TOTALITY OF THE CIRCUMSTANCES: THE DOD LAW OF WAR MANUAL AND THE EVOLVING NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

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EXECUTIVE SUMMARY

This article addresses the evolving notion of direct participation in hostilities, primarily by contrasting the views of a private, international organization – the International Committee of the Red Cross (ICRC) – in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, with that of the approach taken by the United States – a nation that has been engaged in continuous armed conflict for over fifteen years – in the Department of Defense (DoD) Law of War Manual.

In its in-depth study, the ICRC describes two scenarios in which a civilian loses immunity from attack. The first occurs when an individual effectively becomes a combatant by assuming a continuous combat function in an organized armed group. By doing so, that individual forfeits his civilian status and may be targeted at any time unless he effectively withdraws from the armed group. In the second scenario, a civilian loses his protection for such time as he directly participates in hostilities. In that case, a civilian does not forfeit his civilian status, but loses his immunity from direct attack for as long as he is directly participating in hostilities. In order to constitute direct participation in hostilities, one's actions must satisfy three criteria: a threshold of harm, a direct causal link between the act and the harm likely to result,

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and a belligerent nexus.

The ICRC's analysis errs on the side of preserving an inordinate weighting of humanitarian concerns over the balance of military necessity in the law of armed conflict. In addition, it essentially limits actions that would qualify as direct participation in hostilities to those that most closely correspond to activities conducted by the combat arms elements of a State's armed forces. Although most members of a State's armed forces are targetable at any time, including those in the combat service and combat service support elements, the ICRC's analysis generally would not include those performing similar roles for non-State armed groups as performing a continuous combat function. Therefore, they would not be targetable unless they began performing certain acts that the ICRC would consider to constitute direct participation in hostilities.

The United States supports the customary international law principle that a civilian forfeits immunity from attack when directly participating in hostilities. The DoD approach in the Law of War Manual, however, is more expansive than the ICRC's approach. According to the Manual, a civilian forfeits immunity not only by participating in actual combat but, among other things, by engaging in combat sustaining activities as well. This broader definition would include as targetable not only those members of a non-State armed group equivalent of combat arms elements, but rather all members of a non-State armed group, including those who serve in combat service and combat service support roles.

This article concludes that the ICRC approach would inappropriately permit *de facto* combatants to apply the law of armed conflict as a shield to permit them to support non-State armed forces in a manner similar to that of members of State armed forces but without the corresponding risk of being lawfully targeted at any time. The preferred approach in determining

whether an individual has become a member of a non-State armed group is to consider whether, under a totality of the circumstances, he performs functions for that group, either formally or on a continuous basis, that would ordinarily be associated with functions performed by a member of a State armed force. If so, then that individual is a combatant who may be lawfully targeted. The law of armed conflict must not be applied in a manner which unreasonably benefits and encourages unlawful belligerency.

INTRODUCTION

The United States has been engaged in continuous armed conflict for over fifteen years, since commencing its initial military action in Afghanistan in response to the al Qaeda terrorist attacks of September 11, 2001. While the conflicts beginning in Afghanistan in 2001 and Iraq in 2003 initially constituted traditional international armed conflicts between State actors,[1] they both quickly devolved into non-international armed conflicts that pitted the new governments of the respective States, with the support of the United States and its allies, against terrorist organizations such as al Qaeda and its associated forces. Additionally, the expansive use of unmanned aerial vehicles to target enemy fighters has resulted in the extension of combat operations outside of the "hot" battlefield of Afghanistan into countries such as Pakistan, Yemen, and Somalia.[2]

[1] An argument can be made that, unlike the government of Iraq, the Taliban never truly constituted the legitimate government of Afghanistan. *See, e.g.*, *Who Are the Taliban?*, BBC NEWS (Sep. 29, 2015), http://www.bbc.com/news/world-south-asia-11451718 (describing how only three nations – Pakistan, Saudi Arabia, and the United Arab Emirates – recognized the legitimacy of the Taliban during its rule from the mid-1990s to 2001).

[2] *See, e.g.*, Thomas Gibbons-Neff, *U.S. Airstrike Kills More Than 150 at Somalia Terrorist Camp, Military Says*, WASH. POST (Mar. 7, 2016), https://www.washingtonpost.com/news/checkpoint/wp/2016/03/07/u-s-drone-strike-kills-more-than-150-in-somalia (describing a U.S. strike using both manned and unmanned aircraft that targeted al-Shabab training camps in Somalia resulting in the deaths of over 150 militants). A "hot" battlefield refers to an area in which ongoing combat operations are taking place between armed forces. This would include, for example, Afghanistan, where U.S. forces are engaged in combat against the Taliban. However, it would not necessarily include a location such as Somalia where, despite the fact that the U.S. launches drone or other air attacks against militants, U.S. forces are not regularly engaged in combat operations.

The *principle of distinction*, a bedrock law of armed conflict,[3] requires combatants to distinguish themselves from non-combatants and to target only the former. This principle can be difficult enough to apply in the fog of war found in traditional international armed conflicts; however, it is exponentially more difficult to apply in a non-international armed conflict in which the entire enemy force deliberately blends into the local civilian population to avoid detection. Additionally, while the law of armed conflict identifies members of the armed forces of a party to the conflict as combatants that can be targeted at any time, the law presumes that civilians – and those who appear to be civilians – are non-combatants that cannot be targeted unless and for such time as they take a direct part in hostilities.[4] The implication of a civilian potentially losing this vital protection naturally begs the question: what exactly does it mean to take a "direct part" in hostilities?

The International Committee of the Red Cross (ICRC) addressed this concern in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under Humanitarian Law*[5] (ICRC Guidance), released in 2009. In this in-depth study, the ICRC attempted to identify at what point a civilian loses his immunity from attack by directly participating in hostilities in

[3] The terms law of armed conflict, law of war, and international humanitarian law are generally used interchangeably. *See, e.g.*, OFFICE OF GENERAL COUNSEL, U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL ¶ 1.3.1.2 (2015), https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190 [hereinafter LAW OF WAR MANUAL] (stating that the law of war is often called the law of armed conflict and that the term international humanitarian law is "an alternative term for the law of war that may be understood to have the same substantive meaning as the law of war."). For the sake of consistency, I will use the term law of armed conflict throughout this article.

[4] *See, e.g.*, CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4789 (1987) [hereinafter AP Commentary]. *But see* LAW OF WAR MANUAL, *supra* note 3, ¶ 5.4.3.2 (stating the U.S. position that "[u]nder customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases.").

[5] NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter ICRC Guidance].

either an international or non-international armed conflict.[6] In doing so, it describes two scenarios in which this can occur: first, through membership in an organized armed group based on a continuous combat function – in which a combatant effectively forfeits his civilian status for as long as he remains a member performing certain functions in the group; and second, for such time as a civilian directly participates in hostilities. Though criticized as being overly rigid and difficult to apply in real-world scenarios[7], the ICRC Guidance nevertheless represents an important and thorough scholarly approach to addressing this crucial subject.

In June 2015, the Department of Defense (DoD) promulgated its long-awaited Law of War Manual.[8] The manual is a comprehensive treatise which covers a wide array of law of armed conflict subjects, including the targeting of members of non-State armed forces and civilians that take a direct part in hostilities. The United States has not ratified either Additional Protocol I[9] (AP I) or Additional Protocol II[10] (AP II) to the Geneva Conventions of 1949, which provide identical language regarding the prohibition against the targeting of civilians unless and for such time as they directly participate in hostilities. While the United States does not believe the particular language in AP I and AP II reflects customary international law, it nevertheless "supports the customary principle on which [the language] is based."[11] The DoD approach in the Law of War Manual, however, expands beyond what many in the international community

[6] Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, *in* 88 INTERNATIONAL LAW STUDIES, NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 186 (Kenneth Watkin and Andrew J. Norris eds., 2012).
[7] *See, e.g.*, *id.* at 186 (describing feedback stating that the ICRC Guidance is "too rigid and complex" from an operational perspective, and that it "d[oes] not give an accurate picture of State practice or (in some respects) of a practice to which States could realistically aspire.").
[8] LAW OF WAR MANUAL, *supra* note 3. *See id.* at iii to vi (providing a brief history of the Manual's development as well as its antecedents).
[9] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].
[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].
[11] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.1.2.

would consider to constitute taking a direct part in hostilities to include not only participating in actual combat but, among other things, engaging in conduct that "effectively and substantially contribute[s] to an adversary's ability to conduct or sustain combat operations."[12] But what exactly does "sustain" mean in this context, and how far can the application of that type of standard be pushed?

