VOLUME 1—MAY 5, 2010

ARTICLE

The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis

Michael N. Schmitt*

I. Introduction

In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the T.M.C. Asser Institute, launched a major research effort to explore the concept of "direct participation by civilians in hostilities" (DPH Project).[1] The goal was to provide greater clarity regarding the international humanitarian law (IHL) governing the loss of protection from attack when civilians involve themselves in armed conflict. Approximately forty eminent international law experts, including government attorneys, military officers, representatives of non-governmental organizations (NGOs), and academics, participated in their personal capacity in a series of workshops held throughout 2008. In May 2009, the ICRC published the culmination of this process as the "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law".[2]

* Professor of Public International Law, Durham University Law School

[1] *See* INT'L COMM. OF THE RED CROSS (ICRC), OVERVIEW OF THE ICRC'S EXPERT PROCESS (2003-2008), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/overview-of-the-icrcs-expert-process-icrc.pdf (last visited Mar. 30, 2010).

[2] ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed., 2009), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.pdf [hereinafter IG].

Although the planned output of the project was a consensus document, the proceedings proved highly contentious. As a result, the final product contains the express caveat that it is "an expression solely of the ICRC's views".[3] Aspects of the draft circulated to the experts were so controversial that a significant number of them asked that their names be deleted as participants, lest inclusion be misinterpreted as support for the Interpretive Guidance's propositions. Eventually, the ICRC took the unusual step of publishing the Interpretive Guidance without identifying participants. This author participated throughout the project, including presentation of one of the foundational papers around which discussion centered.[4] He was also one of those who withdrew his name upon reviewing the final draft.

Disagreement with the Interpretive Guidance by dissenters varies in nature and degree. In fairness, there is much to recommend the document. The ICRC and the experts involved worked diligently to find common ground. It is a sophisticated work, reflective of the prodigious expertise resident in the ICRC's Legal Division, and one that clearly advances general understanding of the complex notion of "direct participation". Nevertheless, certain points of contention surfaced during the deliberations and in the debates generated by the final draft. This article examines these fault lines through the author's own views. In doing so, it seeks to engage the broader international law community in the dialogue.

A common theme pervades the criticisms set forth below. International humanitarian law seeks to infuse the violence of war with humanitarian considerations. However, it must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, IHL represents a very delicate balance between two principles: military necessity and humanity. This dialectical relationship undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them. It is in this regard that the Interpretive Guidance falters. Although it represents an important and valuable contribution to understanding the complex notion of direct participation in hostilities, on repeated occasions its interpretations skew the balance towards humanity. Unfortunately, such deviations from the

---

[3] *Id*. at 6.

[4] Subsequently published as Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 (2005).

generally accepted balance will likely cause states, which are ultimately responsible for application and enforcement of the law, to view the Interpretive Guidance skeptically.

II. Civilians on the Battlefield

It is useful to understand the context in which the DPH Project emerged. The presence on the battlefield of individuals who are not formally members of the belligerents' armed forces is by no means a new phenomenon. Examples abound. Over 15,000 Hessian "auxiliaries" fought for Great Britain in the U.S. war of independence.[5] During the French Revolution, the National Convention decreed that, "until such time as its enemies shall have been driven from the soil of the Republic, all Frenchmen are in permanent requisition for the services of the armies."[6] Within the year, the size of the French forces reached 1.5 million men. The 1949 Geneva Convention on Prisoners of War (POW) later afforded prisoner-of-war treatment to those "who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed unit."[7] The Convention also granted POW treatment to civilians who "accompany the armed forces without being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, and members of labour units or of services responsible for the welfare of the armed forces."[8] Civilians enjoyed protection against direct attack; however, it was well accepted by this time

---

[5] W. Hays Parks, *Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces*, Presentation at the Third Meeting of Experts 7 (2005). The article provides an excellent series of examples.

[6] *Committee of Public Safety, Levee en Masse*, August 23, 1793.

[7] Convention (III) Relative to the Treatment of Prisoners of War art. 4A(6), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Participants in such actions form a "levee en masse".

[8] *Id.* art. 4A(4). Such treatment was not new. During the U.S. Civil War, Army General Orders No. 100, also known as the Lieber Code, provided that "[c]itizens who accompany an army for whatever purpose . . . if captured, may be made prisoners of war." Francis Lieber, Instructions for the Government of Armies of the United States in the Field art. 50 (Gov't Printing Office 1898) (1863) (officially published as U.S. War Dep't, General Orders No. 100 (Apr. 24, 1863)). Hague Convention IV similarly provided that, "[i]ndividuals who follow an army without directly belonging to it, such as . . . contractors, who fall into the enemy's hands . . . are entitled to be treated as prisoners of war." Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 13, Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague IV R].

that if they took up arms they rendered themselves targetable. In a memorable event involving such individuals, over one-half of the American defenders at Wake Island were civilian contractors building a U.S. naval base when the Japanese attacked in December 1941.[9] Given the prevalence of resistance movements during the Second World War, the Prisoner of War Convention also extended POW treatment to resistance fighters meeting certain conditions.[10]

Twentieth-century state practice clearly demonstrates the acceptance of various categories of civilians on the battlefield and even, in limited and well-defined circumstances, their involvement in hostilities. The 1990's signalled a sea change in the scope of civilian participation in military operations, as Western militaries took advantage of the perceived "peace dividend" resulting from "victory" in the Cold War to dramatically downsize their militaries. Operations in the Balkans quickly revealed the shortcomings of this policy. Faced with the prospect of long-term stability operations such as IFOR (Implementation Force), SFOR (Stabilization Force), and KFOR (Kosovo Force), intervention forces had to turn to civilian contractors to perform many support and logistic functions.[11]

The twenty-first century conflicts in Iraq and Afghanistan took this trend to unprecedented levels. As hopes for a quick victory faded in both cases, Coalition forces settled in for the long haul. Contractors and civilian government employees flooded the theater of operations. By March 2009, United States Central Command, responsible for both conflicts, contracted for the services of nearly 243,000 civilians. Support for the various U.S. bases constituted 58% of this force, whereas 15% were involved in construction. Another 12% performed security functions.[12] By late 2009,

---

[9] Parks, *supra* note 5, at 7.

[10] GC III, *supra* note 7, art. 4A(2). *See also* Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 43–44, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[11] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO THE SUBCOMM. ON READINESS AND MGMT. SUPPORT OF THE S. COMM. ON ARMED SERVS., REPORT NO. GAO-03-695 (2003) (discussing the shortfalls in U.S. military capabilities). Note that civilians had historically supported their country's war effort far from the battlefield, for instance by working at ports from which military equipment, supplies, and troops were shipped. However, now civilians are directly supporting armed forces in the theater of operations.

[12] Of those troops, 132,000 (down from almost 200,000 at the height of the conflict) were serving in Iraq, 68,000 in Afghanistan, and the remainder were at various other locations throughout the region. DEP'T OF DEF., OFF. OF THE DEPUTY UNDER SEC'Y OF DEF. FOR LOGISTICS AND MATERIEL READINESS, CONTRACTOR SUPPORT FOR U.S. OPERATIONS

security contractors outnumbered all foreign armed forces (support and combat) in Iraq except those of the United States, and in Afghanistan only the United Kingdom and United States fielded more troops. These numbers do not include security contractors working for other states, international organizations, or non-governmental organizations; a report to Congress issued in August 2008 estimated that fifty companies had approximately 30,000 security contractors in Iraq alone.[13]

That the contractors were present "on the battlefield" is indisputable. Although reliable figures on contractor deaths and injuries are unavailable, as of April 2008, the U.S. Department of Labor had received claims based on the death of 1,292 contractors (including Iraqis), and the wounding of 9,610 more, during the conflicts in Iraq and Afghanistan.[14] The NGO iCasualties reports that by August 2009, 462 non-Iraqi contractors had been killed in Iraq, including 179 U.S. and 49 British citizens.[15]

Contractors also have been involved in numerous incidents involving civilian deaths, the most notorious example being the 2007 killing of seventeen Iraqis by Blackwater employees while escorting a U.S. Department of State convoy. U.S. judicial authorities indicted five of the contractors, while a sixth pled guilty.[16] Contractor participation in military

---

IN USCENTCOM AOR, IRAQ AND AFGHANISTAN (2009), http://www.acq.osd.mil/log/PS/p_vault/5A_February2010.doc.

[13] JENNIFER ELSEA, KENNON NAKAMURA, & MOSHE SCHWARTZ, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 3 (2008). The questionable status of security contractors provided a major impetus for launch of the DPH Project. The key question was whether the various activities they engaged in amounted to direct participation or, indeed, whether they represented, in some cases, organized armed groups operating on behalf of a party to the conflict. These issues are developed *infra*.

[14] STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 110TH CONG., MEMORANDUM ON SUPPLEMENTAL INFORMATION ON DEFENSE BASE ACT INSURANCE COSTS 4 (Comm. Print 2008). The figures do not represent the total number killed or wounded, but rather only those, including security contractors, who have filed a claim with the Labor Department under either the Defense Base Act or War Hazard Compensation Act; further, it includes only Iraqis employed by U.S. entities.

[15] iCasualties.com, Iraq Coalition Casualty Count: Contractors, http://icasualties.org/Iraq/Contractors.aspx (last visited Apr. 12, 2010). The site cautions that the list is incomplete.

