

# ‘Direct Participation in Hostilities’: A Legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan

DAMIEN VAN DER TOORN\*

## ABSTRACT

The increasing difficulty in distinguishing between peaceful civilians and irregular forces in modern conflicts has necessitated closer legal analysis of the phrase ‘direct participation in hostilities’ as used in the Geneva Conventions and Additional Protocols. The International Committee of the Red Cross’s (‘ICRC’) ‘Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law’, published in June 2009, undertakes such an analysis. The Guidance may well have a significant influence on international and national tribunals considering the meaning of direct participation in hostilities, as well as the framing and implementation of rules of engagement by states for current and future operations. This article offers a critique of the Guidance both in terms of its process and nature, as well as its substantive legal analysis of the phrase. It also evaluates whether the ICRC’s interpretation strikes a reasonable balance between the ability to achieve legitimate military objectives and the protection of civilians. Finally, it considers whether the interpretation results in a ‘level legal playing field’ for all parties to a conflict.

## Introduction

Recent history has witnessed the ‘civilianisation’ of conflict. This is due to the movement of battlefields into civilian centres, as well as the introduction of large numbers of armed actors from the civilian population into armed conflict. These trends have emphasised the importance of having clear guidance to distinguish peaceful civilians from members of organised armed groups and civilians taking a direct part in hostilities. Without such clear

---

\* BA, LLB (Hons) *UQ*, LLM *London*, Principal Legal Officer, Office of International Law, Attorney-General’s Department, Commonwealth of Australia. The views expressed in this article are the author’s and do not necessarily represent those of the Australian Government.

distinctions, there is a greater risk that peaceful civilians may be erroneously targeted in situations of conflict.

Such clear distinctions are not possible without exploring the meaning of the phrase ‘direct participation in hostilities’. This phrase is derived from similar language in Common Article 3 of the *Geneva Conventions*, but is used in many different international humanitarian law (IHL) instruments. In particular, Additional Protocols I and II suspend targeting immunity from civilians who directly participate in hostilities.<sup>1</sup> However, despite its great importance, the phrase is not defined in any of these instruments. There has also been a polarised academic debate over the meaning of the term, with commentators oscillating between narrow and liberal interpretations.<sup>2</sup>

The International Committee of the Red Cross’s (ICRC) *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*<sup>3</sup> (the Guidance) seeks to clarify some of these issues by offering a legal interpretation of the phrase. This article first summarises the background to, and essential elements of, this interpretation. It then critically evaluates the Guidance both in terms of its process and nature, as well as its substantive legal analysis of the phrase. This evaluation considers whether the ICRC’s interpretation strikes a reasonable balance between the ability to achieve legitimate military objectives and the protection of civilians. It also considers whether the interpretation results in a ‘level legal playing field’ for all parties to a conflict.

## I. The Guidance

### A. Process, Scope and Status

The ICRC and the TMC Asser Institute initiated a process of clarification of the notion of ‘direct participation in hostilities’ in 2003. Five informal meetings were held up until 2008,

<sup>1</sup> See *The Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I), opened for signature 12 August 1949, art 51(3) (entered into force 8 June 1977) and the *Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts* 1977 (Additional Protocol II), opened for signature 12 August 1949, art 13(3) (entered into force 8 June 1977). The phrase is also used in the *Additional Protocol I*, arts 43(2), 45(1), 45(3), 47(2)(b)-(c), 67(1)(e) and 77(2)-(3) and in *Additional Protocol II*, art4(1) and (3)(c) and (d). The phrase has been declared to be customary international law by the Israeli High Court of Justice in *Public Committee Against Torture in Israel v Israel* (2007) 46 ILM 375 (‘*Targeted Killing Case*’) [30].

<sup>2</sup> For more restrictive interpretations see Orna Ben-Naftali and Keren R. Michaeli, ‘We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings’ (2003) 36 *Cornell International Law Journal* 233; Roy S. Schondorf, ‘Are “Targeted Killings” Unlawful? The Israeli Supreme Court’s Response: a Preliminary Assessment’ (2007) 5 *Journal of International Criminal Justice* 301. For more liberal interpretations see Michael N. Schmitt, *Direct Participation in Hostilities and 21<sup>st</sup> Century Armed Conflict* (2004), University of Oslo, accessed online at <[http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt\\_direct\\_participation\\_in\\_hostilities.pdf](http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilities.pdf)>; J. Ricou Heaton, ‘Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces’ (2005) 57 *Air Force Law Review* 155.

<sup>3</sup> International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), International Committee of the Red Cross <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/review-872-p991>>.

each involving 40-50 legal experts from military, governmental, academic and non-governmental circles, in their private capacities.<sup>4</sup> This led to a process of refinement, with the final Guidance being published by the ICRC in June 2009.

The Guidance examines the meaning of direct participation in hostilities in the context of both international and non-international armed conflicts. However, the Guidance does not intend to explore the application of the phrase to situations of detention in armed conflict, nor the use of the phrase outside IHL, such as in human rights law or *jus ad bellum* (the 'right to wage war').<sup>5</sup>

The formal status of the document is that it is 'interpretative guidance' by the ICRC for the legal meaning of the phrase 'direct participation in hostilities' as used in IHL. It represents the views of the ICRC only, though these views are informed by the expert process. The Guidance does not seek to change customary or treaty IHL or to be legally binding, though it hopes to be persuasive on the issue.<sup>6</sup> The Guidance draws on a range of sources including treaty and customary IHL, jurisprudence and military manuals.<sup>7</sup>

## **B. Concept of 'Civilian' in International and Non-International Armed Conflicts**

The Guidance begins by clarifying the concept of 'civilian' in both international and non-international armed conflicts. The purpose is to define those categories of persons who are immune from attack and, conversely, those who may be lawfully targeted.

### **I. Civilians and International Armed Conflicts**

In an international armed conflict, the Guidance states that any person who is not: a) a member of an organised armed force, group or unit under a responsible command to a party to the conflict, or b) participating in a *levee en masse*, are 'civilians' and are immune from attack. Conversely, any person falling within these categories is a combatant and may be lawfully targeted at any time. However, if a civilian takes a direct part in hostilities they forfeit their immunity and may be subject to lawful targeting for as long as they do so.<sup>8</sup>

Armed forces of a party to a conflict comprise all organised armed forces, groups or units that are under a command responsible to that party.<sup>9</sup> This includes state forces (as regulated by domestic law) as well as non-state organised armed groups that 'belong to' one of the state parties to the conflict according to the laws of state attribution.<sup>10</sup>

---

<sup>4</sup> Guidance at 9. The names of the experts are not mentioned in the final Guidance.

<sup>5</sup> Ibid 11.

<sup>6</sup> Ibid 9-10.

<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 20.

<sup>9</sup> Ibid 21.

<sup>10</sup> Ibid 23. According to the ICRC, it is essential that the organised armed group conduct hostilities on behalf, and with the agreement of, the party to the conflict.