This article will address the evolving standard applicable to targeting civilians that join organized armed groups or otherwise directly participate in hostilities, especially in the context of the non-international armed conflicts in which the United States is currently engaged. Part II will discuss the principle of distinction and its basis in both treaty and customary international law. Part III will turn to the concept of direct participation in hostilities. It will provide a general overview of the concept under treaty and customary international law, the approach adopted in the ICRC's influential study, and the U.S. position as represented by the Law of War Manual.[13] Part IV will compare the two approaches and ultimately conclude that, given the complexities involved in modern non-international armed conflict, the most practical approach to this difficult subject is to apply a totality of the circumstances analysis focusing on whether the role an individual plays or the actions he takes correspond with what would ordinarily be expected of a member of a State's armed forces. If so, then such association or actions constitute forfeiture of arguably the most important protection the law of armed conflict provides civilians: the protection against being targeted.

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[12] *Id.* ¶ 5.8.3; *see* The Judge Advocate General's Legal Center and School, U.S. Army, International and Operational Law Department, *Operational Law Handbook* 21-22 (2015) [hereinafter OpLaw Handbook] (noting that "[t]hus far, universally agreed-upon definitions of [direct participation in hostilities] have proven elusive" and that "[the ICRC's] proposals and others remain debated by nations, warfighters, and scholars alike.").

[13] *See* LAW OF WAR MANUAL, *supra* note 3, ¶ 1.1.1 (noting that "[a]lthough the preparation of [the] manual . . . benefited from the participation of lawyers from the Department of State and the Department of Justice, [it] does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.").

I. THE LAW OF ARMED CONFLICT PRINCIPLE OF DISTINCTION

At its most basic level, armed conflict entails identifying and killing the enemy or otherwise rendering him *hors de combat*.[14] In a non-international armed conflict, in which the enemy deliberately blends in with the civilian population in order to avoid detection, it is the former, rather than the latter, that can pose the greatest difficulty. The principle of distinction requires combatants to distinguish themselves from civilians and to target only other combatants.[15] To fully understand this principle, however, it is first necessary to define and understand the two generally recognized individual statuses on the battlefield: combatants and civilians.[16]

AP I defines combatants in an international armed conflict as "[m]embers of the armed forces of a Party to the conflict," with the exception of medical personnel and chaplains.[17] The

[14] From the French for "out of combat," persons who are *hors de combat* include those incapable of fighting due to sickness, wounds, or surrender. Those who are *hors de combat* must be treated humanely and cannot be targeted. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW] ("Persons taking no part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."); *see also* The Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Weighing Under 400 Grams Weight (1868 St. Petersburg Declaration) *reprinted in* 1 AJIL SUPPLEMENT: OFFICIAL DOCUMENTS 95, 96 (1907) (recognizing that for "the purpose of weaken[ing] the military forces of the enemy . . . it is sufficient to disable the greatest possible number of men." However, the declaration goes on to prohibit the use of certain explosive projectiles, concluding that it would be contrary to the laws of humanity to employ arms "which uselessly aggravate the sufferings of disabled men, or render their death inevitable.").

[15] *See* AP I, *supra* note 9, art. 48 (stating that "[i]n 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."); *see also* LAW OF WAR MANUAL, *supra* note 3, ¶ 17.5.1 (noting that in a non-international armed conflict, "[p]arties to a conflict must conduct attacks in accordance with the principle of distinction. As during international armed conflict, an adversary's failure to distinguish its forces from the civilian population does not relieve the attacking party of its obligations to discriminate in conducting attacks.").

[16] *See* LAW OF WAR MANUAL, *supra* note 3, ¶ 4.2. *But see id.* at ¶ 4.2.3 (noting that "[c]ertain classes of persons, such as unprivileged belligerents, "do not fit neatly within the dichotomy of . . . combatants and civilians." Unprivileged belligerents, also known as unlawful combatants, are defined as "persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (*e.g.*, being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (*e.g.*, combatant immunity and [prisoner-of-war] status)." *Id.* at ¶ 4.3).

[17] AP I, *supra* note 9, art. 43.2. AP I supplements the four 1949 Geneva Conventions and applies to international armed conflicts and occupations, what are commonly referred to as "common Article 2" conflicts, in reference to

significance of combatant status is two-fold: First, combatants possess "the right to participate directly in hostilities."[18] Known as the "combatant's privilege" or "combatant immunity," combatant status allows a lawful combatant to "kill or wound without penalty," provided that he is otherwise obeying the law of armed conflict while doing so.[19] Second, upon capture by the opposing party, combatants receive prisoner-of-war status,[20] which includes all the rights and privileges accorded by the Third Geneva Convention (GPW).[21] Along with these rights and privileges comes the corresponding reality that during an international armed conflict, combatants may be lawfully targeted by other lawful combatants at any time, whether or not they are directly participating in hostilities at the time they are targeted.[22]

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common Article 2 of the four Geneva Conventions. *See id.*, art. 1.3. Medical personnel and chaplains, while members of the armed forces, are nevertheless considered non-combatants. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 13 (3d ed. 2007) [hereinafter CIHL RULES]; *see also id.* at 11 (discussing how all members of the armed forces of a party to a conflict being combatants, with the exception of medical and religious personnel, reflects customary international law in international armed conflicts); Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2295 (hereinafter Hague IV) (noting that "[t]he armed forces of the belligerent parties may consist of combatants and non-combatants."); *id.*, art 1 (establishing the criteria necessary for belligerent status); and GPW, *supra* note 14, art. 4 (establishing the criteria necessary to obtain prisoner-of-war status in an international armed conflict).

[18] AP I, *supra* note 9, art. 43.2; *see also* AP Commentary, *supra* note 4, ¶ 1679 (discussing the difficulty in defining the concept of "direct participation in hostilities" and noting that to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants, although their possible presence near military objectives . . . does expose them to incidental risk." This difficulty as applied to defining when civilians are directly participating in hostilities is explored further *infra.*).

[19] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 42 (2010). *See also* CIHL RULES, *supra* note 17, at 11 (noting that combatant status exists only in international armed conflicts).

[20] AP I, *supra* note 9, art. 44.1; GPW, *supra* note 14, art. 4.

[21] *See generally* GPW, *supra* note 14.

[22] *See* AP Commentary, *supra* note 4, ¶ 2017 (noting that "members of [armed] forces are combatants, that is to say, they have the right to participate directly in hostilities; the corollary is that they may be the object of hostile acts."); *see also* LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.1 (noting that "combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack. For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*."); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 778 (2010) ("A combatant . . . [m]ay be the object of lawful attack by enemy military personnel at any time, wherever located, regardless of the duties in which he or she is engaged.").

AP I defines civilian in the negative as essentially any person who is not a combatant.[23] This definition reflects customary international law as well.[24] Since civilians are by definition non-combatants, they do not possess the right to directly participate in hostilities.[25] Additionally, if captured while directly participating in hostilities, civilians are not accorded prisoner-of-war status and may be tried for any illegal acts committed.[26] Unlike lawful combatants who may be targeted at any time, civilians generally may not be directly targeted.[27] Furthermore, in light of the overarching intent to protect civilians to the greatest extent possible, AP I provides that "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian."[28] AP II, which applies to certain types of non-international armed conflicts, does not contain a definition for either combatants or civilians, although it contains similar provisions dedicated to the protection of the civilian population.[29]

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[23] AP I, *supra* note 9, art. 50.1; *see* AP Commentary, *supra* note 4, ¶ 1677 (describing how "[a]ll members of the armed forces are combatants, and *only* members of the armed forces are combatants.") (emphasis added). This definition of armed forces includes not only the definition provided for in Article 43 of AP I, but also those covered by Article 4 A 1), 2), 3), and 6) of GPW. *See also* AP Commentary, *supra* note 4, ¶ 1914 (describing how this negative definition is justifiable given that "the concepts of civilian population and the armed forces are only conceived in opposition of each other, and that the latter constitutes a category of persons which is now clearly defined in international law and determined in an indisputable manner by the laws and regulations of States.").

[24] CIHL RULES, *supra* note 17, at 17.

[25] *See* LAW OF WAR MANUAL, *supra* note 3, ¶ 4.8 ("Civilians lack the combatant's privilege, and may be punished, after a fair trial, by an enemy State for engaging in hostilities against it.").

[26] *See* Solis, *supra* note 19, at 207-208; *see also* LAW OF WAR MANUAL, *supra* note 3, ¶ 4.19.4 (noting that "[a]lthough international law affords lawful combatants a privilege or immunity from prosecution, unprivileged belligerents lack such protection. A State may punish unprivileged enemy belligerents, subject to applicable requirements, such as a fair trial.").

