalism across the entire Canadian defence and security community that would help ensure that in a Whole of Government approach, all Canadian government employees involved in national or international operations perform their duties with honour.

Furthermore, as few government departments outside of DND have significant and relevant experience in sending individuals into harm’s way on international missions, DND should consider taking a lead role in developing the way forward in this area. It should at the very least look at championing an interdepartmental assessment of the merits of this concept with other government departments.

### ***Problems with Subjecting Civilians to the Code of Service Discipline***

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<sup>64</sup> Today, defence and security are interrelated, and hence the security element needs exploration as well. This would bring in other communities of practitioners.

DAOD 5028-0 states that while civilians accompanying the armed forces continue to be governed by public service legislation and policies, they may also find themselves subject to: the Code of Service Discipline (CSD); the Criminal Code; international law; Foreign Service Directives; and Military Foreign Service Instructions. In other words, accompanying civilians may be subject to both civilian and military codes of conduct.

The Canadian Forces operates a separate system of military tribunals to serve the particular disciplinary needs of the military. The CSD applies to all CF members and, in certain circumstances, to civilians who may become subject to Canadian military law, for example, when accompanying a CF unit on active service.

The legislative basis for this separate justice system is found in The CSD, Part III of the National Defence Act (NDA). The subjection of persons accompanying the armed forces to service discipline is found in section 61 of the NDA. Section 61(2) defines how persons accompanying Canadian Forces are to be treated under the CSD.<sup>65</sup>

Accompanying civilians are not subject to the various fora of the military justice system, but they are subject to Court-Martial. DND employees are also subject to the Task Force Standing Orders for the operation to which they are assigned.

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<sup>65</sup> NDA 61(2): Subject to subsection (3), every person mentioned in paragraph 60(1)(f) who, while accompanying any unit or other element of the Canadian Forces, is alleged to have committed a service offence, shall be treated as a non-commissioned member.

The exception in subsection (3) refers to persons holding certificates entitling them to being treated as officers.

The fact that civilians accompanying the forces are subject to the CSD was intended to ensure appropriate oversight of civilians by their military commanders. However, it also places these same civilians at a disadvantage relative to the military personnel they may be deployed with. This disadvantage is directly related to the fact that military personnel are members of the profession of arms in Canada, while accompanying civilians are not.

For commanders in charge of units composed of both military and civilian members, it can logically be expected that for an identical task, there would be similar expectations on the part of the commander on performance and conduct for both the military and the civilian employee. However, the expectation on the part of the military commander and those military members under his/her command is shaped by a common military ethos, that of the civilian employees is not. Under the circumstances, is it ethical to expect the same standard of conduct for a civilian as for a military member?

The Public Service has its own code of ethics that its members are expected to adhere to, but public servants have not generally benefited from the extensive training, embedding, discipline, customs and traditions that imbue members of the profession of arms. Hence, civilian employees are at a disadvantage when expected to conduct themselves in an appropriate manner within a military milieu. Merely stating that civilians are subject to the CSD is an abdication of responsibility to these civilians. Clarity, accompanied by sufficient education and training, needs to be shed on what is an acceptable standard of conduct for civilians under a military operations scenario. Training and development towards a “defence” or possibly a “defence and security” profession as discussed

previously would go a long way in leveling the playing field for civilians subject to the CSD

The issues surrounding civilians subject to codes of military justice is currently being highlighted in the US, where attempts are ongoing to bring civilian contractors to court martial for acts committed while on deployment. Whereas the intent is aimed at addressing a valid problem – lack of commander control over civilians - the civilian contractors have not had the benefit of development under the military ethos. It is not surprising that attempts to subject these civilians to military justice are meeting with opposition from civilian representative and civil liberties groups. These groups are arguing that it is not appropriate to judge errant contractors against the same standards applied to military members, and especially so in situations where civilian law would not punish the contractors for their actions<sup>66</sup>.

In development of policy on the deployment of civilians, and specifically because Canadian civilians are subject to the CSD, DND must look at these sorts of issues when determining what standards of conduct should or should not apply to civilians accompanying the armed forces. In the case of DND employees, it is unlikely that these sorts of standards could be determined without input from appropriate Public Service Unions.

***Support Obligations to Civilian Casualties and Their Families***

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<sup>66</sup> Matthews, William, “Military Rule Extends to US Contractors”, *Defence News*, 8 January 2007

Unlimited liability is owed by the CF member to the state. In exchange for this, there is a just expectation on the part of the CF membership that they and their loved ones will be taken care of by the state. In times of peace, the nation often forgets this pact it makes with its military members, with disastrous consequences on pay, benefits, equipment and subsequently morale. In times of conflict, when bodies of soldiers return home for burial, the public rallies around the cry of “we support our troops”.