## **2. Civilians and Non-International Armed Conflicts**

In a non-international armed conflict, the Guidance provides that any person who is not: a) a member of state armed force, or b) another organised armed group (including a dissident armed force), under a command responsible to a party to the conflict, is designated as a civilian and is immune from attack.<sup>11</sup> Conversely, any person falling within these categories may be lawfully targeted at any time. However, if a civilian takes a direct part in hostilities, they forfeit their immunity and may be lawfully targeted for so long as they do so.<sup>12</sup>

The Guidance provides that state armed forces have the same meaning as in an international armed conflict.<sup>13</sup> Membership in other organised armed groups is a significantly more difficult issue, since such membership is not regulated by domestic law and is rarely based on an act of official integration or identification. Rather, such membership may be informal, elastic, clandestine or based on some family, tribal or other affiliation.<sup>14</sup> For these reasons, there is a risk that civilians, whose support for a group does not involve direct participation in hostilities, may be incorrectly targeted. To reduce this risk, the Guidance suggests that membership of such groups should include only those individuals performing a ‘continuous combat function’ for that party to the conflict.<sup>15</sup> This requires an individual to perform a continuous function for the group involving his or her direct participation in hostilities.<sup>16</sup> A lasting integration into the armed group is also required.<sup>17</sup> This approach excludes the targeting of political and administrative personnel, as well as other persons not exercising a combat function. Recruiters, trainers, financiers, propagandists, those involved in general weapons acquisition or manufacture and general intelligence collectors are deemed to fall within the latter category.<sup>18</sup>

Based on this analysis, the Guidance implies that ‘direct participation in hostilities’ is primarily relevant to the targeting of two types of actors within armed conflict: civilians who directly participate in hostilities on a spontaneous, sporadic or unorganised basis, and members of organised armed groups whose functions involve directly participating in hostilities on a continuous basis.

### **C. Concept of ‘Direct Participation in Hostilities’**

The Guidance acknowledges that no clear interpretation of the term is available from treaties, state practice or case law. Instead, the meaning must be derived from ordinary principles of

---

<sup>11</sup> However, the Guidance recognises that categorisation of members of other organised armed groups as non-civilians is not settled in international law. It acknowledges an alternative formulation that they remain civilians who continuously and directly participate in hostilities. Ultimately, the Guidance rejects such a formulation on the basis that it blurs the civilian-armed forces dichotomy intrinsic to IHL as reflected in Common Article 3 and Additional Protocol II.

<sup>12</sup> Guidance at 27–36.

<sup>13</sup> Ibid 30.

<sup>14</sup> Ibid 33.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 34.

<sup>18</sup> Ibid 34–35.

treaty interpretation. While the Guidance acknowledges that interpretation of the phrase must take into account the wide variety of military, cultural, political and geographical contexts in which conflicts occur, it also emphasises the limited elasticity of the concept and the importance of balancing fundamental principles underlying IHL, particularly military necessity and humanity, in interpreting the phrase.<sup>19</sup> However, it asserts that the meaning of 'direct participation in hostilities' is the same in both international and non-international armed conflicts.<sup>20</sup>

### **1. Hostilities**

The ICRC correctly asserts that the notion of hostilities is intrinsically linked to armed conflicts of an international or non-international character, as opposed to internal disturbances and tensions.<sup>21</sup> More specifically, 'hostilities' refers to the collective resort by the parties to a conflict to means and methods of injuring the enemy.<sup>22</sup> Expressed another way, it is the sum total of all hostile acts towards an enemy carried out by those participating in hostilities.<sup>23</sup>

### **2. Specific Acts**

According to the Guidance, 'participation' in hostilities refers to the specific hostile acts carried out by an individual towards an enemy in the context of those hostilities.<sup>24</sup> Each of these acts form components of the collective hostilities between the parties to the armed conflict.

The Guidance argues that interpreting 'participation' beyond specific acts would blur the IHL distinction between temporary, activity-based loss of protection (arising from direct participation in hostilities) and continuous status or function-based loss of protection (due to combatant status or continuous combatant function). It would also create insurmountable evidentiary problems in determining whether persons not engaged in a specific act have done so previously on a recurring basis and whether they have the intent to do so again. This would increase the risks of erroneous or arbitrary attacks on civilians.<sup>25</sup>

### **3. Threshold of Harm**

A specific act must be 'likely' to 'adversely affect' the 'military operations or military capacity' of a party to the conflict.<sup>26</sup> 'Adverse affects' includes not only the infliction of death and injury on military personnel and physical or functional damage to military objects, but also armed or unarmed activities restricting or disturbing deployments, logistics and

---

<sup>19</sup> Ibid 41–42.

<sup>20</sup> Ibid 44.

<sup>21</sup> Ibid 41.

<sup>22</sup> Ibid 43.

<sup>23</sup> Ibid 44.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid 45.

<sup>26</sup> Ibid 47–49.

communication, as well as by capturing or otherwise establishing and exercising control over military personnel, objects and territory to the detriment of the adversary. Specific examples include: denying the adversary the military use of certain objects, equipment and territory, guarding captured military personnel of the adversary, clearing mines placed by the adversary, electronic interference with military computer networks (network attacks or exploitation) or transmitting targeting information during an attack.<sup>27</sup>

Alternatively, the specific act must be likely to inflict 'death, injury or destruction' on persons or objects protected against direct attack.<sup>28</sup> This is directed at the inclusion of attacks against peaceful civilians and civilian objects in the term 'participation'. For example, sniper attacks against civilians or air attacks or armed raids against civilian villages would fulfil this criterion.

Under either limb, the term 'likely' is stated to mean that which can be reasonably expected to result from an act in the prevailing circumstances.<sup>29</sup>

#### **4. Direct Causation**

According to the Guidance, 'direct'<sup>30</sup> participation requires a direct causal link between the act in question and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.<sup>31</sup>

A distinction is made here between individual acts that form part of the conduct of hostilities (considered to have a direct causal link) and acts that form part of the general war effort and sustainment (considered only to have an indirect causal link). Acts forming part of the conduct of hostilities are aimed at bringing out the materialisation of the required harm. Acts constituting part of the general war effort include all activities objectively contributing to the military defeat of the enemy (e.g. design, industrial production and shipment of weapons and military equipment, construction or repair of roads, ports, airports' bridges, railways and other infrastructure outside the context of concrete military operations). Acts constituting war sustainment include political propaganda, production of non-military industrial and agricultural goods and financial transactions.<sup>32</sup>

The Guidance characterises direct causation as harm that is brought about in one causal step.<sup>33</sup> Conversely, conduct that merely builds up or maintains the capacity of a party to harm its adversary is indirect. For example, imposing economic sanctions on a party to an armed conflict, depriving it of financial assets or providing its adversary with supplies and services have only an indirect causal link with hostilities. Other such examples include scientific

---

<sup>27</sup> Ibid 48.