[27] AP I, *supra* note 9, art. 51.2; *see also* AP II, *supra*, note 10, art. 13.2 (although AP II, which applies to certain types of non-international armed conflicts, does not contain definitions for combatants and civilians, Article 13.2 provides a verbatim prohibition on the targeting of civilians); CIHL RULES, *supra* note 17, at 19-20 (providing that this rule constitutes customary international law in both international and non-international armed conflicts).

[28] AP I, *supra* note 9, art. 50.1. *But see* LAW OF WAR MANUAL, *supra* note 3, ¶ 5.5.3.2. The United States, which having signed but not ratified AP I, is not a party to the treaty, and does not consider this provision regarding a presumption of civilian status to constitute customary international law. Similar language does not appear in AP II. *But see* CIHL RULES, *supra* note 17, at 24 (noting that "[i]n the case of non-international armed conflicts, the issue of doubt has hardly been addressed in State practice, even though a clear rule on this subject would be desirable as it would enhance the protection of the civilian population against attack. In this respect, the same balanced approach . . . with respect to international armed conflicts seems justified in non-international armed conflicts.").

[29] *See, e.g.*, AP II, *supra*, note 10, art. 13; *see also* CIHL RULES, *supra* note 17 at 19 (describing how "[t]he definition that 'any person who is not a member of armed forces is considered to be a civilian' and that 'the civilian population comprises all persons who are civilians' was included in the draft of [AP II]," but "this definition was

The definitions of combatant and civilian are inextricably linked to the law of armed conflict principle of distinction, the purpose of which is to protect the civilian population from attack and to limit direct participation in hostilities to lawful combatants.[30] In order for this principle to be effective, lawful combatants must first distinguish themselves from the civilian population, most readily by wearing a uniform or other fixed distinctive sign recognizable at a distance. Second, they must distinguish civilians from the enemy combatants they intend to attack. The requirement to wear distinctive insignia dates back to the Hague Conventions of 1899 and 1907, which required combatants "[t]o have a fixed distinctive emblem recognizable at a distance," and the Geneva Conventions of 1949, which required combatants to "hav[e] a fixed distinctive sign recognizable at a distance," among others requirements, in order to be entitled to prisoner-of-war status upon capture.[31]

AP I discusses the concept of distinction in two locations. First, AP I requires combatants "to distinguish themselves[32] from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack."[33] If unable to do so under those circumstances, a combatant may still fulfill the distinction requirement by carrying his arms openly "during each military engagement, and . . . during each 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

dropped at the last moment . . . as part of a package aimed at the adoption of a simplified text. As a result, [AP II] does not contain a definition of civilians or the civilian population even though these terms are used in several provisions.").

[30] *See* AP Commentary, *supra* note 4, ¶ 1911 (noting in a discussion of AP I, art. 50 that "the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons.").

[31] *See* Regulations Respecting the Laws and Customs of War on Land, annexed to Convention with Respect to the Laws and Customs of War on Land art. 1, Jul. 29, 1899, 32 Stat. 1803, 1811; Hague IV, *supra* note 17, art. 1; and GPW, supra note 14, art. 4. GPW requires a combatant to have a fixed distinctive "sign" rather than a fixed distinctive "emblem."

[32] This distinction presumably would occur through wearing a uniform or other fixed distinctive sign recognizable at a distance as required by Article 4A(2)(b) of GPW.

[33] AP I, *supra* note 9, art. 44.3

participate."[34] By doing so, a combatant retains his combatant status.[35] If a combatant fails to appropriately distinguish himself, he may forfeit his right to prisoner-of-war status, although AP I provides that in such a case he shall nevertheless still be accorded the rights and protections of GPW.[36] The United States has consistently stated that it does not believe this relaxation of the Hague and Geneva Convention distinction requirements constitutes customary international law, and it remains a primary U.S. objection to AP I.[37]

Second, AP I provides that:

> [i]n 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.[38]

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[34] *Id.*
[35] *Id.*
[36] *Id.* at art. 44.4. This provision arguably provides a lower hurdle for those combatants who are not members of the regular armed forces to adequately distinguish themselves and obtain prisoner-of-war status. This is especially true in light of Article 44.7, which states that the provision "is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict." Pursuant to GPW Article 4A(2), the conditions required to obtain prisoner-of-war status are:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war. GPW, *supra* note 14, art. 4A(2). AP I, Art. 44.4 weakens the distinction requirements of GPW, namely Articles 4A(2)(b) and (c), by limiting the instances in which they are required for combatants other than members of the regular, uniformed armed forces.
[37] *See* Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977, Treaty Doc. 100-2 (1987) (noting that the relaxed AP I distinction provision would "grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."); *see also* LAW OF WAR MANUAL, *supra* note 3, ¶ 4.6.1.2 (noting that "[t]he United States has objected to the way these changes relaxed the requirements for obtaining the privileges of combatant status, and did not ratify AP I, in large part, because of them." In addition, "[t]he United States has expressed the view that it would not be appropriate to treat this provision of AP I as customary international law.") and Parks, *supra* note 22, at 781-782 (noting that "[these provisions] were a principal reason for the United States' decision against ratification of [AP I] and the entry of qualifying statements of understanding with respect to these provisions by a number of governments that ratified [AP I].").
[38] AP I, *supra* note 9, art. 48; *see also* CIHL RULES, *supra* note 17, at 11 (noting that, although "combatants" technically only exist in international armed conflicts, "[f]or purposes of the principle of distinction . . . members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts . . .").

This provision reflects the principle of distinction grounded in customary international law.[39] In addition to this provision establishing the concept that combatants must distinguish civilians from combatants, AP I provides the overarching targeting principle that "[t]he civilian population, as well as individual civilians, shall not be the object of attack."[40] This provision appears verbatim in AP II ,[41] and the principles constitute customary international law applicable to both international and non-international armed conflicts.[42]

Thus, treaty and customary international law cover both the requirement that combatants distinguish themselves from civilians and that they distinguish civilians from the enemy combatants they target. These provisions encapsulate the crucial importance of distinction that renders it the bedrock principle of the law of armed conflict, namely, distinguishing between combatants and civilians not as an end in and of itself, but rather to protect the latter to the greatest extent possible from the harms intrinsic to armed conflict. We now turn to the circumstances in which a civilian may nevertheless forfeit that protection and render himself vulnerable to such harms.

II. DIRECT PARTICIPATION IN HOSTILITIES AND ORGANIZED ARMED GROUPS

[39] *See* AP Commentary, *supra* note 4, ¶ 1863 (noting that "[t]he basic rule of protection and distinction is confirmed in [Article 48]. It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law."); *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME II: PRACTICE 2-3 (2005) (noting that the draft of AP II contained language stating that "'in order to ensure respect for the civilian population, the parties to the conflict . . . shall make a distinction between the civilian population and combatants," and was amended to state that "in order to ensure respect and protection for the civilian population . . . the Parties to the conflict shall at all times distinguish between the civilian population and combatants." However, this language was ultimately deleted because it failed to obtain the necessary votes to be included in the final text.). *See also* AP Commentary, *supra* note 4, ¶ 4758 (noting that "[d]espite its brevity, this Part [covering the protection of the civilian population] significantly reinforces the protection of the civilian population because of the fundamental nature of the rules it lays down.").

[40] AP I, *supra* note 9, art. 51.2.

[41] AP II, *supra* note 10, art. 13.2.

[42] CIHL RULES, *supra* note 17, at 3.

A. Introduction

Despite its utmost importance under the law of armed conflict, the prohibition on targeting civilians is not absolute. Immediately following the prohibitive targeting language, AP I provides the crucial exception: "Civilians shall enjoy the protection [against being targeted] unless and for such time as they take a direct part in hostilities."[43] This provision appears verbatim in AP II as well[44] and reflects customary international law in both international and non-international armed conflicts.[45] Although direct participation in hostilities effectively amounts to a forfeiture of arguably the greatest protection accorded to civilians, that of being immune from direct attack, neither the four Geneva Conventions of 1949 nor the two Additional Protocols of 1977 define this concept.[46]

In its *Commentary on the Additional Protocols*, the ICRC states that "[t]he immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts."[47] The ICRC defines "hostile acts" as "acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."[48] Furthermore, direct participation "implies that there is a sufficient causal relationship between the act of participation and its immediate consequences."[49] The Commentary does not provide further clarification regarding what constitutes hostilities, other than to state that hostilities in this sense includes both "preparations for combat" and "the return from combat" in addition to, for