[16] *See* Grand Jury Indictment, United States v. Slough, 669 F.Supp. 2d 51 (D.D.C. 2009) (No. 08-0360 (RMU)), 2008 WL 5129244. Charges were dismissed for evidentiary reasons in December 2009, although at the time of this writing there are indications the

operations extends beyond providing security. For instance, Blackwater employees have reportedly participated in both CIA-led Predator strikes against al Qaeda operatives and "capture or kill" operations conducted in Iraq and Afghanistan. The precise nature of Blackwater's involvement, however, remains murky.[17]

At the outset of these conflicts, the activities and status of contractors were relatively unregulated in either law or policy.[18] As a result of the public attention drawn by the scale of their presence and repeated incidents of misconduct, some states have endeavored to define the legal status of contractors and to create systems whereby they can be held accountable for abuses they commit.[19] Additionally, states sending and those receiving contractors and civilian employees have negotiated status of forces agreements, which establish jurisdictional prerogatives; the agreement signed between the United States and Iraq in November 2008 is especially notable.[20] States have also begun to adopt common "best practices" regarding private military companies, as exemplified by the ICRC/Swiss government sponsored 2009 Montreux Document.[21]

In light of these circumstances, the DPH Project initially focused on contractors—especially private security contractors—and civilian government employees. However, the assembled experts soon turned their

---

government will appeal the ruling. *See* United States v. Slough, No. 08-0360 (RMU), 2009 WL 5173785 (D.D.C. Dec. 31, 2009); Timothy Williams, *Iraqis Angered at Dropping of Blackwater Charges*, N.Y. TIMES, Jan. 2, 2010, at A4.

[17] *See* James Risen & Mark Mazzetti, *CIA Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 21, 2009, at A1; Mark Mazzetti, *Outsiders Hired As CIA Planned To Kill Jihadists*, N.Y. TIMES, Aug. 20, 2009, at A1; James Risen & Mark Mazzetti, *Blackwater Guards Tied To Secret Raids by CIA*, N.Y. TIMES, Dec. 11, 2009, at A1.

[18] The vast majority of security contractors would not qualify as mercenaries because mercenaries must be recruited to take a "direct part" in hostilities (thus raising the question of whether their activities are direct participation) and cannot be nationals of a Party to the conflict. AP I, *supra* note 10, art. 47.2.

[19] *See generally* Michael Schmitt, *Contractors on the Battlefield: The US Approach*, MILITAIR RECHTELIJK TIJDSCHRIFT 264 (July–Aug. 2007); Elsea et al., *supra* note 13, at 20–31.

[20] Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 12, Nov. 17, 2008, *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf.

[21] Letter from Peter Maurer, Permanent Representative of Switz. to the U.N., to the Sec'y Gen., U.N., Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict, annex, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).

attention to groups of "irregular" forces, like those of Hamas, Hezbollah, and the al Qaeda network. From the perspective of states, consideration of the participation in hostilities of these irregular forces was even more central to the legal issues surrounding the targeting of participants in hostilities than that of contractors and employees. For instance, in Iraq, ongoing hostilities are primarily between the Iraqi armed forces (and their foreign partners) and groups such as external jihadists, Sunni extremists (e.g., the loosely affiliated groups comprising al Qaeda in Iraq), and Shi'a extremists (e.g., Muqtada al-Sadr's Jaish al-Mahdi and the Iranian funded Ketaib Hezbollah).[22]

III. The Law Regarding Direct Participation

As noted in the Introduction, international humanitarian law seeks reasoned accommodation of both military necessity and humanitarian concerns. The 1868 St. Petersburg Declaration reflected this balance at the outset of the modern era of IHL when, in addressing small explosive projectiles, it "fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity."[23] As only states make international law, through either treaty or practice (customary law), IHL necessarily takes account of states' military requirements on the battlefield. Indeed, norms that unduly hamper military operations have little hope of emerging.

At the same time, states have an interest in both protecting their populations and property from the carnage of warfare, as well as ensuring their combatants do not suffer unnecessarily. Accordingly, the St. Petersburg Declaration noted that "[t]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy."[24] These concerns are expressed in two "cardinal" principles of IHL recognized by the International Court of Justice: distinction and the prohibition of unnecessary suffering.[25] Only the principle of distinction is of

---

[22] CATHERINE DALE, CONG. RESEARCH SERV., RL 34387, OPERATION IRAQI FREEDOM: STRATEGIES, APPROACHES, RESULTS, AND ISSUES FOR CONGRESS 52–56 (2009).

[23] St. Petersburg Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight, Preamble, Dec. 11, 1868, 138 Consol. T.S. 297.

[24] *Id.*

[25] Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), Advisory Opinion, 1996 I.C.J. 226 ¶ 78 (July 8). The prohibition of unnecessary suffering addresses the means and methods of warfare used against the enemy and has no bearing on who qualifies as either a member of the armed forces or a direct participant in hostilities.

immediate relevance to the issue of "direct participation". Distinction appears in codified form for international armed conflict in Article 48 of the 1977 Additional Protocol I to the 1949 Geneva Conventions: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[26] Additional Protocol I specifically addresses civilians in Article 51.2 by providing that, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[27] These provisions undoubtedly replicate customary law and thus bind even states that are not party to the treaty, such as Israel and the United States.[28] Analogous prohibitions, also customary in nature, exist for non-international armed conflict.[29]

The principle of distinction acknowledges the military necessity prong of IHL's balancing act by suspending the protection to which civilians are entitled when they become intricately involved in a conflict. Article 51.3 of Additional Protocol I conditions the principle of distinction with the caveat that it applies "unless and for such time as [civilians] take a direct

---

[26] AP I, *supra* note 10, art. 48.
[27] *Id.* art. 51.2.
[28] ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), rules 1, 2, and 7 [hereinafter CIHL]. States that are not party to the Additional Protocols nevertheless acknowledge their customary nature. *See*, *e.g.*, DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, § 8-2 (2007), [hereinafter NWP 1-14M]. The acts clearly represent war crimes. *See*, *e.g.*, Rome Statute of the International Criminal Court art. 8.2(b)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The International Criminal Tribunal for the Former Yugoslavia has held the principle of distinction, as reflected in Article 51 of Additional Protocol I, to be customary in nature. *See*, *e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, ¶ 110 (July 29, 2004); Prosecutor v. Galic, Case No.IT-98-29-T, Judgment, ¶ 45 (Dec. 5, 2003).
[29] Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts art 13.2, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]; *See* CIHL, *supra* note 28, rules 1–2 ; Rome Statute, *supra* note 28, art. 8.2(e)(i); MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006), *reprinted in* 36 ISR. Y.B. HUM. R. (Special Supplement) § 2.1.1.1 (2006) [hereinafter NIAC Manual]; Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–127 (Oct. 2, 1995).

part in hostilities."[30] Article 13.3 of Additional Protocol II sets forth an identical limitation in the case of non-international armed conflict.[31] The notion appears elsewhere in IHL instruments and guidelines, including Common Article 3 to the 1949 Geneva Conventions,[32] the Rome Statute of the International Criminal Court,[33] and military manuals.[34] That it constitutes customary international law is beyond dispute.[35]

The combined effect of the aforementioned provisions is threefold. First, the "direct participation" caveat means that, despite the general protection from attack that civilians enjoy, those who engage in acts amounting to direct participation in hostilities may be specifically and intentionally targeted (although the operations remain subject to all other IHL requirements). Second, to the extent that civilians may be attacked under the "direct participation" rule, their death or injury need not be considered in proportionality assessments.[36] Third, by the same logic, states need not consider harm to direct participants when taking "constant care" to "spare" civilians during an attack. This customary law "precautions in attack requirement", found in Article 57 of Additional Protocol I, directs

---

[30] AP I, *supra* note 10, art. 51.3.

[31] AP II, *supra* note 29, art. 13.3.

[32] "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . ." Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3.1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art 3.1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 7, art. 3.1; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3.1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. *See also* AP I, *supra* note 10, arts. 47, 67.1 (regarding the definition of mercenary and dealing with civil defense, respectively).

[33] Rome Statute, *supra* note 28, arts. 8.2(b)(i), 8.2(e)(i).

[34] *See*, *e.g.*, NWP 1-14M, *supra* note 28, § 8.2.2; United Kingdom Ministry of Defence, THE MANUAL ON THE LAW OF ARMED CONFLICT § 5.3.2 (2004) [hereinafter UK Manual].

[35] CIHL, *supra* note 28, rule 6; NIAC Manual, *supra* note 29, § 2.1.1.2; HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285 ¶ 30.

[36] By the customary international law principle of proportionality, reflected in Articles 51.5(b), 57.2(a)(iii), and 57.2(b) of Additional Protocol I, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" is prohibited. AP I, *supra* note 10. *See also* CIHL, *supra* note 28, rule 14; NIAC Manual, *supra* note 29, § 2.1.1.4; UK Manual, *supra* note 34, § 5.33; NWP 1-14M, *supra* note 28, § 8.3.1.

attackers to examine alternative methods (tactics) and means (weapons) of warfare to minimize incidental loss of civilian life or injury to civilians.[37]

Despite the ostensible textual clarity of the aforementioned norms, the devil lies in the details. The DPH Project addressed three unresolved issues: 1) Who qualifies as a civilian in the context of direct participation?; 2) What conduct amounts to direct participation?; and 3) When is a civilian directly participating such that he or she is subject to attack? Curiously, the Interpretive Guidance took on a fourth issue that was unnecessary to a direct participation analysis: the rules and principles governing the conduct of attacks against direct participants. Its treatment of this fourth subject has led to what has been perhaps the fiercest criticism of the Guidance.