<sup>28</sup> Ibid 49–50.

<sup>29</sup> Ibid 47.

<sup>30</sup> The term 'direct' is synonymous with 'active' as used in Common Article 3: Guidance at 43–4.

<sup>31</sup> Guidance at 51–58.

<sup>32</sup> Ibid 51.

<sup>33</sup> Ibid 53.

research and design; production and transport of weapons; and recruitment and training of personnel that is not an integral part of a specific military operation.<sup>34</sup>

According to the Guidance, it is not necessary or sufficient for the act to be indispensable to the causation of harm for it to be direct. Similarly, it is not sufficient that an act and its consequences be connected through an uninterrupted chain of events. For example, assembly and storing of an improvised explosive device (IED) is not direct participation in hostilities, even though it may be connected through an uninterrupted chain of events with the detonation of that IED.<sup>35</sup>

The Guidance interprets 'direct' participation as including individual conduct that causes harm only in conjunction with other acts. The decisive question in determining whether the causal threshold is met is the degree of integration of the act into a concrete and coordinated tactical operation that directly causes harm of the sort discussed above. Such an interpretation would include identification and marking of targets, analysis and transmission of tactical intelligence to attacking forces and instruction and assistance given to troops with regard to execution of a specific military operation.<sup>36</sup>

The Guidance also provides that the existence of a direct causal link should not necessarily be assessed based on the temporal or geographic proximity of the individual to the resulting harm. For instance, even though the laying of mines, booby-traps or other timer-controlled devices may be temporally remote from infliction of harm on an enemy, they remain causally direct. Similarly, the firing of missiles, the piloting of an un-crewed aircraft or attacks on computer networks may take place from a geographically remote location, but still remain causally direct.<sup>37</sup>

The Guidance uses two case studies to illustrate the direct-indirect distinction. First, driving a truck delivering ammunition to positions at the front line would constitute 'direct' participation, whereas the transport of ammunition from a factory to a storehouse for shipping to the conflict zone would only be indirect participation.<sup>38</sup> Second, acting as a voluntary human shield in order to create a physical obstacle to the ground operations of the adversary would constitute direct participation, whereas acting as a voluntary human shield in situations where it amounts only to a legal (rather than physical) obstacle to the operations of the adversary would be causally indirect (and also may not reach the requisite threshold of harm).<sup>39</sup>

## **5. Belligerent Nexus**

A specific act must form an integral part of the hostilities. In particular, it must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict

---

<sup>34</sup> Ibid.

<sup>35</sup> Ibid 54.

<sup>36</sup> Ibid 54–5.

<sup>37</sup> Ibid 55.

<sup>38</sup> Ibid 57.

<sup>39</sup> Ibid.

to the detriment of the other.<sup>40</sup> The purpose of the act must be viewed objectively. The subjective intent or state of mind of the person concerned is not relevant.

Based on this framework, the Guidance gives examples of acts that lack a belligerent nexus, even though they may cause significant harm. These include violent crimes committed for reasons unrelated to the conflict, fleeing refugees blocking a strategically important road,<sup>41</sup> acts of individual self-defence by civilians against an unlawful attack from a party to the conflict, the infliction of death or injury on civilians while in the hands or power of the enemy,<sup>42</sup> suppression of civil unrest by territorial authorities, and purely inter-civilian violence.<sup>43</sup> The Guidance acknowledges that the determination as to whether a particular act has a belligerent nexus can be difficult in practice as there will be many grey areas. Determinations must be made on reasonably available and objectively verifiable information.

## **6. Beginning and End of Direct Participation in Hostilities**

The Guidance includes in the ambit of a ‘specific act’ not only its execution, but also the concrete measures in preparation for such an act, as well as the deployment to and the return from the location of its execution.<sup>44</sup>

Preparatory measures refer to those activities that are preparatory to a specific act. These measures must be of a military nature and so closely linked to the subsequent execution of the act that they constitute an integral part of it. Conversely, the preparation of a general campaign of unspecified operations or preparation aiming to establish the general capacity to carry out operations would not qualify as direct participation in hostilities.<sup>45</sup>

Both the deployment and return must be an integral part of the specific act. Deployment commences upon physical displacement with a view to carrying out an operation.<sup>46</sup> Return finishes upon a physical separation from the operation (e.g. laying down arms).<sup>47</sup> The determination must be made on a reasonable evaluation of the prevailing circumstances.<sup>48</sup>

## ***D. Temporal Scope of Immunity***

### **I. Civilians Taking a Direct Part in Hostilities**

Civilians retain their immunity from attack ‘unless and for such time’ as they directly participate in hostilities. Though they remain part of the civilian population, their immunity is

<sup>40</sup> Ibid 58–59.

<sup>41</sup> Ibid 61.

<sup>42</sup> Examples include the suppression of civil unrest or maintenance of law and order by territorial authorities, or the lawful execution or containment of detainees. This is the case even if the conduct amounts to an international crime: Guidance at 62.

<sup>43</sup> Guidance at 62–63.

<sup>44</sup> Ibid 65.

<sup>45</sup> Ibid 66–67.

<sup>46</sup> Ibid 67.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 67–68.



temporarily suspended. Further, the suspension of immunity lasts exactly as long as the duration of the direct participation in hostilities and they may not be attacked outside this period.<sup>49</sup>

The manner in which the beginning and end of direct participation in hostilities is determined is outlined above. Therefore, civilians lose immunity during each specific act and regain protection in the intervals between such acts. This creates a 'revolving door' of protection for civilians engaging in hostilities. According to the Guidance, this is not a malfunction of IHL. Rather, it is a deliberate safeguard to ensure innocent civilians are protected from erroneous attack. The behaviour of civilians depends on a multitude of constantly changing circumstances that are very difficult to anticipate. Past regular participation is not a reliable indicator of future participation. The Guidance favours this interpretation even though it is recognised that it makes it more difficult for opposing armed forces to respond to civilians directly participating in hostilities.<sup>50</sup>

## **2. Members of Organised Armed Forces or Groups**

The Guidance observes that the 'revolving door' issue becomes problematic as soon as it is applied to members of organised armed groups. In particular, it would encourage them to become 'farmers by day and fighters by night', giving them a significant operational advantage over opposing state armed forces. This may undermine respect for IHL, thereby endangering innocent civilians.

For this reason, the Guidance proposes that loss of immunity be based on 'membership' in an organised armed group, rather than specific acts of individuals. Such persons would be targetable for so long as their membership in the group lasts. According to the Guidance, this occurs from the moment a person begins to perform a *de facto* continuous combat function and lasts until they cease such a function.<sup>51</sup> Cessation need not be openly declared and can be expressed through conclusive behaviour such as lasting physical distancing from the armed group and reintegration into civilian life or permanent resumption of an exclusive non-combat function. However, the determination as to whether a person has joined or left a group may vary with political, cultural and military context, though it must be made in good faith taking into account all the circumstances.<sup>52</sup>

## ***E. Precautions and Presumptions in Situations of Doubt***

The difficulty in objectively distinguishing between members of organised armed groups, civilians taking part in hostilities and peaceful civilians, means that there will often be doubt as to who may be lawfully targeted. All feasible precautions must be taken to determine that

---

<sup>49</sup> Ibid 70–71.