[43] AP I, *supra* note 9, art. 51.3.
[44] AP II, *supra* note 10, art. 13.3.
[45] CIHL RULES, *supra* note 17, at 20. *But see* LAW OF WAR MANUAL, *supra* note 3, ¶ 5.9.1.2 (discussing how the United States does not believe that this language, as drafted, reflects customary international law, but, nevertheless, supports the customary principles on which these two articles are based).
[46] *See* ICRC Guidance, *supra* note 5, at 12 (noting that "despite the serious legal consequences involved, neither the Conventions nor their additional Protocols provide a definition of direct participation in hostilities.").
[47] AP Commentary, *supra* note 4, ¶ 1942.
[48] *Id.*
[49] *Id.* ¶ 4787.

example, actually firing a weapon.[50]

Unlike a combatant who is targetable at any time, a civilian does not become forever targetable by virtue of having committed a hostile act. Rather, he is targetable only for "as long as he directly participates in hostilities."[51] Once he ceases to directly participate in hostilities, he regains his right to immunity from being targeted.[52]

The ICRC's *Commentary on the Additional Protocols* is careful to note that "[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort," emphasizing that "[t]he latter is often required from the population as a whole to various degrees."[53] Two extreme examples of this distinction would be a civilian firing an automatic weapon at a passing convoy, who would be directly participating in hostilities, and a civilian buying a war bond, who would not. But what about everyone in between? Must a civilian actually pull a trigger to qualify as "directly" participating in hostilities such that he may be targeted? And how does the law of armed conflict account for modern day non-international armed conflicts between State actors and terrorist organizations such as the Islamic State, a non-State actor that nevertheless conducts armed conflict on a scale commensurate to that of an actual State's armed forces? Are Islamic State fighters *de facto* combatants within their organization, and therefore targetable at any time? Or are they only targetable when they are actually engaging Syrian or Iraqi armed forces in direct combat? The AP II Commentary states that "[t]hose who belong to armed forces or armed groups may be attacked at any time."[54] As shall be discussed below, this language applies to both the lawful combatants of State armed

[50] *Id.* ¶¶ 1942 and 4788.
[51] *Id.* ¶ 1942.
[52] *Id.* ¶ 1944.
[53] *Id.* ¶ 1945.
[54] *Id.* ¶ 4789.

forces and the unprivileged belligerents who comprise organized armed groups. To begin to address these issues, we turn to the ICRC's comprehensive 2009 study devoted to applying the law of 1949 and 1977 to the battlefields of today.

B. The ICRC's Interpretive Guidance on Direct Participation in Hostilities

The stated purpose of the ICRC Guidance was not "to change the law," but rather "to provide[] an interpretation of the notion of direct participation in hostilities within existing legal parameters."[55] In other words, the ICRC intended to address the growing concern of civilians directly participating in hostilities by interpreting the *lex lata* in light of the realities of modern day conflict, rather than the *lex ferenda*.[56] In the context of providing ten recommendations with corresponding commentary, the ICRC addresses three principal questions "applicable in both international and non-international armed conflict":

1. Who is considered a civilian for the purposes of the principle of distinction?;
2. What conduct amounts to direct participation in hostilities?; and
3. What modalities govern the loss of protection against direct attack?[57]

At the forefront of the ICRC's analysis lies the desire to provide guidance on implementing the principle of distinction "in the challenging and complex circumstances of contemporary warfare" in order to "prevent the exposure of the civilian population to erroneous or arbitrary targeting."[58]

1. Who Is Considered a Civilian?

The identification of who qualifies as a civilian on the battlefield is crucial, of course, because it determines "the circle of persons who are protected against direct attack unless and for

[55] ICRC Guidance, *supra* note 5, at 6. The ICRC was also careful to provide the caveat that "the Interpretive Guidance is an expression solely of the ICRC's views." *Id.*
[56] *Id.* at 9.
[57] *Id.* at 12.
[58] *Id.* at 7.

such time as they directly participate in hostilities."[59] The ICRC Guidance addresses this concept as it applies to both international and non-international armed conflict, as well as to a specific class of persons: private contractors and civilian employees. Given the nature of the conflicts in which the United States is currently engaged, this article will focus on the ICRC's definition of civilian applicable to non-international armed conflicts.

The ICRC begins by identifying three terms found in treaty law governing the law of non-international armed conflict: civilians, armed forces, and organized armed groups.[60] Noting that these three terms are used but not defined in treaty law, the ICRC Guidance nevertheless describes them as "mutually exclusive categories."[61] Similar to AP I, the ICRC Guidance defines civilians in the negative as encompassing "all persons who are not members of State armed forces or organized armed groups of a party to the conflict."[62] Thus, in order to understand the ICRC's definition of civilians in non-international armed conflicts, it is crucial to understand what the ICRC means by State armed forces and organized armed groups.

Drawing on language found in common Article 3 of the Geneva Conventions of 1949,[63] which states that "'each Party to the conflict' must afford protection to '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,*'"[64] the ICRC Guidance concludes that "both State and non-State parties to [a non-international armed conflict] have armed forces distinct from the civilian

[59] *Id.* at 13.
[60] *Id.* at 27.
[61] *Id.* at 28.
[62] *Id.* at 36.
[63] *See, e.g.*, GPW, *supra* note 14, art. 3. Common Article 3 is the sole article of the four Geneva Conventions applicable to non-international armed conflict. It is supplemented by AP II, which applies to non-international armed conflicts in which "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of [the territory of a High Contracting Party] as to enable them to carry out sustained and concerted military operations and to implement [AP II]." AP II, *supra* note 10, art. 1.1.
[64] ICRC Guidance, *supra* note 5, at 28 (quoting common Article 3).

population."[65] It notes that AP II uses the generic term "armed forces" to identify the armed forces of a State, whereas it uses the terms "dissident armed forces" and "other organized armed groups" to identify the armed forces of non-State parties.[66] The ICRC Guidance, in turn, uses the term "State armed forces" to describe the armed forces of a State party, and "organized armed group" to include both dissident armed forces, defined as "part of a State's armed forces that have turned against the government,"[67] and other organized armed groups.[68]

Membership in the armed forces of a State is governed by domestic law and is generally a straight-forward process "expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment."[69] According to the ICRC, membership in an organized armed group, however, is based on function, specifically, a "continuous function assumed by an individual [that] corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict."[70] Therefore, the "decisive criterion for individual membership in an organized armed group is whether the person assumes a continuous function for the group involving his or her direct participation in hostilities."[71]

A continuous combat function requires "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict," and includes those "whose function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities . . .", even before he "first carries out a hostile

[65] *Id*.
[66] *Id.* at 29.
[67] *Id.* at 31-32.
[68] *Id.* at 30.
[69] *Id.* at 31.
[70] *Id.* at 33.
[71] *Id.*

act."[72] However, according to the ICRC Guidance, it does not include "[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities," such as "recruiters, trainers, financiers and propagandists" who "continuously contribute to the general war effort of a non-State party," but "are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities."[73] This applies to those whose "function is limited to purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations" as well.[74]

When describing the composition of non-State parties to a conflict, the ICRC Guidance explicitly differentiates between "fighting forces" and the "supportive segments of the civilian population such as political wings and humanitarian wings," with "[t]he term organized armed group . . . refer[ing] exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense."[75] The members of the organized armed group, the fighting forces, are therefore combatants who remain targetable at all times. The members of the supportive segments or political establishment as such remain civilians, and, therefore, cannot be attacked unless and for such time as they directly participate in hostilities.

The ICRC's analysis regarding what constitutes armed forces in a non-international armed conflict is significant, because it unambiguously concludes that members of organized armed groups are not civilians.[76] Accordingly, members of organized armed groups are more

[72] *Id.* at 34.
[73] *Id.*
[74] *Id.* at 35.
[75] *Id.* at 32.
[76] *See id.* at 28 (describing how understanding members of organized armed groups to be civilians essentially in a state of constant direct participation in hostilities would "seriously undermine the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population."); *see also id.* at 34-35 (describing how "[c]ontinuous combat function does not imply *de jure* entitlement to combatant privilege. Rather, it distinguishes members of the organized fighting forces of a non-

akin to combatants in an international armed conflict, although without the corresponding prisoner-of-war status applicable to a combatant when captured in an international armed conflict or the concomitant combatant's privilege. Similar to combatants in an international armed conflict, members of the armed forces in a non-international armed conflict, whether belonging to State or non-State parties, "are considered to be 'taking no active part in the hostilities' only once they have disengaged from their fighting function . . . or are placed *hors de combat*."[77] In other words, like combatants in an international armed conflict, members of both State and non-State armed forces in a non-international armed conflict are generally targetable at all times, regardless of whether they are actually engaged in hostilities at the time they are attacked.[78] Civilians, including members of non-State parties who do not comprise an organized armed group, may not be targeted unless and for such time as they directly participate in hostilities.