A. The Concept of "Civilian"

The concept of civilian status is the greatest source of controversy, albeit principally with respect to the IHL governing detention. Reduced to basics, the issue, which surfaces only in international armed conflict, is whether civilians who take up arms qualify for treatment as: 1) prisoners of war under the 1949 Third Geneva Convention; 2) civilians under the 1949 Fourth Geneva Convention; or 3) "unlawful combatants" who enjoy only basic protection, such as that set forth in Common Article 3 to the 1949 Geneva Conventions and Article 75 of Additional Protocol I.[38]

In light of this debate, the ICRC elected to avoid the quandary by expressly limiting its analysis of civilian status in the Interpretive Guidance to the context of direct participation; it is not meant to have any bearing on the status of direct participants in detention situations. This bifurcated approach is not without risks. Despite the cautionary caveat as to the scope of application, treating direct participants differently than civilians proper seems to support the proposition that they are a separate category and, thus, not entitled to the protections civilians enjoy during detention under the

---

[37] *See* AP I, *supra* note 10, art. 57.2(a)(ii); CIHL, *supra* note 28, at rule 17; NIAC Manual, *supra* note 29, § 2.1.2; UK Manual, *supra*, § 5.32.4; NWP 1-14M, *supra* note 28, § 8.3.1.

[38] *See* Yoram Dinstein, *Unlawful Combatancy*, INTERNATIONAL LAW AND THE WAR ON TERROR, 79 NAVAL WAR C. INT'L L. STUD. 151 (Fred Borch and Paul Wilson eds.) (2003) (discussing status); *See also* KENNETH WATKIN, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, OCCASIONAL PAPER, WARRIORS WITHOUT RIGHTS? COMBATANTS, UNPRIVILEGED BELLIGERENTS, AND THE STRUGGLE OVER LEGITIMACY (2005); Adam Roberts, *Counter-terrorism, Armed Force, and the Laws of War*, 44 SURVIVAL 7 (2002).

Fourth Geneva Convention. At the same time, participants typically lack protection as prisoners of war under the Third Geneva Convention because they fail to comply with Article 4A(2)'s requirements that "members of other militia and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict" be "commanded by a person responsible for his subordinates," bear a "fixed distinctive sign recognizable at a distance," carry arms openly, and conduct operations "in accordance with the laws and customs of war."[39]

The Interpretive Guidance formula for international armed conflict defines civilians negatively as "all persons who are neither members of the armed forces of a party to the conflict nor participants in a levee en masse."[40] On its face, the definition is unexceptional. It excludes all those encompassed by Article 1 of the 1907 Hague IV Regulations and Article 4 of the Third Geneva Convention and thus presents a classic understanding of the term "civilian".[41] It also excludes armed forces as defined in Article 43.1 of Additional Protocol I.[42] The ongoing controversy over Additional Protocol I's relaxation of the Hague IV and Third Geneva Convention's standards for combatant status has no bearing on the issue of direct participation, as the experts in the DPH Project agreed that individuals considered armed forces under Article 43.1 of Additional Protocol I should be targetable at all times.[43]

---

[39] GC III, *supra* note 7, art. 4A(2)(a)–(d). This provision was based on certain partisan groups in World War II that were not formally part of their countries' armed forces but that fought on behalf of a party to the conflict (e.g., Tito's partisans in Yugoslavia). It is not applicable to the modern phenomenon of security contractors.

[40] IG, *supra* note 2, at 26.

[41] The Hague IV Regulations refer to armies, militia, and volunteer corps fulfilling the same four conditions echoed in GC III. *See* Hague IV R, *supra* note 8, art. 1; GC III, *supra* note 7, art. 4A(2).

[42] "[A]ll organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." AP I, *supra* note 10, art. 43.1.

[43] Rather, the issues are the combatant privilege of engaging in hostilities and qualification for prisoner of war status. The United States' objection that Additional Protocol I is "fundamentally and irreconcilably flawed" is based in part on the assertion that it "would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population . . . ." Transmittal from President Ronald Reagan to the U.S. Senate (Jan. 29, 1987), *reprinted in Agora: U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910 (1987).

Applying this definition, the Interpretive Guidance concludes that the term "armed forces" for direct participation purposes includes both regular armed forces and any organized armed group that belongs to a party to the conflict. So long as these criteria (organized, armed, and belonging) are met, members of the latter category—with an important caveat discussed below—are not civilians and may be attacked at any time. Of particular importance is the fact that the direct participation standard's limitation of attacks to the period during which the targeted individual is engaged in hostilities ("for such time") does not apply to members of the armed forces. In justification of its approach, the Interpretive Guidance correctly points out that "it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war."[44]

The first two requirements, that the group be organized and armed, met with no opposition in the group of experts. On the contrary, treating an organized armed group as the equivalent of a regular armed force was viewed as a significant compromise on the part of those who wished to limit the notion of direct participation in order to retain protection from attack for as many individuals as possible. The compromise resolved, to some extent, the highly controversial "for such time" aspect of the direct participation rule. Experts concerned with the "for such time" limitation had previously worried about the incongruity that would result from the lack of an analogous temporal limitation for members of the armed forces.[45] After all, if irregular forces benefited from the limitation, they would enjoy greater protection from attack than regular forces, which would thereby disrupt the general balance of military necessity and humanity that permeates IHL. The decision to treat organized armed groups as armed forces appeared an appropriate solution.

An alternative approach championed by a number of the experts could also have maintained the requisite balance. By it, members of organized armed groups that did not fully qualify as combatants under the criteria of Article 4 of the Third Geneva Convention would remain civilians. However, insofar as they are members of a group that exists for the very

---

[44] IG, *supra* note 2, at 22.

[45] *See*, *e.g.*, W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 143 (1990).

purpose of engaging in hostilities, the "for such time" criterion must be interpreted as extending throughout the duration of their membership. Unlike civilians who act on their own, group members do not regain protection during periods in which they abstain from hostile activities (a contentious issue discussed below); instead, members must opt out of group membership in order to enjoy protection from attack. Although it might be difficult to discern when a member has left a group, proponents of this position argued that the direct participant should bear the risk of mistake, not his or her opponents, as IHL does not envision the participation of the former in the first place. For those DPH Project members who wished to preserve, in the context of detention, the characterization of direct participants as "civilians", this approach had the benefit of maintaining a parallel characterization in the direct participation analysis. At the same time, it met the concerns of others who wished to ensure that direct participants remain targetable as long as they are members of the group, not just when they engage in hostilities.

Consensus foundered on the third criterion: that the group in question must "belong to a party to the conflict." The Interpretive Guidance defines the notion of belonging to a party, which surfaced only at later stages of the DPH Project discussions, "as requiring at least a de facto relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting."[46]

In support of its position, the Interpretive Guidance cites the nonbinding ICRC Commentary to Article 4 of the Third Geneva Convention.[47] Yet, the allegedly supportive commentary actually accompanies a provision regarding eligibility for POW status. There is complete agreement that members of an organized armed group should not be entitled to POW status unless, *inter alia*, the group belongs to a party to the conflict; the underlying logic of the POW protection does not fit those who are not entitled under IHL to fight for a state. It may be sensible to shape detention issues by relationship to a belligerent, as states understandably wish to protect those who fight on their behalf. However, in targeting matters, the appropriate relationship logically should be determined by whom the individuals to be attacked are fighting *against*.

---

[46] IG, *supra* note 2, at 23.
[47] *See id.* n.20.

This is, after all, the foundational premise of direct participation. As will be seen, the Interpretive Guidance itself defines direct participation by reference to acts "likely to adversely affect the military operations or military capacity of a party to the conflict."[48] In other words, direct participants are "the enemy". It is this relationship that should have been employed in defining civilian status—groups that comprise "the enemy" should not benefit from treatment as civilians for targeting purposes, whether in international or non-international armed conflict.

Recall the Interpretive Guidance's accurate assertion that the logic of the principle of distinction precludes treatment of irregular armed forces under the more protective legal regime afforded civilians because irregular armed forces fail to distinguish themselves from the civilian population, carry their arms openly, or conduct their operations in accord with the laws of war. Precisely the same logic should apply to groups that do not belong to a party to the conflict.

In what was possibly a rebalancing effort, the Interpretive Guidance argues that "organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict."[49] The "belonging" criterion makes sense in the context of non-international armed conflict, for the essence of such conflicts is fighting between a state and a non-state armed group. Nevertheless, from a practical perspective, it is problematic to treat organized armed groups that do not belong to a party to an international armed conflict as involved in a non-international armed conflict. Having just excluded organized armed groups not belonging to a party from the ambit of armed forces—and thereby shielded them from attack when they do not participate in hostilities—under the law of international armed conflict, the Interpretive Guidance applies the non-international armed conflict standard to treat those who are members of "organized armed groups" as other than civilians. The result of this normative detour is that members of the organized armed group may not be attacked by virtue of membership in the group pursuant to the law of *international* armed conflict, but they may be attacked pursuant to that of *non-international* armed conflict. This difference is one certain to be lost on both those being attacked and those mounting attacks.

---

[48] *Id.* at 46.
[49] *Id.* at 24.