<sup>50</sup> Ibid.

<sup>51</sup> For the meaning of 'continuous combat function' see discussion under 'Civilians and non-international armed conflicts' above.

<sup>52</sup> Guidance at 72–73.

persons are legitimate targets prior to attack. Attacks must be halted if it becomes apparent that the target is not legitimate.<sup>53</sup>

The Guidance also considers that where there is doubt about whether a particular act by a civilian constitutes direct participation in hostilities or whether a person is a member of an organised armed group, there must be a presumption that he or she is a civilian immune from attack. ‘Doubt’ in this context is not equivalent to the level of certainty applicable in criminal law, but corresponds to the level of certainty that can reasonably be achieved in the circumstances. This may take into account such factors as the means and intelligence at the disposal of the decision-maker, the urgency of the situation, as well as the damage likely to result from an erroneous decision for the operating forces or innocent bystanders.<sup>54</sup>

### ***F. Restraints on the use of Force in Direct Attack***

The Guidance points out that there are limited provisions in IHL dealing with the kind and degree of force that may be used against persons not entitled to immunity.<sup>55</sup>

In situations not covered by specific treaty rules, the Guidance suggests that the kind and degree of force used against such persons must not exceed that which is necessary to accomplish a legitimate military purpose in the prevailing circumstances. Accordingly, there is an obligation to capture, rather than kill, an adversary where there would be no additional risks to the operating forces or to the civilian population.<sup>56</sup>

According to the Guidance, this requirement is derived from basic principles of military necessity and humanity. The principle of military necessity permits only that degree and kind of force— not otherwise prohibited by the law of armed conflict— that is required in order to achieve the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources. The principle of humanity forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.<sup>57</sup> These principles underlie and inform the entire normative framework of IHL and shape the context in which its rules must be interpreted.

### **I. Consequences of Regaining Civilian Protection**

When civilians cease to directly participate in hostilities or when members of organised armed groups cease their continuous combat function, they regain their civilian immunity from direct attack. However, the fact that persons have regained civilian immunity does not exempt them from prosecution for violation of domestic or international law, which they previously may have committed.<sup>58</sup>

---

<sup>53</sup> Ibid 75.

<sup>54</sup> Ibid 75–6.

<sup>55</sup> Ibid 77–78. Other branches of international law such as human rights may also be relevant.

<sup>56</sup> Guidance at 78–82.

<sup>57</sup> Ibid 78–79.

<sup>58</sup> Ibid 83–85.

## 2. Critique of Guidance

The ICRC has shown great initiative in developing the Guidance. It has produced a comprehensive and considered document that is clearly written and presented.

The Guidance may well influence national or international tribunals when they come to consider the interpretation of direct participation in hostilities, including those exercising criminal jurisdiction. In fact, the Guidance has already been referred to by the US Court of Appeals in *Al-Bihani v Obama*.<sup>59</sup> It may even be viewed as a secondary source of international law by such tribunals, analogous to writings of the 'most highly qualified publicists'.<sup>60</sup> This is due to the fact that the ICRC is the recognised custodian of IHL and its views on IHL are highly regarded. In addition, it may well influence the framing and implementation of rules of engagement by states for current operations such as in Afghanistan and Iraq, as well as for future conflicts.

Such an important legal work should be the subject of reflection, comment and debate. A starting point for such debate should be an inquiry into the ordinary meaning of the term 'direct participation in hostilities' in its treaty context.<sup>61</sup> However, a technical construction is only of limited benefit in this matter. Another approach is to examine the practice of states in applying the term during military operations.<sup>62</sup> However, while this would be illuminating, a widespread survey of such practice has not been undertaken. In the absence of such information, it is necessary to focus on the object and purpose of the Geneva Conventions and Additional Protocols to form a proper and reasonable meaning of the phrase.<sup>63</sup> One key purpose may reasonably be characterised as the regulation of armed conflict in a manner that appropriately balances the ability of parties to achieve their legitimate military objectives with the protection of civilians. Interpretations that reflect such a balance are to be preferred over those that do not.<sup>64</sup>

The main substantive criticism is that, for the most part, the Guidance does not achieve this balance by taking too restrictive an interpretation of the meaning of 'members of organised armed groups' and 'civilians taking a direct part in hostilities'. On the one hand, this approach gives as wide as possible legal protection to the civilian population, which may reduce the risk of innocent civilians being erroneously killed or injured. On the other hand, it

---

<sup>59</sup> US Court of Appeals for the District of Columbia Circuit, 5 January 2010, No. 9-5051 *per* Williams J at 4-6; 590 F.3d 866 (2010), 4-6 (Williams J)

<sup>60</sup> *The Statute of the International Court of Justice* 1949, art 38(1)(d) includes the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Though they are not a primary source of law, such works can furnish reliable evidence of the law. The category also includes sources analogous to writings of publicists. These works are used widely and play an important role in the development of international law. The International Court of Justice relies on such works, even though the majority of judgments may not cite them. Likewise, arbitral tribunals and national courts make extensive use of juristic works: see Ian Brownlie, *Principles of Public International Law* (5<sup>th</sup> ed., 1999) 24-25.

<sup>61</sup> See *The Vienna Convention of the Law of Treaties* 1969 (VCLT), art 31(1).

<sup>62</sup> See *the VCLT*, art 31(3)(b).

<sup>63</sup> See *the VCLT*, art 31(1).

<sup>64</sup> In fact, the Guidance acknowledges that it is necessary to strike a balance between the fundamental principles underlying IHL, particularly military necessity and humanity, in interpreting the phrase; see 41-42.

significantly limits the scope of targeting by state militaries of irregular forces and individuals who alternate between civilian life and engagement in hostilities. In some contexts, these forces often pose a serious military threat and can hamper—and even jeopardise—the achievement of military objectives. The ICRC’s interpretation also results in irregular forces frequently being immune from attack in circumstances where regular forces would be targetable, resulting in an operational advantage for irregular forces. These factors may also undermine respect for, and observance of, IHL by state forces.<sup>65</sup>

## **A. Process and other Preliminary Issues**

### **1. State Consultation and Reference to State Practice**

The Guidance would have benefited from formal state consultation and feedback. This could have involved a formal written questionnaire process through which all states would give a summary of their official views and practices on the issue of ‘direct participation in hostilities’. This feedback could have been used in the legal interpretation of the phrase.<sup>66</sup> Such consultation would also have demonstrably aligned the Guidance with the reality of current views and practices of states. Instead, it is open to criticism that it departs, in several respects, with state practice on the battlefield.<sup>67</sup> The likely significant implications for states and their military personnel of the Guidance, as outlined above, underline the importance of such consultation.