Finally, the ICRC addresses the increased participation of private contractors and other civilian employees who accompany the armed forces in modern day conflicts and perform "previously traditional military functions" in support of the armed forces.[79] The ICRC states that such individuals must be regarded as civilians, and therefore protected from attack, unless they

State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."); CIHL RULES, *supra* note 17, at 21 ("To the extent that members of armed opposition groups can be considered civilians . . ., this rule appears to create an imbalance between such groups and governmental armed forces. Application of this rule would imply that an attack on members of armed opposition groups is only lawful for 'such time as they take a direct part in hostilities' while an attack on members of governmental armed forces would be lawful at any time. Such imbalance would not exist if members of armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or not considered to be civilians.").

[77] ICRC Guidance, *supra* note 5, at 28 (quoting common Article 3).

[78] *See* Pomper, *supra* note 6, at 186-187 (noting that, although it has been highly criticized, the ICRC Guidance "is in some ways pathbreaking in the level of recognition that it gives to the concept that individuals who become members of organized armed groups lose their civilian status and, while members, can be targeted on the basis of their status alone for the duration of a [non-international armed conflict].").

[79] ICRC Guidance, *supra* note 5, at 5.

assume a continuous combat function or otherwise directly participate in hostilities as defined by the analysis above.[80]

2. What Conduct Amounts to Direct Participation in Hostilities?

The ICRC Guidance next focuses on determining what conduct actually qualifies as direct participation in hostilities. The determination is crucial, because such action by a civilian results in "the suspension of [that] civilian's protection against direct attack."[81] The ICRC Guidance makes clear that direct participation in hostilities refers to a person's engagement in "specific hostile acts."[82] Whereas "hostilities" refers to a collective resort to violent measures, "participation" in hostilities is conducted on an individual basis.[83] Rather than constituting a function-based loss of protection against being targeted, such as due to possessing a continuous combat function and membership in an organized armed group,[84] direct participation in hostilities is a temporary or activity-based loss of protection applicable to civilians.[85] The ICRC provides three criteria for determining whether a "specific hostile act" qualifies as direct participation in hostilities:

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), and
2. There must be a direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

[80] *Id.* at 39-40.
[81] *Id.* at 13.
[82] *Id.* at 44.
[83] *Id.* at 43.
[84] As stated *supra* in section II.B.1., members of organized groups are not considered civilians but rather members of the armed forces of a party to the conflict. Such members lose civilian status upon assuming a continuous combat function within the group, and only re-gain civilian status upon leaving such groups. On the other hand, civilians who directly participate in hostilities retain their civilian status, but nevertheless may be targeted for such time as they directly participate in hostilities. Although separate concepts, as the ICRC notes, continuous combat function "is intrinsically linked to the concept of direct participation in hostilities." *Id.* at 69.
[85] *Id.* at 44-45.

3. The act must specifically be 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).[86]

The ICRC Guidance describes these three elements as "closely interrelated" and states that "there may be areas of overlap between them."[87]

The first element, threshold of harm, is based on the objective likelihood that a particular act will result in either military harm or harm to protected persons. For "military harm" – that which "encompass[es] not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict" – the threshold requirement is generally assumed regardless of the level of harm inflicted.[88] For harm to persons or objects protected against direct attack, the hostile acts must be likely to cause death, injury, or destruction in order to reach the required threshold of harm.[89] Therefore, while the threshold of harm may be met through hostile acts directed against military targets or protected persons, the quantitative harm required to reach the threshold is higher when it is likely to cause harm to protected persons rather than military harm.

The second element, direct causation, distinguishes between "direct" participation in hostilities and "indirect" participation, with only the former resulting in the loss of protection from attack.[90] Here, the ICRC specifically distinguishes between the actual "conduct of hostilities" (direct participation) and "other activities that are part of the general war effort[91] or

[86] *Id.* at 46.
[87] *Id.*
[88] *Id.* at 47.
[89] *Id.* at 50.
[90] *Id.* at 51.
[91] According to the ICRC, "the general war effort could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, 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), while war-sustaining activities would additionally include political, economic, or

may be characterized as war-sustaining activities" (indirect participation).[92] This is an important distinction, because as will be discussed *infra* in section III.B., the United States specifically includes war-sustaining acts within its definition of direct participation in hostilities.[93]

While the ICRC acknowledges that indirect participation could ultimately "result in harm reaching the threshold require[ment]," direct participation "is designed to cause that harm," whereas indirect participation "merely maintain[s] or build[s] up the capacity to cause such harm."[94] This includes acts which "constitute[] an integral part of a concrete and coordinated tactical operation that directly causes such harm,"[95] as long as the "concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold."[96] Thus, "the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm."[97]

The third element, belligerent nexus, requires that "an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another."[98] Such belligerent nexus is based on the "objective purpose of the act" and "does not depend on the mindset of every participating individual."[99] In other words, civilians forced to directly participate in hostilities lose their protected status as well.[100] In the absence of such a belligerent nexus, such acts cannot be considered to constitute direct

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media activities supporting the general war effort (e.g. political propaganda, financial transactions, production of agriculture or non-military industrial goods)." *Id.*

[92] *Id.* This distinction applies "at the collective level of the opposing parties to an armed conflict."

[93] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.3.

[94] ICRC Guidance, *supra* note 5, at 52.

[95] *Id.* at 54-55.

[96] *Id.* at 58.

[97] *Id.* at 52.

[98] *Id.* at 64.

[99] *Id.* at 59.

[100] *Id.* at 60.

participation in hostilities, and would fall within the realm of domestic law enforcement rather than the law of armed conflict.[101]

Finally, the ICRC addresses the "for such time" language of the AP I and AP II provisions, confirming that "[m]easures 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 that act."[102] Accordingly, direct participation in hostilities effectively encompasses these circumstances as well, in addition to the actual hostile act or acts themselves, and, therefore, permits civilians engaged in such activity to be lawfully targeted. This rule also highlights the fact that, once a civilian has "resum[ed] activities distinct from that operation," he effectively re-gains his protected status and may no longer be targeted.[103] The "decisive criterion" for the ICRC is that "both the deployment and return be carried out as an integral part of a specific act amounting to direct participation in hostilities."[104] This determination should be made "based on a reasonable evaluation of the prevailing circumstances."[105]

3. What Modalities Govern the Loss of Protection Against Direct Attack?

In its final section, the ICRC provides greater detail regarding the circumstances behind a civilian's loss of protection based on direct participation in hostilities or continuous combat function in an organized armed group. First, the ICRC discusses the temporal scope of the loss of protection. For civilians, their protection is forfeited "for the duration of each specific act

[101] *Id.* at 59.
[102] *Id.* at 65.
[103] *Id.* at 67.
[104] *Id.* at 68.
[105] *Id.*; *see also* OpLaw Handbook, *supra* note 12, at 12 (describing the "Rendulic Rule," a "broad[] standard regarding liability for battlefield acts" that holds that "commanders and personnel should be evaluated based on information reasonably available at the time of decision," and how the United States Senate has reiterated this standard when providing advice and consent for numerous law of armed conflict treaties.).

amounting to direct participation in hostilities."[106] However, they remain civilians through this time while their protection is "temporarily suspended."[107] The ICRC admits that this produces a "revolving door" issue of civilian protection, allowing civilians to lose and regain protection with each hostile act.[108] However, the ICRC views this "farmer-by-day, fighter-at-night" revolving door concept as "an integral part" of the law of armed conflict, rather than "a malfunction," because of the ambiguities and complexities of the "constantly changing circumstances" that make "the behavior of individual civilians . . . very difficult to anticipate."[109] In other words, the ICRC adopts a position that it is preferable to continuously provide an individual the benefit of the doubt and assume civilian status in order to "protect the civilian population from erroneous or arbitrary attack."[110]

On the other hand, members of organized armed groups "cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function."[111] Therefore, they are targetable at any time, whether or not they are actually in the process of committing a hostile act. In this case, the "'revolving door of protection starts to operate based on membership" rather than on specific hostile acts, and only ends with disengagement from the group.[112]

Second, the ICRC addresses precautions and presumptions in situations of doubt, stating that "[a]ll feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must

[106] ICRC Guidance, *supra* note 5, at 70.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 70-71.
[110] *Id.* at 71.
[111] *Id.* at 70.
[112] *Id.* at 72.

be presumed to be protected against direct attack."[113] This reinforces the rule found in AP I that "in case of doubt regarding the status of an individual, he is presumed to be a civilian."[114] Again, the ICRC is attempting to provide the greatest degree of protection possible to the civilian population through an emphasis on the importance of distinction in targeting individuals.