War affects accompanying civilians no differently than it affects troops. The military have long experienced casualties in warfare, and have an extensive support system available to victims and their families. No such system and culture exists on the civilian side. Civilian families affected by a casualty are permitted to use the services of the Military Family Support Unit. While this is a good start, the Military Support Unit to date has little experience in dealing with civilian casualties, and the unique issues they may present. How civilians avail themselves of this support remains problematic.

Another related consideration for civilian home units is how does the civilian home unit handle its casualties? What support is the civilian home unit ethically obligated to provide and should be prepared to provide to the employee and the affected family? Issues such as these have not been thought through within DND with regard to its employees. Canada has experienced only one civilian death so far in support of international operations. DND has yet to experience a DND civilian casualty in support of an international operation. As a consequence, it will only be when it suffers that first

casualty that the problems with the current approach will become evident. Anticipatory preparation is required.

### **Morale and Cohesion Problems**

People working together in tight units, enduring similar circumstances and performing similar or related tasks, expect to be treated in a similar fashion when it comes to benefits and compensation. Differences in entitlements between military personnel and civilians working alongside them create problems of morale that can affect the cohesiveness and effectiveness of the unit. This is already starting to be seen in some deployed operation scenarios in Afghanistan, where differences in benefits like availability of overtime, tax-free exemption status, expected maximum hours of work, etc. have caused tensions within work units. In this regard, the efforts of ADM HR CIV in addressing some of these inconsistencies on behalf of its civilian population are to be applauded. However, careful consideration must be given to perceived inadequacies on the military side. Unions must be educated to understand these particular sensitivities in deployed operations. Collective agreements need to be negotiated and/or modified for operations-specific issues and context.

### **Training Issues**

The current training provided for Canadian civilian deployments has been undergoing continuous improvement as lessons-learned from field experience are picked up. In

general, such training provides a good foundation on the major operational issues associated with support to deployed operations. However, current training, and in particular the mission-specific training, is provided from a purely military perspective and aimed at military personnel. The training afforded civilians needs further thought and development. Policies around this training need to be tailored to the civilian-specific context.

One of the things that is not currently well covered in this pre-deployment training is on issues related to the perceived value-added of civilians in theater by commanders. These comments come predominantly from my own personnel on the lessons learned around utilizing defence scientists in field in previous rotations in Afghanistan. In these situations, commanders were not always aware of how the defence scientists could be optimally used to support their objective, and in some cases valuable time was lost in putting the civilians to good use. In fact, comments coming from defence scientists in the earliest rotations showed that they frequently had to find tasks to do and demonstrate their utility to their commanders. This only serves to highlight the problems around necessity to perform these tasks in the first place, and the placement of civilians in harms way.

## **SUMMARY OF RECOMMENDATIONS**

- 1) If DND is to continue with and in fact expand the use of civilian employees in support of international CF operations, it must develop a comprehensive policy and



doctrine for their use founded on national and strategic considerations and based on an assessment of real necessity, associated risks and guided by the most fundamental values and interests of the Canadian public.

2) Facing increasing pressures to employ civilians, one of the most fundamental policy decisions DND and the CF need to grapple with is the determination and subsequent publication and communication of which functions and roles must be military, and which ones can be civilian.

3) DND/CF should determine and communicate the activities that it will consider to collectively define direct participation in combat operations. These activities must be reserved for military personnel only. Clear policies and guidelines, available to both the military commanders and civilian home units must be produced on what will constitute acceptable activities for accompanying civilians to perform, as well as policies and guidelines on roles, responsibilities and accountabilities of both commanders and civilian home organizations in the event of a casualty, capture or breach of appropriate conduct by the civilians in question.

4) A systematic assessment needs to be performed of the “the principle of necessity” in decisions to use civilians in support of deployed operations. Doing so systematically as opposed to on an ad-hoc basis means that in most cases, such positions can be identified well before deployments arise, and be planned for.

- 5) In carrying out (4), the volunteer nature of civilian positions needs to be reassessed and possible alternatives, such as use of reservists, considered, in particular in cases where the tasks performed are essential to operations.
  
- 6) DND should ensure that it adheres to the principle of distinction in employing civilians in theater. This means that policies concerning civilian use of uniforms and weapons need to be carefully thought through, developed and implemented.
  