Aside from the practical illogic of the approach, the distinction makes little sense in legal terms. Admittedly, there is no question that international and non-international conflicts can coexist in the same battlespace.[50] The clearest example occurs when a non-international conflict is already underway at the time an international armed conflict breaks out. For instance, a non-international armed conflict between the Taliban-led Afghan government and the Northern Alliance was already underway when the international armed conflict between the United States and Afghanistan (the Taliban) commenced. The latter conflict did not change the character of the pre-existing one. Similarly, if a state sends in its military to support rebel forces in a non-international armed conflict, or exerts control over those forces, the conflict between the two states is international in character.[51] In another example, if a state splits into separate states, an ongoing non-international conflict transforms into an international one.[52]

However, the situation envisaged in the Interpretive Guidance differs dramatically from these scenarios. It presumes an ongoing international armed conflict in which irregular forces not belonging to a party to the conflict become involved in the hostilities. The paradigmatic example would be the conflict in Iraq, where irregular forces are engaged in hostilities against the American-led coalition. Some of these forces joined in the conflict for reasons wholly unrelated to support of the Iraqi government.

---

[50] Yoram Dinstein labels these conflicts "horizontally mixed". YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 14–15 (2004). *See also* Christopher Greenwood, *International Law and the "War Against Terror"*, 78 INT'L AFFAIRS 301, 309 (2002); Christopher Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, 2 MAX PLANCK Y.B. OF UNITED NATIONS LAW 97, 117 (1998).

[51] The International Court of Justice addressed this situation in the Nicaragua Case. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 115 (June 27). Also, in *Tadic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that "for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State. . . . [I]t must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity." Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 120, 131 (July 15, 1999). The ICTY distinguished its holding on this point from that in the Nicaragua Case, where the ICJ had set a higher standard: effective control. If a state assists the government in a non-international armed conflict, even to the point of providing combat troops, the conflict remains non-international in nature.

[52] *Tadic*, Case No. IT-94-1-A, Appeals Judgment, ¶ 162.

Indeed, most Shiite militia and Sunni jihadist groups saw defeat of the secular Iraqi government as a positive event from which they could benefit. But they were nevertheless opposed to the presence of Coalition forces and took advantage of the international armed conflict to attack them.

Seemingly, some support for the Interpretive Guidance's position is to be found in the ICRC's Commentary to Article 4 of the Third Geneva Convention. It provides that "[r]esistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict.'"[53] Careful reading of the ICRC's Commentary to Article 3 reveals, however, that the drafters of the Convention were viewing Article 3 conflicts exclusively in the guise of hostilities conducted against a force's own government. There is no hint that the ICRC envisaged hostilities against governments with which the force's government was fighting in an international armed conflict. On the contrary, the Commentary is crafted in terms of the "Party in revolt against the de jure Government", "rebellion", and "rebel Party".[54]

Adopting the organized armed groups approach, and then applying the international armed conflict criterion of "belonging to a Party", flies in the face of both the logic of the principle of distinction and the *travaux préparatoire* of the underlying black letter law. Moreover, since the Interpretive Guidance permits attack on members of groups not belonging to a party in the supposed non-international armed conflict, the practical effect of this overly legalistic approach is negligible at best. There are but two rational approaches. Either members of an organized armed group should be treated as "armed forces" for targeting purposes regardless of their ties to a belligerent party or they should be treated as direct participants in the hostilities throughout the duration of their membership in the group.[55]

---

[53] ICRC, COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 57 (Jean S. Pictet, ed.) (1960).

[54] *Id*. at 36.

[55] The Trial Chamber in *Tadic* clearly recognized the independent significance of membership when considering whether "acts taken against an individual who cannot be considered a traditional 'non-combatant' because he is actively involved in the conduct of hostilities *by membership* in some form of resistance group can nevertheless constitute crimes against humanity." Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 639 (May 7, 1997) (emphasis added).

Complicating matters is an additional criterion that edged its way into the Interpretive Guidance over the series of meetings: the requirement that the members of the organized group in question perform a "continuous combat function" before they qualify as individuals who may be attacked on the basis of membership. According to the Interpretive Guidance, continuous combat function is synonymous with direct participation; that is, group members whose function is to engage in actions that would rise to the level of direct participation (see discussion below) are subject to attack. They need not be engaging in these activities at the time they are attacked; in this sense they resemble soldiers of the regular armed forces. Members not having such functions are considered to be civilians directly participating in hostilities and may be attacked only if, and for such time as, they undertake actions qualifying as direct participation. They are treated precisely as would individuals who participate in hostilities on "a merely spontaneous, sporadic, or unorganized basis."[56] This combat function criterion applies to members of organized armed groups in both international and non-international armed conflicts.

The continuous combat function idea initially surfaced in the context of non-international armed conflict. Some of the DPH Project experts were concerned that members of organized armed groups often fail to distinguish themselves from the civilian population during internal conflicts and thereby heighten the risk of attacks on civilians due to erroneous conclusions that they are also members of an armed group. As noted in the Interpretive Guidance, membership in irregularly constituted groups

> is not consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to 'membership' within the meaning of IHL. . . . In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State Party to the conflict and its armed forces.[57]

---

[56] IG, *supra* note 2, at 34.
[57] *Id.* at 32–33.

Given these challenges, these experts felt it was useful to limit membership to individuals who were unambiguously members of the organized armed group by virtue of their involvement in combat action. Over the course of the meetings, this criterion slowly bled into international armed conflict; its evolution is reflected in the fact that the Interpretive Guidance discusses the criterion with regard to international armed conflict only in passing and entirely by reference to its application during non-international armed conflict.

Evidence of continuous combat function, according to the Interpretive Guidance, may be openly expressed

> through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.[58]

Any such determination must be "based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances."[59] The concern about identifications is somewhat counterfactual. Armed units of organized groups are sometimes distinguishable from their political or social wings, as is the case, for example, in certain circumstances with Hamas and Hezbollah. Within mixed groups, membership in the armed faction is often clear-cut: only fighters wear uniforms and carry weapons. Membership in the armed wing may also be established through reliable intelligence, such as captured membership lists or communications intercepts, or by location, such as presence at a remote insurgent camp. The point is that while membership in an organized armed group can be uncertain, it may also be irrefutable.

Furthermore, by the Interpretive Guidance's approach, members of an organized armed group who have a continuous combat function may be attacked at any time, whereas those who do not, but who periodically take up arms, must be treated as civilians directly participating in hostilities and

---

[58] *Id.* at 35.
[59] *Id.*

may only be attacked while doing so. In practice, it will usually be impractical to distinguish between the two categories. For example, if an individual is identified as having engaged in hostilities in a past engagement, how can an attacker possibly know whether the participation was merely periodic when it conducts a subsequent operation against the organized armed group?

Application of the continuous combat function criterion also badly distorts the military necessity-humanitarian balance of IHL. A requirement of continuous combat function precludes attack on members of an organized armed group even in the face of absolute certainty as to membership. In contrast, membership alone in a state's military suffices, even when there is absolute certainty that the individual to be attacked performs no functions that would amount to the equivalent of direct participation.[60] To illustrate, a cook in the regular armed forces may be lawfully attacked at any time; his or her counterpart in an organized armed group may be attacked only if he or she directly participates and then only for such time as the participation occurs.[61]

What the Interpretive Guidance appears to have missed is that international humanitarian law already accounts for situations of doubt as to whether an individual is a civilian. Article 50.1 of Additional Protocol I, a provision generally deemed reflective of customary international law,[62] provides that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[63] Accordingly, it makes little sense to justify the continuous combat function criterion on the basis of concern about an inability to distinguish members of an organized armed group from civilians or civilian affiliates of the armed group, as IHL already deals with doubt through a presumption of civilian status.

---

[60] *See* Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. OF THE RED CROSS 931 (2008) (on the issue of creating differing legal regimes for those on the battlefield).

[61] *Id.*

[62] *See* CIHL, *supra* note 28, at 23–24. The application of the rule has been subject to important qualifications. *See*, *e.g.*, UK Statement upon Ratification, ¶ (h), Jan. 28, 1998, *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument (noting the obligation of a commander to protect his or her forces); UK Manual, *supra* note 34, § 5.3.4.

[63] AP I, *supra* note 10, art. 50.1.

Even the Interpretive Guidance's development of the combat function concept displays insensitivity to practical issues. Consider its mention of an identification card as distinguishing regular from irregular armed forces. The purpose of the card is identification in the event of capture.[64] One can only wonder how it might assist an attacker to differentiate combatants from civilians in attack situations. Or consider the wearing of uniforms. When an armed group wears uniforms, the uniforms seldom clearly indicate any particular functions performed by its wearer. Except in cases of attack against isolated individuals who have been identified previously as having a continuous combat function or who are engaging in hostilities at the time of attack (in which case they could nevertheless be attacked as direct participants), the standard is highly impractical. In practice, most attacks will be launched against groups of individuals or in time-sensitive situations in which distinction based on function will prove highly difficult. Simply put, the Interpretive Guidance's solution for avoiding mistaken attacks on civilians by imposing a function criterion for attacks on group members will accomplish little.

Ultimately, the only viable approach to membership in the direct participation context is one that characterizes all members of an organized armed group as members of the armed forces (or as civilians continuously directly participating). It makes no more sense to treat an individual who joins a group that has the express purpose of conducting hostilities as a civilian than it would to distinguish between lawful combatants.