### **2. Law Making or Interpretation**

A further question is whether the Guidance goes beyond the limits of legal interpretation and into the realm of law development, despite the assertion that it does not seek to change customary or treaty IHL.<sup>68</sup> The primary rule of treaty interpretation requires a good faith analysis of the ordinary meaning of the particular words in their context and in the light of the object and purpose of the instrument.<sup>69</sup> It could be argued that the level of prescription in the Guidance goes beyond an analysis of what may be commonly understood from the words ‘direct participation in hostilities’. This is especially evident in the framing of elements and development of complex tests for the fulfilment of those elements that are not automatically apparent from the plain meaning of the words. This leaves the Guidance open to criticism that it is, in substance, bordering on law development that should be the domain of states.

---

<sup>65</sup> In this respect, see also Schmitt, above n 3, 509. Schmitt also argues that a more liberal interpretation creates an incentive for civilians to remain distant from the battlefield to avoid being targeted and potential criminal sanctions; see Michael N. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’ (2005) 5 *Chicago Journal of International Law* 511, 535.

<sup>66</sup> See *VCLT*, art 31(3)(b), which provides that ‘any subsequent practice in the application of [a] treaty which establishes the agreement of the parties regarding its interpretation’ may be taken into account.

<sup>67</sup> Heaton, above n 3, 177 suggests that the ‘restrictive’ view does not reflect state practice.

<sup>68</sup> Guidance at 9.

<sup>69</sup> *VCLT*, art 31.

### 3. Scope of Practical Relevance

It would have been useful if the Guidance had more clearly identified the situations in which the term 'direct participation in hostilities' becomes relevant in practical war fighting. This would have signalled to military personnel and others the practical situations in which the Guidance needs to be applied. In most cases, the question whether an individual is a member of an organised armed group, a civilian taking a direct part in hostilities or a peaceful civilian largely arises in the context of planned, offensive operations against particular groups or individuals. This is because there are usually alternative bases for targeting during defensive operations. If forces are actually attacked in the battlefield, there is nothing to prevent them from exercising their right of self-defence without applying the analysis in the Guidance, provided the response is proportionate to the threat.<sup>70</sup> In addition, when attacking military targets containing individuals of unknown status, the categorisation of those individuals may become redundant where the military advantage from attacking the target would always outweigh the collateral damage—even if such persons were presumed to be civilians.<sup>71</sup>

## **B. Substantive Issues**

### 1. Meaning of Organised Armed Groups

The Guidance does not sufficiently indicate that there is a preliminary issue as to what constitutes an organised armed group before any analysis of membership can take place. Though the term is not defined in international law, a reasonable interpretation could take into account indicative factors such as the association of a number of persons, a degree of organisation and hierarchy, and a common purpose of opposing an adversary in an armed conflict through the use of armed force.

### 2. Membership of Organised Armed Groups

The purpose of the 'continuous combat function' test is to place some limits on who may be targeted by virtue of their association with an organised armed group. Such a test is necessary; otherwise there would be a significant risk that innocent civilians with some tenuous connection may be targeted.

However, the formulation of the test would rule out the targeting of some important categories of individuals who are intimately involved in the operation of the organised armed group, but whose functions do not involve direct participation in hostilities (according to the ICRC's interpretation) on a continuous basis. As discussed further below, a key problem with the ICRC's interpretation of 'combat function' or 'direct participation in hostilities' is that it

---

<sup>70</sup> See also Albert S. Janin, 'Engaging Civilian-Belligerents Leads to Self-Defence/Protocol I Marriage' (2007) *The Army Lawyer*, 92.

<sup>71</sup> See the *Additional Protocol I*, arts 51(5)(b) and 57(2)(a)(iii).

excludes military activities more than one step removed from a specific attack.<sup>72</sup> For instance, commanders may be involved in operational<sup>73</sup> planning for the group, but may not participate in the development of specific attacks. This would not qualify as direct participation in hostilities according to the ICRC's standards. The key problem with the 'continuous' participation requirement is that it imposes a very high threshold and would likely exclude a large number of individuals who fight for the group on a regular but not continuous basis. These categories of individuals constitute important military objectives in the overall submission of the group. In addition, the same persons would be targetable if they performed the same function in a state armed force.

A greater balance between the ability to pursue legitimate military objectives and the protection of innocent civilians could be achieved by reworking the scope the ICRC's interpretation of direct participation in hostilities (discussed further below) and by relaxing the threshold of continuous participation. Some possibilities for the latter might be to require 'regular participation' or to require an individual's 'predominate function' to involve direct participation in hostilities for the group.

The purpose of the ICRC's 'lasting integration' requirement is to ensure the continuous combat function is closely connected with the objectives of the organised armed group. However, the concept of 'integration' is, in substance, simply a synonym for membership and does not advance the question of what factors sufficiently establish such a connection to the group. Objectively verifiable indicia could include regular physical association with other individuals affiliated with the group, acting under orders or the command of senior figures, and any other conduct that demonstrates they are seeking to advance the common purpose of the group.

### **3. Specific Acts**

Fundamentally, this part of the Guidance characterises the scope of physical conduct by an individual that qualifies as 'participation' in hostilities. The Guidance is correct to treat 'participation' as conduct at the level of the individual rather than by collective groups or forces. However, there is insufficient justification in the Guidance as to why 'participation' in hostilities should be limited to single, specific acts. Such an approach seems to place artificial dividing lines between what often may be inseparable courses of conduct by individuals.

This problem arises at the level of the organisation and execution of a single attack on the adversary. A hypothetical scenario best illustrates the issue. Three Afghani men, who are supportive of, but not integrated into, the Taliban, intend to place an IED on a road regularly used by International Security Assistance Force (ISAF) supply vehicles in southern

---

<sup>72</sup> This problem is also identified by Kenneth Watkins 'Opportunity Lost: Organised Armed Groups and the ICRC's "Direct Participation in Hostilities" Interpretative Guidance' (2010) 42 *New York University Journal of International Law and Politics* 641, 685.

<sup>73</sup> 'Operational planning' involves the decisions about the conduct of military campaigns or operations. This may be compared with 'strategic planning' which involves setting overall security and military strategies and resource allocation and 'tactical planning' which involves the planning of individual battles and engagements: see Schmitt, above n 68, 543.

Afghanistan. On the first day, they talk to some contacts to arrange the sourcing of the components for the device. On the third day, they receive the components and begin to assemble the device. On the fourth day, they visit the roadside to watch the movements of enemy supply vehicles in order to determine where best to place the device. On the fifth day, they finish assembling the device. In between this conduct, they return to their vocation as farmers. On the seventh day, one of them prepares a hole in which to place the device. Finally, on the night of the eighth day, they place the device and fill in the hole. They wait on a nearby vantage point on the ninth day, await an enemy vehicle to pass and remotely detonate the device destroying the vehicle and its operators. Under the ICRC's approach, 'participation' is equated to the single, discrete acts on each of the days. The intervening periods are deemed to be peaceful activity, even though they are merely interruptions in between the pursuit of violence.