Finally, the ICRC addresses restraints on the use of force in direct attack.[115] According to the ICRC, "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."[116] The ICRC ties this rule to the principles of military necessity and humanity under the law of armed conflict to draw the conclusion that these principles "reduce the sum total of *permissible* military action from that which [the law of armed conflict] does not expressly prohibit to that which is *actually necessary*."[117] This concept introduces the idea that, when feasible, capture or other non-lethal means may be required to neutralize a threat, even though it would be otherwise lawful under the law of armed conflict to use lethal force.[118] This proposed rule has been the source of considerable criticism based on its inadequate grounding in the law.[119]

The ICRC should be applauded for its comprehensive approach to the difficult area of direct participation hostilities. However, questions remain whether the ICRC's analysis

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[113] *Id.* at 74.
[114] AP I, *supra* note 9, art. 50.1. For additional discussion, see *supra* note 28 and accompanying text.
[115] ICRC Guidance, *supra* note 5, at 77.
[116] *Id.*
[117] *Id.* at 79 (emphasis added).
[118] *See id.* at 81 (providing examples of this principle in application).
[119] *See, e.g.*, Parks, *supra* note 22, at 783-784 (noting that "[e]xperts' reactions to [this section], both as to its addition to the Interpretive Guidance and its substance, were instantaneous and vigorous."); Parks, *supra* note 22, at 796-797 (arguing that this rule applies an "unaccepted use-of-force continuum theory" and "attempts to impose a law enforcement paradigm with respect to targeting civilians taking a direct part in hostilities throughout the conflict spectrum in order to apply a human rights 'right to life' standard. In the process, it disregards the substantial body of case law that recognizes that the law of war is *lex specialis* in armed conflict."); Parks, *supra* note 22, at 828 (noting that the ICRC "construct[ed] a theory not supported by treaty law, State practice, or court decisions. Its ill-constructed theory is flawed beyond repair.").

accurately reflects the *lex lata* in this area or whether it unnecessarily imposes overly stringent burdens on State forces engaged in combat against organized armed groups and civilians directly participating in hostilities. As the ICRC itself noted, "the Interpretive Guidance is not and cannot be a text of a legally binding nature,"[120] a premise U.S. courts have noted in federal *habeas* cases involving Guantanamo Bay detainees who have cited it as authoritative.[121] We now turn to the DoD Law of War Manual to compare the approach of the ICRC – a private, international organization dedicated to promoting the law of armed conflict – with that of the United States, a nation whose military applies the law of armed conflict on the battlefield every day.

C. The U.S. Interpretation Under the DoD Law of War Manual

The ICRC's study remains controversial, with many nations, such as the United States, declining to accept many of its positions.[122] Because "a clear and uniform definition of direct participation in hostilities has not been developed in State practice,"[123] the United States and other nations have developed their own interpretations of the definition and application of this concept in modern day conflicts. In 2015, the U.S. Department of Defense (DoD) promulgated its long-awaited DoD Law of War Manual (the Manual).[124] The Manual focuses on the *jus in*

[120] ICRC Guidance, *supra* note 5, at 6.
[121] *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866, 884-885 (2010) (Williams, J., concurring) (Al-Bihani, a cook for an armed group engaged in hostilities in Afghanistan, cited the ICRC Guidance to argue that he was effectively a civilian contractor rather than a bona fide member of the group. Judge Williams, concurring, wrote that Al-Bihani's involvement with the group, which included cooking for them and carrying arms provided by them, was sufficient to render him properly subject to U.S. force directed at the group. Judge Williams noted that "[t]he alternative conclusion – which would have it that the President was authorized to use force against the fighting members of the [group] on the front lines in northern Afghanistan, but not against the armed people who enabled them to fight – is senseless." Judge Williams also noted that since the ICRC Guidance is not legally binding, the best [Al-Bihani] [could] do is suggest that [the court] should follow it on the basis of its *persuasive* force.") (emphasis added); *see also* Pomper, *supra* note 6, at 186 (noting that in federal habeas proceedings, the U.S. government has made clear that it does not view the ICRC Guidance as an authoritative statement of law).
[122] *See* OpLaw Handbook, *supra* note 12, at 22; *see also* Pomper, *supra* note 6, at 191.
[123] CIHL RULES, *supra* note 17, at 23.
[124] The Department of Defense released updated versions of the Manual in May and December 2016, neither of which contained significant changes regarding the topics discussed in this article. All citations in this article correspond to the December 2016 version of the Manual, the most recent update as of the time of this article's publication.

bello and "addresses the law of war that is applicable to the United States."[125] With nineteen parts and almost 1,200 pages of text, the Manual is a comprehensive treatise covering the full spectrum of law of armed conflict topics, including non-State armed groups and civilians directly participating in hostilities.

1. Armed Groups Liable to Attack

The Manual describes certain classes of persons as military objectives, a term generally used in treaties to refer solely to objects.[126] Military objectives, whether persons or objects, may lawfully be made the object of attack.[127] This includes combatants, including unprivileged belligerents, and civilians taking a direct part in hostilities.[128]

The Manual re-states the general rule that "combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of the attack," provided, of course, that they have not been placed *hors de combat*.[129] Combatants include "members of the armed forces of a State . . ., persons belonging to non-State armed groups . . ., and leaders whose responsibilities include the operational command and control of the armed forces or of a non-State armed group."[130] Thus, "[m]embership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities."[131]

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[125] LAW OF WAR MANUAL, *supra* note 3, ¶ 1.1.2. *Jus in bello* refers to the "law relating to the conduct of hostilities and the protection of war victims." The law of war applicable to the United States includes "treaties to which the United States is a party, and applicable customary international law." *Id.*
[126] *Id.* ¶¶ 5.6.1.1 and 5.6.2. *See, e.g.*, AP I, *supra* note 9, art. 52.2, defining military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."
[127] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.6.
[128] *Id.* ¶ 5.6.2.
[129] *Id.* ¶ 5.7.1.
[130] *Id.* ¶ 5.7.2.
[131] *Id.* ¶ 5.7.1.

This analysis is similar to the ICRC, although the Manual makes no reference of the requirement that a fighter possess a "continuous combat function" in order to be deemed part of an organized armed group. Rather, the Manual focuses solely on membership in the group itself, noting that "the organization's hostile intent may be imputed to an individual through his or her association with the organization," and that "[m]oreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group."[132]

Membership in an armed group may be either formal or functional.[133] Formal membership may be indicated directly through the use of rank, taking an oath of loyalty, wearing a uniform, or other such manner.[134] However, this may be difficult to determine since the common practice of such armed groups is for members to conceal their identities in order to blend in with the civilian population.[135] Thus, formal membership may also be inferred indirectly through activities such as "performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces," or "taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation," among other things.[136] This differs, of course, from the ICRC "revolving door" analysis, which would argue that direct participation in hostilities is separate from membership in an organized armed group, which is contingent on a member's continuous combat function rather than the frequency of direct participation in hostilities.

On the other hand, functional membership in an armed group applies to non-State armed

[132] *Id.*
[133] *Id.* ¶ 5.7.3.
[134] *Id.* ¶ 5.7.3.1.
[135] *Id.*
[136] *Id.*

groups that are not organized in a formal command structure.[137] In such cases, the Manual provides that:

> [a]n individual who is integrated into the group such that the group's hostile intent may be imputed to him or her may be deemed to be functionally (*i.e.*, constructively) part of the group, even if not formally a member of the group. The integration of the person into the non-State armed group and the inference that the individual shares the group's intention to commit hostile acts distinguish such an individual from persons who are merely sympathetic to the group's goals.[138]

Functional membership in an armed group may include "taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis."[139] Again, this would differ from the ICRC's "revolving door" analysis. Functional membership may also include "performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State."[140] This, too, is a departure from the ICRC's analysis, which would not necessarily include combat support or combat service support roles within the continuous combat function necessary to constitute membership in an organized armed group. Rather, continuous combat function would generally be limited solely to those who serve a purely combat-oriented role within the group.