- 7) Canada should work within the international community in overhauling the LOAC to reflect the realities of modern warfare. This should include involvement in international efforts to clarify activities designated to be direct participation in hostilities, clarifying the legal status of accompanying civilians and engaging in debate over the lawful targeting of civilians providing essential and direct support to operations.
  
- 8) DND should investigate the implications of the continued use of civilians on the professions of arms in Canada and make recommendations aimed at mitigating potential harm to the profession. Consideration should be given to a DND-sponsored interdepartmental initiative<sup>67</sup> aimed at exploring the feasibility of migrating and evolving the concept of the profession of arms to a more encompassing concept of a “defence (or defence and security) profession”.

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<sup>67</sup> While DND could take a leadership or sponsorship role in moving forward with such an interdepartmental activity, if the concept were deemed feasible, DFAIT would be the better candidate for evolving such a concept to maturity and “owning” the concept from a Whole of Government perspective.

9) As civilians are subject to the code of service discipline, DND must determine what standards of conduct should or should not apply to civilians accompanying the armed forces, given that they have not benefited from being members of the profession of arms.

10) DND and the Government of Canada must think through ethical and practical considerations around support obligations to civilian casualties and their families. These obligations should encompass not just DND employees, but also contractors and Third Party Nationals in their employ.

11) Collective agreements need to be negotiated and/or modified for operations-specific issues and context.

12) Policies around civilian training need to address civilian-specific context. Training specific to civilian/military mixes in deployed contexts and the Whole of Government approach to operations needs further development. DND should work with DFAIT and other government departments to develop such training.

## **CONCLUSION**

Technology has substantially altered warfare in recent decades. The complexity of the weapons and systems that the military now employ means that increasingly armed conflict as practiced by many states is shifting activities previously performed by military

personnel, such as maintaining sophisticated equipment and supporting combat operations, to civilian employees and contractors often required because of their unique expertise. With modern offensive capability such as long range strike, all deployed personnel, face risk of injury, death or capture.

The laws of war have not caught up to the changing nature of modern warfare. Aimed at protecting civilians from being targets of attacks, the LOAC was developed for an older paradigm of simple weapon systems operating at short ranges, with individuals intimately involved in the act of violence. It no longer provides clear guidance to today's sorts of warfare. In particular, with regards to the increasing use of civilians in the battlespace, no suitable standards exist for determining what civilians accompanying the armed forces may do and when they may be legitimate targets of attack. As a consequence, LOAC needs to be altered to ensure the principle of distinction while acknowledging that civilians are now an integral part of warfare.

Intentionally placing civilians in harms way in support of combat operations has both domestic and international implications to a state that need to be carefully considered. States that employ civilians in roles that risk being considered combatant in nature run the risk of breaching their obligations under international law. These breaches have ramifications both nationally and internationally. When developing policies and guidelines for the employment of civilians in support of international deployed operations, a states' responsibility to carefully consider the associated implications and risks of inappropriately employing civilians must be foremost in consideration.

In Canada, use of civilian employees and contractors is still at a nascent stage. However, in keeping with world-wide trends, it is anticipated that the use of civilians in deployed CF operations will grow with time, and civilian casualties and captures are to be expected. As a consequence, policies and doctrines for the employment of civilians in deployed operations must be developed, not from an ad-hoc operational perspective, but from a national strategic perspective. Development of such policy and doctrine within DND is very timely, and should be done in anticipation of the worse case scenario – the death, injury or capture of civilians while supporting the CF abroad.

Finally, although the primary intent of this paper was to look at issues concerning DND employees in support of international military operations, there exists a general need to develop clear policies and procedures guiding the deployment and tasking of ALL civilians in support of Canadian government sponsored operations abroad.

The CF also employs Canadian contractors as well as local civilians on deployed operations. Their services in support of Canadian overseas operations are a valuable and necessary contribution to achieving military objectives. It is unclear that any considerations have been made in terms of what responsibility and liability DND, and in fact the Canadian Government considers itself to have for these groups of civilians and their families in the event of death, injury or capture.

Local civilians in particular are often targeted from within their communities for supporting foreign troops. What responsibilities should the Government of Canada have to local civilian in their employ and to the resultant casualties and their families? The simplistic answer to this is that these individuals have generally been well compensated monetarily for their efforts. However, Canada prides itself on the international stage with being a champion of human rights and the responsibility to protect and in fact better the lives of those less fortunate than ourselves. How Canada treats all civilians supporting its international operations and the obligations it extends to these civilians reflect upon Canada's true commitments to the principles it says it upholds.

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