The problem also arises when civilians engage in regular attacks against an adversary. By way of illustration, an Afghan man is aligned with the Taliban, though he is not a member. He instructs and equips young Afghan men to launch suicide attacks against specific Afghan Government targets in Kabul. He is involved in acquiring the suicide vests, their psychological preparation and teaching them how to detonate the bomb. He has been engaging in these activities several times per week for three months. However, under the ICRC's approach, he has only 'participated' in hostilities on the specific occasions when he has met with the young men and given them their instructions. The remaining periods in the week he is deemed to be a peaceful civilian, whose existence is unrelated to the hostilities.

A plain legal interpretation of the word 'participation' reveals other possibilities that could achieve a greater balance between the ability to achieve military objectives and the protection of innocent civilians. In particular, it could also be interpreted to refer to a *series or chain of acts* by an individual. Each link in the chain would need to be closely connected with the next. The chain would cease when the individual demonstrably disengages from the series of acts, for instance, by not engaging in any acts for several consecutive days.<sup>74</sup> The period encompassing the entire chain of acts would be deemed to be participation in hostilities.

This interpretation would widen the scope for the targeting of individuals engaging in this type of conduct, without eroding protections for innocent civilians. It would not, as suggested in the Guidance, blur the distinction between activity-based and status- or function-based loss of protection. Instead, it would simply be a broadening of the activity for which immunity may be suspended. Nor would this interpretation necessarily create insurmountable evidentiary problems.<sup>75</sup> Close surveillance and intelligence may be able to establish these requirements in some circumstances and, if there were significant doubts, the presumption of civilian status would be triggered in any case.

---

<sup>74</sup> The Guidance accepts a similar formulation for determining when individuals cease to be members of organised armed groups; 72–73. See also Schmitt, above n 3, 510 where it is argued that, since such participants do not enjoy any privilege to engage in hostilities, it is reasonable that the participant assume the risk that the other side is unaware of such withdrawal.

<sup>75</sup> This is supported by Watkins, above n 73, 688.

#### **4. Threshold of Harm**

This element considers the requisite degree of harm that must be suffered by the enemy or civilians as a result of the physical conduct of an individual. Without the infliction of this degree of harm, the conduct of the perpetrator will not qualify as participation in hostilities. This element is necessary as, in the absence of such a threshold, conduct could be deemed 'participation' no matter how incidental or inconsequential the effect on the enemy.

However, the condition that an act 'adversely *affect*' the enemy does not address the threshold of an act. Rather, it is test of causation. Instead, this element should be directed at the degree of harm suffered by those bearing the results of the physical conduct of the perpetrator. For these reasons, the test should be reformulated as requiring an adverse 'effect' on the enemy.

Even so, the requisite threshold is quite low. In fact, any negative impact, even if relatively inconsequential to the enemy, would qualify. The following hypothetical scenario illustrates the issue. A group of Afghan youths who are supportive, but not members, of the Taliban, throw stones at a convoy of ISAF vehicles on their way to an operation against the local Taliban, in a futile attempt at hindering the attack. The stones are easily deflected and cause little damage to the convoy. Under the ICRC's formulation, these youths have participated in hostilities and could be targeted, even though their act is relatively minor. To avoid such situations, it would be preferable to exclude acts that have only an inconsequential effect on military operations or military capacity of the enemy.

On the other hand, requiring injury, death or destruction to civilians may be too high a threshold in some circumstances. Again, a scenario can be used to demonstrate the problem. The Taliban control a region in a remote part of southern Afghanistan beyond the reach of the central government. The Taliban seek to detain elements of the civilian population who are rumoured to be collaborating with the enemy. The activity is aimed at securing the obedience of the local population in the fight against the enemy, which is critical to the Taliban's overall military strategy. Under the ICRC's formulation, such detention of the civilian population is not considered to be participation in hostilities, as it does not involve injury or death to civilians. A possible alternative that includes detention of civilians as participation in hostilities might simply be to require *adverse effects to civilians*.

Finally, though it is important that the conduct of the perpetrator be 'likely' to result in the requisite harm to the enemy or civilians, this element does not relate to the degree of harm suffered by the enemy. Instead, it raises the issue of the causal relationship between the physical conduct and the harm suffered. It is therefore a matter to be addressed by the next section.

#### **5. Direct Causation**

This element concerns the causal relationship between the physical conduct of the perpetrator and the harm suffered by the enemy or civilians. Again, if the link between these two physical elements is insufficient, the conduct of the perpetrator will not qualify as participation in hostilities. A close causal relationship is a necessary element. If no such element were included, there would be no limit to attacks on large parts of the civilian population whose conduct might only have some remote or tenuous connection to hostilities.

However, the ICRC's interpretation that acting as a 'voluntary human shield' would not bring about the materialisation of harm against the enemy, unless they posed a physical



obstacle to the attack, is questionable. Deliberately posing as a civilian shield at a military target immediately requires the enemy to erroneously take into account the death of a civilian in their proportionality assessment. This could cause the enemy not to attack the target, either as a matter of law or as a matter of choice. Such activity is a ruse of war, solely designed to defend a locality from attack. By doing so, it seeks to advance a party's military aims to the detriment of the enemy.<sup>76</sup> For these reasons, if the attacking forces are able to determine that individuals are posing as human shields, they should be deemed to be participating in hostilities and may be targeted.<sup>77</sup>

Further, the alternative requirement that the specific act be integral to a concrete operation that brings about the materialisation of harm to the enemy may be too narrow in some circumstances. This formulation would exclude vital military activities from the meaning of participation, including operational level planning,<sup>78</sup> as well as general intelligence activities,<sup>79</sup> military logistics,<sup>80</sup> military communications,<sup>81</sup> IED assembly<sup>82</sup> and combat instruction.<sup>83</sup> None of these activities themselves inflict harm on the enemy and, though they may be integral to general military operations, are not aimed at a specific operation. The inability to target such activities could make it very difficult for state forces to achieve their military objectives against irregular forces and would place such forces at a significant operational advantage.

Two scenarios illustrate the problem. In the first, several Afghan men sit down in their camp located in a desolate, mountainous region of Afghanistan. It is nearing the end of winter and they are planning to attack foreign troops and Afghan forces in the early spring. They discuss conducting ambushes and IED attacks in the local area, though they do not discuss exactly how, when or where these attacks will occur. Even though this discussion is critical to the coordination of the attacks, this activity is not deemed to be participation in hostilities under the ICRC's formulation because this activity does not inflict harm, nor is it integral to a specific operation. In the second scenario, a young man in the tribal areas of south-western Pakistan performs reconnaissance for the local Pakistan-Taliban militia who are fighting against Pakistani government forces. His task is to find out how many troops are

---

<sup>76</sup> See also Schmitt, above n 3, 522 where it is argued that characterising acting as voluntary human shields as non-participation would encourage such conduct by minimising the risk assumed by their actions. See also support for this position in the *Targeted Killings Case* (2007) 46 ILM 375, [36]. For a contrary view see: Rewi Lyall, 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 313 and Schondorf, above n 3, 308.