B. The Concept of Direct Participation

Whereas the Interpretive Guidance's treatment of the concept of a civilian is unacceptable due to the "belonging to a Party" and "continuous combat function" criteria, its development of the notion of direct participation is less problematic. The concept is developed from the prohibition on attacking or mistreating "persons taking no active part in the hostilities" found in Common Article 3 of the 1949 Geneva Conventions.[65] It is well accepted in international law that the terms "active" and "direct" are synonymous, whether the concept is applied in non-international or international armed conflict.[66] Unfortunately, the phrase "direct part in

---

[64] GC III, *supra* note 7, art. 17.

[65] *Id.* art 3.

[66] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998); NIAC Manual, supra note 29, § 1.1.2 (discussion). The Rome Statute employs the term "direct"

hostilities" is undefined in IHL.[67] The need for an agreed upon understanding of the phrase was therefore a primary impetus for the DPH Project.

Simply participating in hostilities does not constitute direct participation such that it would result in a loss of protection from attack. Rather, it is necessary to distinguish "indirect" from "direct" participation.[68] Doing so has generally been treated as a matter of judgment on the part of those planning, approving, and executing attacks. For instance, the U.K. Manual on the Law of Armed Conflict provides that, "[w]hether civilians are taking a direct part in hostilities is a question of fact."[69] Similarly, the U.S. Commander's Handbook on the Law of Naval Operations states that, "[d]irect participation in hostilities must be judged on a case-by-case basis . . . . Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location, attire, and other information at the time."[70] In the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia likewise noted:

> [I]t is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's

---

in referring to the concept in both international and non-international armed conflict. Rome Statute, *supra* note 28, arts. 8.2(b)(i), 8.2(e)(i).

[67] Thus, as used in treaties, it must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[68] As noted in the ICRC Commentary to Article 51.3, "There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context." ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1945 (Yves Sandoz et al. eds., 1987) [hereinafter AP Commentary]. *See also id.* ¶ 1679; Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Judgment, ¶¶ 175–76 (July 17, 2008); Third Report on the Human Rights Situation in Colombia, Inter-Am. C.H.R., OEA/Ser.L/V/II.102, doc. 9 rev. ¶ 1, Ch. IV, ¶ 56 (1999).

[69] UK Manual, *supra* note 34, § 5.3.3.

[70] NWP 1-14M, *supra* note 28, § 8.2.2.

> circumstances, that person was actively involved in hostilities at the relevant time.[71]

The challenge with case-by-case assessments was the absence of an accepted basis for making the direct participation determinations. The non-binding ICRC Commentary explains that direct participation "means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces."[72] The ICRC further defines hostilities as "acts of war which are intended by their nature and purpose to hit specifically the personnel and the material of the armed forces of the adverse Party."[73] The group of experts struggled to refine the concept of direct participation throughout the course of the DPH Project meetings. Numerous options, including proximity to the battlefront, the extent to which the individual's actions contribute to combat action, the extent of military command and control over the activities, and the degree to which the actor harbors hostile intent, were offered as possible foundational criteria for distinguishing indirect from direct participation. This author proposed a standard centered on the "criticality of the act to the direct application of violence against the enemy."[74]

From the DPH Project discussions, three common themes emerged that eventually matured into the Interpretive Guidance's "constitutive elements" of direct participation:

> 1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*);
>
> 2) There must be a direct causal link between the act and the harm likely to result either from that act or from a

---

[71] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 616 (May 7, 1997).
[72] AP Commentary, *supra* note 68, ¶ 1944. *See also* Prosecutor v. Galic, Case No.IT-98-29-T, Judgment, ¶ 48 (Dec. 5, 2003); *Strugar*, Case No. IT-01-42-A, (Appeals Judgment), ¶ 178.
[73] AP Commentary, *supra* note 68, ¶ 1679.
[74] For instance, gathering strategic intelligence would generally not be direct, whereas collecting tactical intelligence would qualify. Similarly, preparing an aircraft for a particular combat mission would qualify, while performing scheduled depot level maintenance would not. Schmitt, *supra* note 4, at 534.

> coordinated military operation of which that act constitutes an integral part (*direct causation*); and
>
> 3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).[75]

The elements are cumulative; only satisfaction of all three elements suffices to render an act one of direct participation. Although various experts entertained specific concerns about particular facets of the constitutive elements, most viewed them as, in a very general sense, reflecting the group's broad understanding.[76]

It is useful to highlight several aspects of the criteria. The threshold of harm element requires only that the act in question be likely to result in the adverse effect in question; it need not eventuate. Such effects must be of a military nature. For instance, actions that diminish the morale of the civilian population would not qualify. Although they must be military in nature, effects need not constitute an "attack", a term of art in IHL.[77] As an example, clearing mines emplaced by enemy forces or carrying out a computer network attack intended to monitor enemy tactical communications would qualify. The Interpretive Guidance usefully points out that it is not direct participation to refuse to engage in activities that might positively affect enemy operations, such as refusal to provide the enemy with information on the location of military forces.[78]

The limited notion of "harm" in the element proved controversial, as it would exclude actions by civilians that were designed to enhance a party's military operations or capacity. Of course, in warfare, harm and benefit are relative concepts; actions that weaken one side in a conflict contribute to the wherewithal of the other, and vice versa. But if a distinction is to be drawn, it must be recognized that the strengthening of enemy capacity may be just as much a concern for commanders in the field as the weakening of one's own forces. Consider the development and

---

[75] IG, *supra* note 2, at 46.
[76] *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. (forthcoming 2010) (for an analysis focusing specifically on the constitutive elements and problems therewith).
[77] "'Attacks' means acts of violence against the adversary, whether in offence or in defence." AP I, *supra* note 10, art. 49.1.
[78] IG, *supra* note 2, at 49.

production of simple improvised explosive devices (IEDs) by Iraqi insurgent forces, and their training to use them. Today, IEDs cause the greatest number of casualties in Iraq and Afghanistan, and their fielding has necessitated an enormous investment in counter-technologies. IEDs have affected the morale of troops in the field and domestic attitudes about continued human investment in the two conflicts. Clearly, the element of "harm" should have included both sides of the coin. Interestingly, it does so with respect to actions against civilians and civilian objects, which can meet the threshold test "regardless of any military harm to the opposing party to the conflict."[79] Why the Interpretive Guidance requires harm in cases not involving civilians and civilian objects is unclear.

The threshold of harm element includes inflicting death, injury, or destruction on civilians, civilian objects, and other protected entities. However, application of the notion of direct participation to attacks against protected persons and objects as well as against enemy forces is not self-evident. Additional Protocol I's definition of "attacks" as "acts of violence against the adversary, whether in offence or defence", provides the basis for their inclusion.[80] Relying on *travaux préparatoire*, the Interpretive Guidance suggests that, because the "phrase 'against the adversary' does not specify the target, but the belligerent nexus of an attack", violence directed against protected persons and objects is encompassed in the characterization of all "attacks" as acts of direct participation.[81] Case law of the International Criminal Tribunal for the Former Yugoslavia, which has held that sniping and bombardment of civilians amount to an attack, is in accord.[82] Although novel, the inclusion of harming protected persons and objects in the threshold of harm element drew minimal objection from the assembled experts. That said, it is a fair question as to why the criterion should be limited to death, injury, or destruction. Would it not, for instance, constitute direct participation to force inhabitants of a particular ethnic group to leave an occupied area during a conflict in which ethnicity factored? A more useful criterion in this regard would distinguish actions directly related to the armed conflict from those that are merely criminal in nature.

---

[79] IG, *supra* note 2, at 50.
[80] AP I, *supra* note 10, art. 49.
[81] IG, *supra* note 2, at 49 (*citing* Diplomatic Conference of 1974–77, CDDH/II/SR.11, at 93f).
[82] Prosecutor v. Galic, Case No.IT-98-29-T, Judgment, ¶ 27 (Dec. 5, 2003); Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 282, 289 (Jan. 31, 2005).

The second element, direct causation, is rooted in the ICRC Commentary to both Additional Protocols I and II.[83] During the DPH Project proceedings, this author suggested that, based on the Commentary text,

> direct participation . . . requires 'but for' causation (the consequences would not have occurred but for the act), causal proximity (albeit not direct causation) to the foreseeable consequences of the act, and a *mens rea* of intent; the civilian must have engaged in an action that he or she knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way.[84]

Eventually, this proposal matured into the less legalistic causation formula set forth in the Interpretive Guidance.

The Interpretive Guidance's explanation of directness is strict on its face, arguably overly so. It requires that the harm caused by an act "be brought about in one causal step."[85] The group of experts agreed that the relationship between the action in question and the harm caused should be relatively direct, but at no time did anyone suggest that it had to occur in but a single step. For instance, a civilian who gathers information on the movement of particular forces may report that information to an intelligence fusion center that in turn studies it and passes on the resulting analysis to a mission planning cell. The cell, depending on such factors as risk, value, and availability of attack assets, may decide to continue monitoring those forces and to only attack them once they are confirmed present and determined vulnerable. The causal link would be more than a single step, but the information would be no less critical to the ultimate

---

[83] AP Commentary, *supra* note 68, ¶ 1679 (noting, in the context of an international armed conflict, that "[d]irect participation in hostilities implies a direct casual relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place"); *id.* ¶ 4787 (explaining in the context of a non-international armed conflict that the notion of direct participation "implies that there is a sufficient casual relationship between the act of participation and its immediate consequences").
[84] Schmitt *supra* note 4, at 533; DPH PROJECT, SUMMARY MEETING REPORT 11, 25 (2004), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2004-07-report-dph-2004-icrc.pdf [hereinafter DPH Project (2004)]; DPH PROJECT, SUMMARY MEETING REPORT 28, 34 (2005), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2005-09-report-dph-2005-icrc.pdf [hereinafter DPH Project (2005)].
[85] IG, *supra* note 2, at 55.

attack. The initial identification of the forces surely represents direct participation.