2. Civilians Taking a Direct Part in Hostilities

The Manual states unequivocally that "[c]ivilians who take a direct part in hostilities forfeit protection from being made the object of attack."[141] However, since the United States is not a party to either AP I or AP II, the Manual is careful to note that its usage of this terminology is not meant to indicate "that the United States has adopted the direct participation in hostilities

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[137] *Id.* ¶ 5.7.3.2.
[138] *Id.*
[139] *Id.*
[140] *Id.*; *see* JOINT PUBLICATION 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Nov. 8, 2010) (defining "combat support" as "[f]ire support and operational assistance provided to combat elements" and "combat service support" as "[t]he essential capabilities, functions, activities, and tasks necessary to sustain all elements of all operating forces in theater at all levels of war.").
[141] *Id.* ¶ 5.8.

rule that is expressed in Article 51 of AP I."[142] Rather, the Manual states that while the language contained in Article 51.3 of AP I[143] "does not reflect customary international law, the United States supports the customary principle" on which it is based."[144] The Manual also specifically references the ICRC's Interpretive Guidance, noting that while parts of it "are consistent with international law, the United States has not accepted significant parts of the ICRC's interpretive guidance as accurately reflecting customary international law."[145]

The Manual states that, "[a]t a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy."[146] This language is uncontroversial and consistent with the ICRC's approach. However, the Manual immediately goes beyond the ICRC's analysis, stating that:

> [t]aking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort, such as by buying war bonds.[147]

This language, particularly the use of the word "sustain," suggests that the U.S. view of direct participation in hostilities goes beyond that of the ICRC. Much like its approach to armed groups discussed *supra* in section III.B.1., the Manual includes civilians performing roles traditionally reserved for combat service or combat service support rather than actually conducting combat operations.

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[142] *Id.* ¶ 5.8.1.
[143] AP I, *supra* note 9, art. 51.3 ("Civilians enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.").
[144] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.1.2; *see also id.* ¶ 5.8.3 (noting that "the United States is not a Party to a treaty with a . . . provision defining taking a direct part in hostilities for the purpose of assessing what conduct renders civilians liable to being made the object of attack.").
[145] *Id.* ¶ 5.8.1.2; *see also* Pomper, *supra* note 6, at 186 (noting that in federal habeas proceedings, the U.S. government has made clear that it does not view the ICRC Guidance as an authoritative statement of law).
[146] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.3. "Enemy" as used here applies to the enemy armed forces.
[147] *Id.*

The Manual states that "[w]hether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context . . . ."[148] It does not adopt the ICRC's three-part test to determine if an individual is directly participating in hostilities, but rather provides a non-exhaustive list of "considerations [which] may be relevant":

- the degree to which the act causes harm to the opposing party's persons or objects, such as
    - whether the act is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or
    - the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as
    - the degree to which the act is temporally or geographically near the fighting; or
    - the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
    - whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party's war effort, such as
    - the degree to which the act contributes to a party's military action against the opposing party;
    - whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities;
    - whether the act poses a significant threat to the opposing party;
- the degree to which the activity is viewed inherently or traditionally as a military one, such as
    - whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or
    - whether the activity involves decisions on the conduct of hostilities, such as determining the use or application of combat power.[149]

While there is overlap between the three requirements imparted by the ICRC and the five non-exhaustive criteria that the Manual lists, the Manual is clearly intended to be more permissive in determining whether a particular act constitutes direct participation in hostilities. For example, the Manual specifically includes combat support and combat service support functions as

[148] *Id.*
[149] *Id.*

examples of those "traditionally performed by military forces," which may be evidence of direct participation in hostilities. Furthermore, the relevant factors listed are "considerations" that "may be relevant," which, of course, implies that additional factors may be considered in making a determination.

Under the Manual's analysis, military necessity no longer exists, and thus a civilian directly participating in hostilities may no longer be lawfully targeted, once that civilian has "permanently ceased [his] participation."[150] This assessment must be based on "a good faith assessment of the available information."[151] In contrast to the ICRC though, the Manual states that the law of armed conflict "gives no 'revolving door' protection . . . ."[152] Accordingly, "persons who are assessed to be engaged in a pattern of taking a direct part in hostilities do not regain protection from being made the object of attack in the time period between instances of taking a direct part in hostilities."[153] Otherwise, civilians who directly participate in hostilities on a regular basis would be provided greater protections than lawful combatants, who may be targeted at any time, including when they are not directly participating in hostilities.[154] Thus, continuous direct participation in hostilities constitutes functional membership in the armed group and results in forfeiture of civilian status until such participation permanently ceases.

IV. PIECING IT ALL TOGETHER

The protection against direct attack is arguably the greatest protection accorded to civilians under the law of armed conflict. When trying to arrive at the appropriate standard to determine when a civilian has essentially become a combatant, and therefore forfeited his or her

[150] *Id.* ¶ 5.8.4.
[151] *Id.* ¶ 5.8.4.1; *see also supra* text accompanying note 105 (discussing the application of the "Rendulic Rule").
[152] *Id.* ¶ 5.8.4.2.
[153] *Id.*
[154] *Id.*

right to such protection, individuals should be given the benefit of the doubt. However, that is different from arguing that individuals who are known to fulfill combat service or combat service support functions within an organized armed group, or those who act as farmer by day and fighter by night, have not in essence forfeited their civilian status for as long as they retain such membership or continuously engage in such activity. Once an individual has been reasonably identified to be fulfilling such a role, then the benefit of the doubt should cease. Providing *de facto* combatants with protections reserved for civilians incorrectly applies the law of armed conflict in a manner which unreasonably benefits and encourages unlawful belligerency.

A. Membership in an Armed Group

Members of the armed forces of a party to a non-international armed conflict are combatants that may be targeted at any time. This definition, when applied to members of non-State groups, should include all those who serve a role, whether formally or functionally, that would ordinarily be reserved to a member of the military in the armed forces of a State party. The ICRC Guidance appropriately identifies members of organized armed groups as combatants under the law of armed conflict. However, it incorrectly limits this category to those who maintain a continuous combat function or, in other words, to the combat arms members of the organization. In doing so, it creates an imbalance between State armed forces, whose members may be attacked at any time regardless of the role they serve, and non-State armed forces, who are provided greater protections.[155]

The Law of War Manual provides a broader interpretation regarding targeting members of an organized armed group that more appropriately accounts for the overall support to the

[155] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 649 (2010) (noting that "[t]he practical result [of the ICRC's analysis] is that the scope for attacking regularly constituted armed forces is significantly broader than the military forces of non-state actors under the Guidance.").

armed group's mission that its members provide. For example, individual U.S. Marines fulfill a wide range of specialties, ranging from combat arms, such as infantrymen, to combat service support, such as administrative clerks. Although only the infantryman's normal duties are directed at actually engaging in combat, an administrative clerk could lawfully pick up a rifle and engage the enemy at any time and, in fact, is trained to do so. Similarly, a non-State armed group may have some members whose ordinarily duty is to engage in combat and others whose ordinary duty is, for example, to serve as a driver for one of the group's leaders but who may, as the Manual points out, perform a combat role at any time. Under the Manual's analysis, both the ordinary fighter and the driver, similar to the Marine infantryman and administrative clerk, would be targetable at any time, regardless of their conduct at the time. Under the ICRC's analysis, both the Marine infantryman and administrative clerk would be targetable at any time, regardless of conduct, as members of a State's armed forces. However, only the fighter within the organized armed group would be targetable at any time, because, unlike the driver, his role within the group would constitute a continuous combat function. Despite the fact that the driver shares the organization's hostile intent and may take up a weapon at any time, he may only be targeted for such time as he directly participates in hostilities.

The ICRC's imbalance creates inequity in the law.[156] Members of armed groups that serve combat service or combat service support roles enable and help to sustain the continued functioning and war-fighting capability of those armed groups in the same way as non-combat arms members of State armed forces. Whether they ordinarily conduct administrative matters,

[156] *See* Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 767 (2010) (noting that "the U.S. has put forward a powerful argument that the ICRC approach creates an imbalance between exposure to attack of armed forces and direct participators, an imbalance that may erode respect for the law and thus enhance risk in the long term to civilians.").

train fighters in tactics, provide logistical support,[157] or conduct convoy operations, they share the same hostile intent as the members of the group who are actually firing weapons. Even more importantly, as the Law of War Manual describes, any of these members may be called upon to take up arms at any time. To consider these members of non-State armed forces to be civilians who may only be targeted unless and for such time as they directly participate in hostilities unjustifiably grants them greater protection under the law than members of State armed forces receive, and it distorts their true status as *de facto* combatants.