<sup>77</sup> See also Schmitt, above n 68, 541 in support of this position.

<sup>78</sup> This is characterised as an act of direct participation in the *Targeted Killings Case* (2007) 46 ILM 375 [37], by Janin, above n 71, 98 and by Schmitt, above n 68, 543.

<sup>79</sup> This is characterised as an act of direct participation in the *Targeted Killings Case* (2007) 46 ILM 375 [35] and by Heaton, above n 3, 177.

<sup>80</sup> Ibid. This is also characterised as direct participation by Watkins above n 73, 683.

<sup>81</sup> Fleck includes 'the logistics of military operations' as direct participation: Dieter Fleck (ed.) *The Handbook of International Humanitarian Law in Armed Conflict* (1995) 232.

<sup>82</sup> This is characterised as being sufficiently causal in Michael Schmitt 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' 42 *New York University Journal of International Law and Politics* 697, 731.

<sup>83</sup> Ibid 730.

stationed in a particular area and the types of weapons they are carrying. This information is transmitted to the militia for use in their general operational planning. Again, this man is not participating in hostilities because his acts do not inflict harm on the enemy and are not integral to a specific operation. Nevertheless, his acts are a vital component of the militia's military operations.

Contrary to the position taken in the Guidance, it is reasonable to assert that such operational activities are sufficiently proximate to the materialisation of harm as to be characterised as direct. This category of activities forms part of the military machinery necessary to conduct specific operations and so is more closely connected with the actual infliction of harm. Though they may not inflict harm in one causal step, they constitute the essential links in the chain immediately preceding that final step. As Heaton states, 'combatants...are only capable of engaging in combat because of the support they have received'.<sup>84</sup> Acts of combat represent the apex of a pyramid built on the efforts of support personnel.<sup>85</sup>

Further, it can be reasonably argued that these acts do not fall within the category of contributing to the general war effort or war sustainment. War efforts and sustainment are more causally removed from the infliction of harm. They are the activities that support the general operational activities. For example, supplying fuel and food, building accommodation, providing financing or distributing propaganda supports the capacity to conduct the operational activities that ultimately manifest in specific operations.<sup>86</sup>

One alternative, that more appropriately balances the ability to achieve military objectives with the protection of innocent civilians, may be to reformulate the test of causal proximity to include operational activities that facilitate and are closely connected with the materialisation of harm. This would remove the requirement that an act be integral to a specific operation and would permit the targeting of the precursor operational activities that make possible the ultimate infliction of harm.

One benefit of this standard is that it removes the difficulty faced by attacking forces of distinguishing between conduct integral to specific operation and general military activities. For example, if a soldier witnesses persons assembling IEDs in a building, it is difficult to know, unless there is some other intelligence available, whether these acts are part of a specific operation or operations more generally. Another example is a soldier witnessing training of fighters from a distance. Again, without further intelligence, it may be difficult to determine whether this is training for a specific operation or for more general operations.

## **6. Belligerent Nexus**

This element concerns the objective purpose behind an act. This is not assessed subjectively, but must be inferred from the surrounding circumstances. This is clearly a legitimate

---

<sup>84</sup> Heaton, above n 3, 178.

<sup>85</sup> Ibid 196.

<sup>86</sup> See also the *Targeted Killings Case* (2007) 46 ILM 375 [35].

requirement, as it is necessary to distinguish acts forming part of the hostilities from other types of violence.

However, in some circumstances it would be very difficult to objectively determine the purposes of a perpetrator. For example, a soldier witnesses a local militia execute several men from a village. Without specific intelligence, it is difficult to know whether the killings are in support of the militia's military campaign or whether it may be an unrelated issue such as a local dispute or breach of religious laws.

For this reason, there would need to be a reasonably wide discretion given to personnel in making this judgment, especially when hostilities are situated among the civilian population. In these situations, state forces would be frequently faced with this dilemma and it could significantly impede operations.

### **7. Beginning and End of Direct Participation in Hostilities**

The inclusion of the deployment to, execution of and return from a hostile act within the meaning of 'participation' is uncontroversial. It is also agreed that preparation for such acts should also fall within this term.

However, the restriction of preparatory acts to those related to a 'specific operation' may be too narrow. Essentially, it leads to the same problem that arises from the ICRC's test of 'causal directness'; that is, it would exclude significant military activities from the meaning of participation, including operational level planning, as well as general intelligence activities, military logistics, military communications, IED assembly and combat instruction. The inability to target such activities could make it very difficult for state forces to achieve their military objectives against irregular forces and would place such forces at a significant operational advantage.

A scenario illustrates the problem. Three Afghan men sit in an abandoned building in a small village in Helmand province assembling parts to make IEDs. They are to be laid on roads carrying ISAF army vehicles over coming weeks, though they have not yet decided exactly where or when this will occur. These men are not participating in hostilities under the ICRC formulation as they are not preparing for a specific operation, though their activities are indispensable to the campaign by local irregular forces.

The problem could be solved by adopting the standard discussed above under direct causation, namely to include operational activities that facilitate and are closely connected with the materialisation of harm in the meaning of direct participation. This would remove the requirement that preparation relate to a specific operation and would permit the targeting of preparatory military activities that lead straight to, and generally make possible, the ultimate infliction of harm. Such a change would promote a better balance between the achievement of military objectives and the protection of innocent civilians.

### **8. Temporal Scope of Immunity**

As the Guidance acknowledges, the ICRC's interpretation of direct participation in hostilities leads to the problem known as the 'revolving door' of protection when applied to civilians participating in the hostilities. The restriction of direct participation to certain types of specific acts means that civilian immunity is regained in the period between two or more specific acts. The ICRC justifies this interpretation based on the need to protect civilians from erroneous attack.

However, the ‘revolving door’ of protection leads to the situation where civilians may frequently switch between being targetable and immune depending on their specific actions at the time. Civilians regularly taking part in hostilities can easily abuse the revolving door to engage in conflict and then retreat back to their civilian protection.<sup>87</sup> In fact, they may rely on their protected status to plan and prepare their engagement in hostilities.<sup>88</sup> Further, since state forces do not benefit from a revolving door of protection and are continuously targetable, it results in an uneven legal playing field on the battlefield. The disadvantage faced by the regular forces may also engender disrespect for IHL, thereby endangering civilians.<sup>89</sup> This is the case even though such individuals often pose a serious military threat to state forces, especially when participating in large numbers. As illustrated above in the discussion of ‘specific acts’, the problem arises both in relation to a single attack and regular attacks.