As the "one causal step" criterion is not developed to any degree in the Interpretive Guidance, it remains unclear whether it is merely a poorly drafted explanation of the agreed upon need for a clear link between the act and the ensuing harm or whether it reflects an actual, and if so, flawed, requirement. The Interpretive Guidance's discussion would seem to suggest the former, for its examples of indirect participation—imposing economic sanctions, conducting scientific research and design, producing weapons, recruiting forces, and providing general logistics support—are far removed in the causal sense from the harm caused to the enemy.[86]

The reference to "one causal step" is unfortunate, as the constitutive element itself sets forth the essential requirement that the act must constitute "an integral part" of the operation causing the harm. "Integral" is not to be equated with "necessary". Although a certain action may constitute a critical facet of a military operation, in some cases the operation may nevertheless proceed without it, albeit with reduced likelihood of success. The classic example is again intelligence. While an attack typically has a greater chance of success and poses less risk to the attacker as the degree and reliability of intelligence increases, the absence of particular intelligence may not preclude its execution. The fact that the additional intelligence is not indispensable does not exclude its collection from the ambit of direct participation.

The Interpretive Guidance offers several examples of direct and indirect causation. Experts were particularly divided over the assembly and storage of improvised explosive devices, which the Interpretive Guidance labels as indirect participation. Based on the "one casual step" criterion, it is true that such activities would not qualify, but this illustrates the weakness of the standard. As the conflicts in Afghanistan and Iraq have exemplified, the use of IEDs is an effective tactic against superior forces. IEDs are often assembled and stored in close proximity to the battlefield by members of armed groups. Although the precise location and time at which they will be used may not be known in advance, they will likely be employed soon after their assembly. In this sense, the assembler of an IED is comparable to a "lookout" who reports the movement of enemy forces down a road. The precise attack for which the information will be used may be uncertain

[86] *Id.* at 53.

initially. However, because positional information is of fleeting value, it is likely to be used within a certain time frame and in a particular area; hence the general agreement that serving as a lookout represents direct participation. The Interpretive Guidance went astray by equating assembly of an IED with the production of munitions in a factory far removed from the battlefield, which all the experts agreed is indirect in nature. Like intelligence activities, the production of weapons is case-specific. In some circumstances, IED assembly and storage will constitute direct participation; in others it will not.

Curiously, similar logic undergirds the Interpretive Guidance's sensible treatment of direct causation in collective operations. The Guidance provides that, "where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly cases such harm."[87] An excellent example, developed by the experts during the DPH Project meetings, was an unmanned aerial vehicle (UAV) attack that involves a pilot remotely operating the UAV, another person controlling the weapons, a communications specialist maintaining contact with the craft, and a commander in overall control. All are direct participants.

Even greater controversy erupted over the treatment of human shields. All experts agreed that civilians forced to shield a military objective are not direct participants in hostilities. However, there was marked disagreement over the status of those who served as voluntary shields.

The Interpretive Guidance correctly takes the position that "[w]here civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities."[88] For instance, civilians may block a bridge across which military vehicles are advancing. However, the Interpretive Guidance goes on to suggest that "in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective."[89] The Interpretive

[87] *Id.* at 54–55.
[88] *Id*. at 56.
[89] *Id*. at 57.

Guidance therefore argues that in such a case the shields' voluntary participation does not qualify as direct. As non-participating civilians, the presence of the shields accordingly must be considered when assessing proportionality. In extreme cases, a shield's intentional actions may so alter the proportionality calculation that an attack on the target would cause excessive harm to civilians relative to the anticipated military advantage and thus bar the operation's execution as a matter of law.

Many of the experts, especially those with actual military experience, vehemently opposed this position.[90] As with other Interpretive Guidance provisions, the voluntary human shields stance fails to fairly balance military necessity with humanitarian concerns. From an attacker's perspective (the military necessity prong), it does not matter why an attack cannot be mounted. Whether the obstacle is physical or legal, any military advantage that might have accrued from the attack is forfeited. Indeed, the legal obstacle is often the more effective one. A physical obstacle can be removed or otherwise countered in many situations; a legal prohibition is absolute. Few would contest the characterization of actively defending a military objective as direct participation. However, the possibility that images of civilian casualties might be broadcast globally would generally serve as a far greater deterrent to attack than many modern air defense systems employed by nations such as the United States and the United Kingdom. This very fact motivates the voluntary shielding in the first place.[91] Finally, one has to query why IHL would distinguish between those who physically protect a military objective from those who intentionally misuse the law's protective

---

[90] *See* DPH Project (2004), *supra* note 84, at 6; DPH PROJECT, SUMMARY MEETING REPORT 44 (2006), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2006-03-report-dph-2006-icrc.pdf [hereinafter DPH Project (2006)]; DPH PROJECT, SUMMARY MEETING REPORT 70 (2008), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2008-05-report-dph-2008-icrc.pdf [hereinafter DPH Project (2008)]. On the issue generally, see Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. INT'L L. 292 (2009). For a review of commentary on the subject, see Rewi Lyall, *Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States*, 9 MELB. J. INT'L L. 313 (2008). In the Targeted Killings Case, the Israeli Supreme Court held that voluntary human shields were direct participants, while involuntary human shields were not. HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285 ¶ 36.

[91] It is common in modern conflict for a party to use "lawfare", the use of law as a "weapon" by creating the impression, correct or not, that an opponent acts lawlessly. On lawfare, see Charles Dunlap Jr., *Law and Military Interventions: Preserving Military Values in 21st Century Conflicts* (Harvard Univ. Carr Ctr., Working Paper, 2001).

provisions to prevent an otherwise lawful attack. It would seem that the latter poses the greater risk to humanitarian ends by undermining respect for IHL.

Proponents of the Interpretive Guidance's approach object to the normative consequence that would result if voluntary shields were characterized as direct participants: they may resultantly be directly attacked. While accurate as a matter of law, such concerns reveal unfamiliarity with military doctrine. One of the time-honored "principles of war" is economy of force, which holds that commanders should only use that amount of force necessary to attain the sought-after military advantage. Employing greater force wastes assets that would otherwise be available for employment against other military objectives.[92] Therefore, those who urge that voluntary human shields should be treated as direct participants embrace the characterization not because they want the shields to be subject to attack, but rather because it will preclude the inclusion of their death or injury in the proportionality calculation and thereby maintain the delicate military necessity-humanitarian considerations balance.

The third constitutive element of direct participation, belligerent nexus, requires that the act in question "not only be objectively likely to inflict harm that meets the first two criteria, but it must also be specifically designed to do so in support of a party to an armed conflict and to the detriment of another."[93] There was significant discussion during the meetings of whether the intent of the actor was relevant; that is, whether the actor had to harbor a desire to affect the hostilities before his or her conduct could be deemed direct participation.[94] Despite protestations by some experts who argued that soldiers on the battlefield are regularly called upon to assess the intent of others (e.g., in situations of self-defense or when

---

[92] U.S. joint doctrine defines economy of force as the "judicious employment and distribution of forces. It is the measured allocation of available combat power to such tasks as limited attacks, defense, delays, deception, or even retrograde operations to achieve mass elsewhere at the decisive point and time." JOINT CHIEFS OF STAFF, JOINT OPERATIONS, (JOINT PUBL'N 3-0) A-2 (2008).

[93] IG, *supra* note 2, at 58. The criterion of belligerent nexus should not be confused with the requirement of nexus to an armed conflict for the purpose of qualifying as a war crime. *See*, *e.g.*, Prosecutor v. Kunarac, Case No. IT-96-23 & 231A, Appeal Judgment, ¶ 58 (June 12, 2002); Prosecutor v. Rutaganda, Case No. ICTR-96-3, Appeal Judgment, ¶ 570 (May 26, 2003).

[94] DPH Project (2005), *supra* note 84, at 9, 26, 34, 66; DPH Project (2006), *supra* note 89, at 50; DPH Project (2008), *supra* note 89, at 66.

maintaining order during a stability operation), the majority agreed that the better approach focused on an act's objective purpose. Doing so removes such issues as duress or age from the analysis, which is an appropriate consequence, as most experts concurred that, for example, civilians forced to participate in military operations and child soldiers can be direct participants.

Examples of acts that might qualify as direct participation on the basis of the first two elements but fail due to a lack of belligerent nexus include assaults against military personnel for reasons unrelated to the conflict, theft of military equipment in order to sell it, defense of oneself or others against unlawful violence (even when committed by combatants), exercise of police powers by law enforcement authorities, and civil disturbances unrelated to the conflict. The key question is whether the activities are intended to harm one party to the conflict, usually to the benefit of another.