In fact, the ICRC recognises this very problem with respect to organised armed groups. For this reason, it favours targeting of such persons based on their membership in the group rather than their specific acts. However, in some situations civilians taking a direct part in hostilities may pose just as significant a military threat as organised armed groups. In these situations, it is difficult to understand how the revolving door of protection for civilians can be justified. A possible solution to this problem—that better balances the ability to achieve legitimate military objectives with the protection of innocent civilians—has been identified in the discussion of specific acts above, namely to include a series or chain of acts within the meaning of participation.

## **9. Precautions and Presumptions in Situations of Doubt**

The Guidance correctly reflects existing IHL in stating that individuals should be presumed to be civilians immune from attack in situations of doubt.

However, the interpretation of ‘doubt’ in this context as ‘the level of certainty that can reasonably be achieved in the circumstances’<sup>90</sup> could create significant loopholes. In some situations, there may be evidential problems when considering the elements of direct participation in hostilities, especially in the heat of battle. Therefore, the level of certainty that can reasonably be achieved may be quite low.

A scenario can be used to illustrate the problem. A soldier witnesses a camp of men in the distance. This might be a group of Taliban insurgents planning an attack or a gathering of local tribal leaders. There is no other means of obtaining further intelligence and the targeting window is short. The soldier believes the men are Taliban as they are numerous in the area and several are carrying weapons. So long as that low level of certainty is achieved and is

---

<sup>87</sup> See also Dewi Williams, ‘The Often-Vexed Question of Direct Participation in Hostilities: A Possible Solution to a Fraught Legal Position?’ 2(1) *Journal of Politics and Law* 2, 4; the *Targeted Killings Case* (2007) 46 ILM 375 [40] and Schmitt, above n 68, 536.

<sup>88</sup> See also Program on Humanitarian Policy and Conflict Research, Harvard University, *IHL and Civilian Participation in Hostilities in the OPT Policy Brief* (2007) accessed online at <<http://www.hpcrresearch.org/sites/default/files/publications/ParticipationBrief.pdf>> 3.

<sup>89</sup> See Schmitt, above n 68, 536.

<sup>90</sup> Guidance at 76.

reasonable in the circumstances, the use of force will be justified under the ICRC's formulation, even if the camp turns out to be civilian in nature.

One alternative might be to require a high probability, taking into account all available information that the persons are targetable.<sup>91</sup> If each element of direct participation (as formulated in this critique) satisfied such a standard, it would provide significant safeguards against erroneous attacks on civilians.

### **10. Restraints on the use of Force in Direct Attack**

The Guidance asserts that there is an obligation to use no more force than is reasonably required when targeting individuals, provided there is no more risk to the attacking forces<sup>92</sup> or to innocent civilians. This sounds like a reasonable proposition, but the issue is whether this is a moral rather than legal obligation.

The ICRC argues that the legal nature of the obligation arises chiefly from the basic principles of humanity and military necessity that underpin IHL. This argument relies on the basic principles themselves being positive law rather than theoretical concepts or themes underlying this body of law. Though there are a number of specific provisions in IHL that clearly reflect these principles, the wider principles themselves are not expressly stated in any treaty law. This means that the principles must represent customary international law in order for them to be legally binding. A recent study of customary IHL does not specifically include these principles as customary rules (though more specific rules which derive from them are included).<sup>93</sup> Such an issue could only be definitively resolved by an in-depth analysis of state practice and *opinio juris* in relation to these principles. The ICRC has not carried out such an analysis. There are several factors in favour of customary status, including the fundamental nature of the principles and their common inclusion in rules of engagement, the observance of which amounts to state practice. In addition, a duty to capture rather than kill under particular circumstances was upheld by the Israeli High Court of Justice in *Public Committee against Torture v Israel*.<sup>94</sup> Nevertheless, the existence of such a customary rule is far from settled.<sup>95</sup>

---

<sup>91</sup> See also the *Targeted Killings Case* (2007) 46 ILM 375 [40] commenting that 'the burden of proof on the attacking army is heavy'.

<sup>92</sup> See also President Beinisch in the *Targeted Killings Case* (2007) 46 ILM 375 [407] stating that 'a significant level of probability of the existence of such risk is required'.

<sup>93</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005).

<sup>94</sup> See [40], though this was largely argued based on human rights law principles. For a criticism of this aspect of the *Targeted Killings Case* (2007) 46 ILM 375; Schondorf, above n 3, 309 and Amichai Cohen and Yuval Shany, 'Are Targeted Killings Unlawful? The Israeli Supreme Court's Response: A Development of Modest Proportions' (2007) *Journal of International Criminal Justice* 310.

<sup>95</sup> For a critique of this aspect of the Guidance see W. Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise and Legally Incorrect' (2010) 42 *New York University Journal of International Law and Policy* 769.

## Conclusion

In summary, the Guidance is a welcome and useful contribution to the debate over the interpretation of direct participation in hostilities. However, the Guidance is capable of critique on several levels.

In terms of process, the Guidance would have benefited from greater state consultation and reliance on instances of state practice. As to its nature, a question mark remains over whether the Guidance has crossed the reasonable bounds of interpretation and entered into law development. Also, the scope of practical relevance of 'direct participation in hostilities' could have been more clearly delineated.

The major substantive criticism is that the ICRC's interpretation does not adequately reflect the key object and purpose of Geneva Conventions and Additional Protocols, namely the regulation of armed conflict in a manner that appropriately balances the ability to achieve legitimate military objectives and the protection of civilians. This is because the Guidance takes too restrictive an interpretation of the meaning of 'members of organised armed groups' and 'civilians taking a direct part in hostilities'. Though this broadens the legal protection of civilians, it significantly hampers the ability of state forces to conduct military operations against irregular forces. It also creates a significant operational advantage for civilians who alternate between civilian life and engagement in hostilities. These factors may also undermine respect for and observance of IHL by state forces.

This criticism applies to several of the ICRC's elements of direct participation in hostilities. In particular, equating participation only with 'specific acts' places artificial dividing lines between what is often inseparable courses of conduct and leads to a 'revolving door of protection' which irregular forces can easily abuse to their advantage. Further, limiting 'direct participation' to acts only one causal step removed from the infliction of harm, or that are preparatory to a specific operation, excludes the targeting of the precursor military activities that enable irregular forces to inflict this harm.

A potential remedy for these issues is to rework the interpretation of direct participation in hostilities in two ways. The first is to include both specific acts and a series or chain of specific acts in the scope of 'participation'. The second is to include both the materialisation of harm and the operational activities that facilitate and are closely connected with such harm in the meaning of 'direct participation'. These changes, combined with the alternative tests for threshold of harm and belligerent nexus described above, plus the need to establish each of the elements to a high level of probability, would lead to greater balance between the ability to conduct military operations and the protection of civilians. They would also provide a more even legal playing field for parties to a conflict.