The sole problem with the belligerent nexus criterion is the requirement that the act be "in support of a party to the conflict and to the detriment of another." As noted in the discussion of the concept of civilian, there is substantial opposition to the requirement that an organized armed group belong to a party to the conflict in order to qualify as an armed force. For those who oppose the requirement, including this author, the belligerent nexus criterion should be framed in the alternative: an act in support or to the detriment of a party. This would account for cases where an armed group might engage in operations against one party without intending to assist its opponent. For example, an armed group might wish to fight an invading force in the hope of situating itself to seize power. Of course, in most cases, direct participation is a zero-sum game. To the extent one side is harmed, the other benefits.

C. Temporal Aspects of Direct Participation

The qualifier "for such time" in the direct participation norm has long been a source of disagreement. In the 2006 *Targeted Killings Case*, the Israeli government argued that the phrase did not reflect customary international law but rather was simply a treaty restriction that limited only states party to the relevant instruments (principally the Additional Protocols). The Israeli Supreme Court rejected this contention by correctly

noting that the issue was not whether the "for such time" limitation was customary but rather how to interpret it.[95]

Before exploring the "for such time" notion, it is important to emphasize that this concept does not apply to the actions of organized armed groups. All experts eventually agreed that in international armed conflict timing is a non-issue for organized armed groups that belong to a party to the conflict because their members do not qualify as civilians (at least by the approach taken in the Interpretive Guidance). As to groups that do not belong to a party in an international armed conflict, the better position is that they too cannot qualify as civilians. But even under the narrower approach adopted in the Interpretive Guidance, such groups would be involved as parties in a non-international armed conflict such that the concept of direct participation would be equally inapplicable to them. The net result of both positions is the same: there is no issue of direct participation, and therefore of temporality, for organized armed groups (at least regarding members with a continuous combat function, if one accepts this requirement). Consequently, the only instance in which the "for such time" issue arises is with respect to individuals whose involvement in the hostilities is spontaneous, sporadic, or temporary.

The Interpretive Guidance takes the position that "measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of the act."[96] This formula derives in part from the Commentary to the direct participation articles in Additional Protocols I and II. The former provides that a number of delegations to the Diplomatic Conference viewed direct participation as including "preparations for combat and return from combat" and that "once he ceases to participate, the civilian regains his right to the protection."[97] The latter states that a civilian loses protection "for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked."[98]

---

[95] Targeted Killings Case, IsrSC 57(6), at ¶ 38. *See also* Prosecutor v. Blaskic, Case No. IT-95-14-A, Appeal Judgment, ¶ 157 (July 29, 2004).
[96] IG, *supra* note 2, at 65.
[97] AP Commentary, *supra* note 68, ¶¶ 1943–44.
[98] *Id.* ¶ 4789.

During the DPH Project meetings, the experts failed to achieve consensus over the meaning of this "for such time" standard, other than to generally agree that it was customary in nature. Two issues proved irresolvable. The first surrounds the precise moment at which direct participation begins and ends. According to the Interpretive Guidance, preparatory measures "correspond to what treaty IHL describes as 'military operation[s] preparatory to an attack'."[99] That phrase, as well as the term "deployment", is found in Additional Protocol I, Article 44.3, albeit in connection with the question of when combatants are obligated to distinguish themselves from the civilian population.[100] However, the reference back to the treaty text proves tautological, for the Commentary offers no indication of those actions that constitute a military operation preparatory to attack. Complicating matters, the Commentary acknowledges that the term deployment "remained the subject of divergent views" at the Diplomatic Conference.[101]

The Interpretive Guidance takes a restrictive approach to the timing issue by suggesting that preparatory measures "are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act." Actions "aiming to establish the general capacity to carry out unspecified hostile acts do not" rise to this level.[102] Deployment "begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation", whereas "return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation."[103] The key is the extent to which an act that takes place prior to or after a hostile action amounts to a concrete component of an operation.

An alternative view popular among the group of DPH experts looked instead to the chain of causation and argued that the period of participation should extend as far before and after a hostile action as a

---

[99] IG, *supra* note 2, at 65.
[100] AP I, *supra* note 10, art. 44.3. "Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack." *Id.* A combatant is also obliged to carry arms openly, "during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate." *Id.* art. 44.3.b.
[101] AP Commentary, *supra* note 63, ¶ 1714.
[102] IG, *supra* note 2, at 66.
[103] *Id.* at 67.

causal connection existed.[104] The best example is that discussed above: the assembly of improvised explosive devices. Recall that the Interpretive Guidance excludes assembly from direct participation; an individual who acquires the materials and builds an IED that he eventually employs is only directly participating once he begins the final steps necessary to use it. By the alternative approach, the acquisition of the materials necessary to build the device as well as its construction and emplacement comprise preparatory measures qualifying temporally as the period of direct participation.

The second point of controversy regarding the "for such time" standard has become known as the "revolving door" debate. It is popularly symbolized by the farmer who works his fields by day, but becomes a rebel fighter at night. According to the Interpretive Guidance, individuals who participate in hostilities on a recurrent basis regain protection from attack every time they return home and lose it again only upon launching the next attack; hence the revolving door as the farmer passes into and out of the shield of protection from attack.

Although the Interpretive Guidance acknowledges that a revolving door exists, it claims the phenomenon serves as an "integral part, not a malfunction of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat."[105] There are two holes in this logic. First, the reason civilians lose protection while directly participating in hostilities is because they have chosen to be part of the conflict; it is not because they represent a threat. Indeed, particular acts of direct participation may not pose an immediate threat at all, for even by the restrictive ICRC approach, acts integral to a hostile operation need not be necessary to its execution. Instead, the notion of "threat" is one of self-defense and defense of the unit, which is a different aspect of international law. It is accounted for in operational procedures know as rules of engagement, which are based as much in policy and operational concerns as in legal requirements. To the extent it is based in law, self-defense applies to civilians who are not directly participating in hostilities rather than those who are participating (as they may be attacked without any defensive purpose).

---

[104] *See*, *e.g.*, Yoram Dinstein, *Distinction and the Loss of Civilian Protection in Armed Conflict*, *in* 84 INTERNATIONAL LAW STUDIES 183, 189-90 (Michael D. Carsten ed., 2008), *reprinted in* 38 ISR. Y.B. HUM. R. 1 (2008); *See also* Kenneth H. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 17 (2004).
[105] IG, *supra* note 2, at 70.

Apart from the structural distortion of the revolving door phenomenon, the approach makes no sense from a military perspective. For instance, in asymmetrical warfare, individual insurgents typically mount surprise attacks; sometimes the attack does not occur until long after the insurgents have departed the area, as with IED or land mine attacks. Without an opportunity to prepare for attack, the best option for countering future attacks is to locate insurgent "hideouts" through human and technical intelligence and to target these hideouts when the insurgents are likely present. Yet, by the Interpretive Guidance's approach, once the insurgents return from an attack, they are "safe" until such time as they depart to attack again. Again, the Interpretive Guidance has thrown the military necessity-humanitarian considerations balance wildly askew.

The better approach is one whereby a civilian who directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal.[106] He or she may be attacked between episodes of participation. It may sometimes be difficult to determine when a direct participant no longer intends to engage in further hostilities, but having enjoyed no right to participate in the first place, the direct participant should bear the risk associated with misunderstanding as to status and not combatants who have been previously attacked. This represents a far more appropriate and sensible balancing of military necessity and humanitarian concerns. After all, IHL presupposes a conflict between particular actors who are entitled to use force: combatants. Charging direct participants, rather than combatants, with the consequences of a mistaken conclusion as to continued involvement in the hostilities maintains this internal logic.

It might be objected that this approach violates the presumption of civilian status in cases of doubt. Most experts agreed that when doubt exists

---

[106] The United States District Court for the District of Columbia addressed the question of status as a member of an organized armed group in a 2009 habeas corpus proceeding involving a Guantanamo detainee. *See* Al Ginco v. Obama, 626 F. Supp. 2d 123 (2009). The district court held that "[t]o determine whether a pre-existing relationship sufficiently eroded over a sustained period of time, the Court must, at a minimum, look to the following factors: (1) the nature of the relationship in the first instance; (2) the nature of the intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody." *Id.* at 129. The court found the prior relationship with al Qaeda/Taliban to have been severed. *Id.* at 15.

as to whether the target is a directly participating civilian or member of the armed forces (at least doubt sufficient to cause a reasonable combatant to hesitate to act), an attack may not be mounted or continued.[107] However, the issue in this case is not doubt but rather mistake of fact: the civilian has decided to refrain from further participation in hostilities, but an attacker is unaware—and has no reason to be aware—of that fact. IHL does not prohibit the making of reasonable factual mistakes on the battlefield. International criminal law expressly acknowledges the likelihood of reasonable mistakes in the fog of war. The Rome Statute, for instance, provides for a mistake-of-fact defense when the mistake negates a mental element of the crime.[108] In particular, the offense of willfully killing civilians requires that the perpetrator have been aware of the factual circumstances that established the protected status.[109] Thus, a reasonable mistake as to the "for such time" aspect of direct participation would preclude criminal responsibility for attacking an individual who was no longer a direct participant.

IHL merely requires that actors take precautions that may prevent mistakes. With regard to the question at hand, an attacker must take feasible steps to verify that targets are not protected civilians.[110] If it becomes apparent that a targeted individual does enjoy such protection, the attack must be cancelled.[111] In the "for such time" context, the norm requires an attacker to take reasonable steps to ensure that a potential target remains subject to attack. However, the risk that an attacker's reasonable steps might not reveal that a civilian has withdrawn from hostilities can only logically be borne by the former direct participant.

IV. Restraints on the Use of Force

Possibly the area of the Interpretive Guidance that attracted the greatest criticism among the experts who participated in the DPH Project

---

[107] IG, *supra* note 2, at 74; DPH Project (2005), *supra* note 84, at 44, 67; DPH Project (2006), *supra* note 89, at 70.
[108] Rome Statute, *supra* note 28, art. 32.
[109] *See* International Criminal Court, Elements of Crimes arts. 8(2)(b)(i), 8.2(e)(i), U.N. Doc. PCNICC/2000/1/Add.2 (2000). For commentary, see generally Knut Dormann, ELEMENTS OF WAR CRIMES UNDER THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY (2002).
[110] *See* AP I, *supra* note 10, art. 57.2(a)(i); CIHL, *supra* note 28, at rule 16; UK Manual, *supra* note 34, § 5.32.2.
[111] *See* AP I, *supra* note 10, art. 57.2(b); CIHL, *supra* note 28, at rule 19.

involves "restraints on the use of force in direct attack."[112] According to the Interpretive Guidance, "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances."[113] The Guidance cites the principles of military necessity and humanity in support of this proposition.[114]

The U.K. Manual on the Law of Armed Conflict, to which the Interpretive Guidance refers, explains that the principle of necessity allows only that "degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve a legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources."[115] The latter prohibits "the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."[116]

In its discussion on restraint of force, the Interpretive Guidance misapplies the principle of necessity, as evidenced by disagreement with its treatment on the part of certain DPH experts who were also responsible for drafting the U.K. Manual. The Manual correctly notes that military necessity is one of four fundamental principles underlying the positive rules of customary and treaty IHL.[117] Specific customary and treaty rules set forth in IHL have already taken military necessity into account. Illustrative examples abound. For instance, "when a choice is possible between several military objectives for obtaining a *similar military advantage*, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."[118] Similarly, "effective advance warning shall be given of attacks which may affect the civilian

---

[112] IG, *supra* note 2, at 77

[113] IG, *supra* note 2, at 77. Use of the term "actually" is problematic for it introduces an objective test that would not account for situations in which such force reasonably appeared necessary in the circumstances, but which later proved unnecessary. However, this point is not developed here because the overall approach taken by the Interpretive Guidance is more generally flawed.

[114] IG, *supra* note 2, at 78–82 .

[115] UK Manual, *supra* note 34, § 2.2.

[116] *Id.* § 2.4.

[117] *Id.* § 2.1. The others are humanity, distinction, and proportionality.

[118] AP I, *supra* note 10, art. 57.3.

population, *unless circumstances do not permit*."[119] Most significantly, the definition of military objective requires that objects to be targeted make an effective *contribution to military action* and that their partial destruction, capture, or neutralization offer a definite *military advantage*.[120] Only when the positive law specifically cites military necessity does it come into play as a factor in itself.[121] No state practice exists to support the assertion that the principle of military necessity applies as a separate restriction that constitutes an additional hurdle over which an attacker must pass before mounting an attack. The operation is lawful so long as the target qualifies as a lawful military objective, collateral damage will not be excessive, and all feasible precautions are taken.

The flawed logic vis-à-vis necessity is mirrored in the Interpretive Guidance's citation to the principle of humanity. Humanity is equally a foundational principle of IHL rather than a positive rule. Thus, as explained in the UK Manual:

> [I]f an enemy combatant has been put out of action by being wounded or captured, there is no military purpose to be achieved by continuing to attack him. For the same reason, the principle of humanity confirms the basic immunity of civilian populations and civilian objects from attack because civilians and civilian objects make no contribution to military action.[122]

In both examples, the principle of humanity is expressed through positive rules and not general application of the principle.[123] Again, no state practice supports the application of the principle in the manner suggested by the Interpretive Guidance.

Particularly problematic is the Interpretive Guidance's assertion that "it would defy basic notions of humanity to kill an adversary or to refrain

---

[119] *Id.* art. 57.2(c).
[120] *Id.* art. 52.2 (emphasis added).
[121] As an example, GC IV, *supra* note 32, art. 53, provides that "[a]ny destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."
[122] UK Manual, *supra* note 34, § 2.4.1.
[123] AP I, *supra* note 10, arts. 41(c), 51.

from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force."[124] IHL already accounts for situations in which an opportunity to capture an enemy exists by prohibiting attacks on an individual who "clearly expresses an intention to surrender."[125] It is this rule, rather than that proposed by the Interpretive Guidance, that reflects the principle of humanity as well as the general balance between military necessity and humanitarian considerations. The crucial issue is not whether the individual in question can feasibly be captured but instead whether he or she has clearly expressed his or her intention to surrender. The claim that an individual who has not surrendered must, when feasible, be captured (or at least not attacked) is purely an invention of the Interpretive Guidance.

A requirement does exist in *human rights* law to capture rather than kill when possible. It applies primarily during peacetime as well as in certain circumstances when occupying forces are acting to maintain order.[126] The question is whether this human rights norm has any bearing on classic conduct of hostilities situations.

Although it is now well settled that human rights law does apply during armed conflict, its application is conditioned by IHL in both international and non-international armed conflict.[127] In its Advisory Opinion on the use of Nuclear Weapons, the International Court of Justice addressed the issue of the interplay between human rights law and the IHL governing attacks. It held that, while the non-derogable prohibition on arbitrary deprivation of life found in Article 6.1 of the International Covenant on Civil and Political Rights applies in times of war, the "test of what is an arbitrary deprivation of life . . . falls to be determined by the

---

[124] IG, *supra* note 2, at 82.

[125] AP I, *supra* note 10, art. 41(b).

[126] *See* McCann v. United Kingdom, 21 Eur. Ct. H.R. 97, ¶ 236 (1995). In *McCann*, the European Court of Human Rights held that "the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk." *See also* HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel (Targeted Killings Case) [2006] IsrSC 57(6) 285 ¶ 40 ("[I]f a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed" (citing Mohamed Ali v. Public Prosecutor 1 A.C. 430 (1969)).

[127] Of course, the treaty or norm in question must be intended to apply to armed conflict.

applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."[128]

The *lex specialis* dynamic explains the Interpretive Guidance's circuitous attempt to squeeze a plainly human rights norm into a restraint on attacks against direct participants under the guise of IHL. The attempt fails because the IHL analysis on which it relies is fundamentally flawed. Of course, military considerations will often augur against attacking an individual who, although not *hors de combat*, can be captured; this is especially true in counter-insurgency operations, where the rules of engagement are typically restrictive.[129] However, such considerations are grounded in policy and operational concerns and not in international humanitarian law.

Inclusion of the proposed restrictions on attack in the Interpretive Guidance was unfortunate. Quite aside from the substantive weakness of the supporting argument, it was unnecessary to the determination of either the nature of direct participation or its temporal reach. Ultimately, doing so merely provided additional fodder for criticism by many of the experts involved in the DPH Project.

V. Concluding Thoughts

Despite the critical nature of the comments above, there is much to recommend in the Interpretive Guidance. In particular, the constitutive elements of direct participation, although not bereft of flaws, represent a useful step forward in understanding the notion. The Interpretive Guidance's principal author, Dr. Nils Melzer of the ICRC, is due special commendation for this creative and insightful contribution as well as for the Herculean task of trying to pull together the work of diverse experts over a five-year period. It cannot be denied that the Interpretive Guidance brings

---

[128] Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), Advisory Opinion, 1996 I.C.J. 226 ¶ 25 (July 8). On the applicability of human rights law in armed conflict, *see, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 136 ¶¶ 105–106 (July 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116 ¶ 216 (Dec. 19).

[129] On the restrictive nature of engagements in a counterinsurgency, *see*, *e.g.*, U.S. ARMY & U.S. MARINE CORPS, COUNTERINSURGENCY, USA FM 3-24 & USMC WARFIGHTING PUB. 3-33.5 (2006). For a discussion in the context of the hostilities in Afghanistan, see Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan,* 39 ISR. Y.B. HUM. R. 99 (2009).

the issue of direct participation to the forefront of IHL dialogue—a place it should enjoy in light of the nature of conflict in the twenty-first century. The work effectively identifies and frames the issues and offers a sophisticated departure point for further mature analysis.

However, the Interpretive Guidance repeatedly takes positions that cannot possibly be characterized as an appropriate balance of the military needs of states with humanitarian concerns. In particular, the Guidance proposes incompatible legal standards for conflicts between a state's regular armed forces and non-state armed groups. Counter-intuitively, non-state actors, who enjoy no combatant privilege, benefit from greater protection than do their opponents in the regular armed forces. It is similarly disturbing that individuals who directly participate on a recurring basis enjoy greater protection than lawful combatants. Finally, the purported restraints on the use of force find little basis in international humanitarian law.

In light of these flaws, it is essential to grasp the prescriptive reach of the Interpretive Guidance. As Dr. Jakob Kellenberger, President of the ICRC, notes in his foreword to the document, "the Interpretive Guidance is not and cannot be a text of a legally binding nature. Only State agreements (treaties) or State practice followed out of a sense of legal obligation on a certain issue (custom) can produce binding law."[130] Unfortunately, the Interpretive Guidance, the product of tireless efforts on the part of the ICRC and the experts involved, sets forth a normative paradigm that states that actually go to war cannot countenance.

---

[130] IG, *supra* note 2, at 7.