While the principle of distinction certainly should prohibit the targeting of an individual unless it can be reasonably determined that he is, in fact, a member of the armed forces of a non-State party, that individual should be targetable once that determination has been made. Thus, the determination to be made should be whether, under the totality of the circumstances, the individual has formally or functionally joined the armed group such that, in an ordinary military setting, he would be considered to be a member of the party's armed forces, whether serving in a combat, combat support, or combat service support role.[158] If so, that person is targetable at any time, regardless of whether he is directly participating in hostilities, and remains so unless he affirmatively leaves the group in a manner that is reasonably apparent under the circumstances. As Kenneth Watkin has noted, "the conduct of military operations across the broad scale of armed conflict is a group activity which requires fundamentally the same organization regardless of whether one fights for a State or a non-State actor."[159] Accordingly, to provide *de facto*

[157] *See* Watkin, *supra* note 155, at 684 (noting that "[t]he Interpretive Guidance ignores the lessons of history regarding the importance of logistics to the conduct of military operations.").
[158] *See id.* at 691 (arguing that "[i]ndicia of membership in an organized armed group should include whether a person is carrying out a combat function. Such a function would involve combat, combat support, and combat service support functions, carrying arms openly, exercising command over the armed group, carrying out planning related to the conduct of hostilities, or other activities indicative of membership in an armed group." Watkin further argues that "[t]he key factor remains that they are a member of an organization under a command structure. It is that organization which fights as a group.").
[159] *Id.* at 690.

combatants who are serving non-combat military roles within a non-State group with civilian protections not only distorts the law of armed conflict, but ignores the reality of how a military force operates as well.[160]

As the ICRC acknowledges, today's armed conflicts include not only the deployment of State armed forces, but also civilian contractors who accompany the armed forces and provide valuable services. Civilian contractors are, of course, civilians, and, as with any other civilian, are not targetable unless and for such time as they directly participate in hostilities. This article does not mean to suggest that civilian contractors automatically forfeit their protected status because they provide supporting roles for members of the State armed forces. Rather, it recognizes and highlights the difficulty in distinguishing between those who are members of a non-State party's armed forces from those who would more closely resemble a civilian contractor for the organization, based simply on the conduct in which they are engaging.

For example, a member of the State armed forces who is transporting troops from one location to the other is targetable based on his status as a combatant. A private contractor transporting troops may be targetable, depending on all the circumstances, such as whether he is transporting troops directly to combat (which may constitute direct participation in hostilities) or far from any active hostilities (which may not). How can such a determination be made with regard to a non-State group, in which a driver who is a member of the organized armed group, and a driver who is not, may equally appear to be civilians based, in particular, on a lack of a uniform or other distinguishing sign? The determination may be extremely difficult to make. However, the point to be made is that if that determination can be made, the member of the

[160] *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 699 (2010) (noting "a general failure [of the Interpretive Guidance] to fully appreciate the operational complexity of modern warfare.").

organized armed group is individually targetable wherever he is and regardless of where he is transporting troops.[161] Such an application of the law will serve as an important deterrent to discourage civilians from participating in any activity that may serve as evidence of direct participation in hostilities or membership in a non-State's armed forces.[162] That, in turn, will ultimately help ensure one of the primary goals of the law of armed conflict – the protection of non-combatants – by decreasing the likelihood of civilian casualties as the result of association with combatants.

Dr. Nils Melzer, the legal adviser to the ICRC who oversaw the development of the Interpretive Guidance, acknowledges that what he describes as "dual function" personnel – "individuals assigned to predominantly administrative functions" who are "issued firearms and, in all likelihood, [are] expected to directly participate in hostilities whenever needed" – "would have to be regarded as members subject to direct attack on a continuous basis."[163] However, he

[161] There is no question that the troops being transported as well as the vehicle they are riding in would constitute military objectives that may be targeted. Thus, even if he is the equivalent of a civilian contractor, the driver of the vehicle may ultimately be killed under a proportionality analysis in which he is reasonably considered to be collateral damage. However, he could not be independently targeted unless it is determined that he is a member of the organized armed group, i.e., a combatant, or that his actions constitute direct participation in hostilities.

[162] *See, e.g.*, Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FEST-SCHRIFT FÜR DIETER FLECK 505, 509 (Horst Fischer et. al. eds., 2004) (arguing that "[g]rey areas [concerning whether conduct constitutes direct participation in hostilities] should be interpreted liberally, i.e., in favor of finding direct participation," because "a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to be directly targeted."). *But see* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 875-878 (2010) (arguing that a presumption in favor of finding direct participation in hostilities would only "exacerbate the current exposure of the civilian population to erroneous or arbitrary targeting.").

[163] Melzer, *supra note* 162, at 848. Melzer argues that "[w]hile . . . the resulting notion of regular armed forces may be wider than that of their irregularly constituted counterparts, the practical relevance of this conceptual difference should not be overestimated." *Id.* at 851. Noting that "[i]n practice, almost all non-combatant members of regular armed forces (except medical and religious personnel), such as cooks and administrative personnel, are not only entitled, but also trained, armed, and expected to directly participate in hostilities in case of enemy contact and, therefore, also assume a continuous combat function," he states that "[l]ikewise, in reality, non-combat tasks such as cooking for an organized armed group will more often be carried out in addition to, rather than instead of, a continuous combat function." *Id*. at 852. However, assuming this is true, for organized armed groups it would permit the targeting of fighters who may also serve as cooks but not necessarily cooks who may also (or at least eventually) serve as fighters. On the other hand, for regular armed forces, both infantrymen who may at times serve as cooks and cooks who may be called to serve as infantryman would be targetable at all times.

criticizes Kenneth Watkin's "*unqualified* assertion" that those serving "*exclusively* 'combat service support' functions . . . 'can be targeted in the same manner as if that person was a member of regular State armed forces.'"[164]

Dr. Melzer argues that "the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups make it practically impossible, but also conceptually meaningless to distinguish between 'non-combatant' members of [organized armed groups]" such as administrative personnel or cooks "and civilian supporters accompanying them without taking a direct part in hostilities."[165] As such, Dr. Melzer concludes that "there are essentially two solutions: First, the notion of 'organized armed group' can be overextended to include *all persons accompanying or supporting that group* (i.e., regardless of function)" . . . or "[a]lternatively, the notion of 'organized armed group' can be limited to those persons who represent the *functional equivalent of 'combatants'* in the regular armed forces."[166] Dr. Melzer explains further that "while membership in State armed forces generally implies a 'right' to directly participate in hostilities, membership in organized armed groups implies a 'function' to do so."[167] Thus, Dr. Melzer determines that "the latter approach" – limiting the notion of membership in an organized armed group to those who represent the functional equivalent of combatants – "best reflects the understanding of organized armed groups as irregularly constituted 'armed forces' of a party to the conflict."[168]

[164] *Id.* at 848-849 (quoting Watkin at 692). Melzer describes combat service support functions as referring to "a wide range of administrative, technical, and support activity in favor of operational forces, including not only the provision of fuel, equipment and transport, but also of food and shelter, administrative and legal services, and even medical and religious care." *Id.*
[165] *Id.* at 849-850.
[166] *Id.* at 850 (emphasis in original).
[167] *Id*.
[168] *Id*.

The dichotomy Dr. Melzer presents dismisses the possibility that, while potentially difficult to make, a factual determination could be made that establishes that an individual currently performing non-combat duties is, nevertheless, a member of an armed group. In other words, he argues that the law of armed conflict should not be applied uniformly to members of State and non-State armed forces because determining who constitutes non-State armed forces, and distinguishing them from the equivalent of non-State civilian contractors, will likely present a more difficult question of fact than who constitutes State armed forces and State civilian contractors. Ironically, it is the failure of non-State armed forces to distinguish themselves that helps to create the difficult question of fact that Dr. Melzer believes should be side-stepped, resulting in greater protections being provided to them.

Concomitant with the "right" of State armed forces to engage in combat is the continual threat of doing so that they pose. Thus, a member of a State armed force who spends his day in a warehouse tending to supply matters is a threat to enemy forces not only based on the benefits his service provides to his armed force but the fact that he could, for example, be ordered at any time to join a platoon about to conduct a patrol and ultimately engage in combat against the enemy. This is the main distinction between a member of a State armed force working in a supply warehouse and a civilian contractor performing similar duties. Although their day-to-day duties may be similar, if not identical, the civilian contractor may never be lawfully ordered to engage in combat, while the member of the State armed force could. Members of non-State organized armed groups pose the same threat as members of State armed forces. Although they do not have the same right to engage in combat, the threat they pose to potentially engage in combat, in conjunction with the harm that their day-to-day duties cause to the enemy or the benefits they confer upon their group, distinguishes them from a civilian contractor whose

actions may ultimately harm the enemy or benefit the armed forces, but who cannot take up arms in the absence of self-defense.

For this reason, although a factual determination may be difficult to make, the law should allow for the targeting of individuals who can reasonably be determined to be members of non-State armed forces. Similar to civilian contractors supporting State armed forces, if there is no reasonable prospect that an individual providing non-combat services to a non-State armed force could be called upon to engage in combat, other than in self-defense, then that individual cannot be determined to be a member of an organized armed group either formally or functionally. As such, he would remain a civilian and could not be lawfully targeted unless he directly participated in hostilities. As described *supra*, such a determination would be a fact-based, intelligence driven assessment based on a totality of the circumstances.

The distinction between those who comprise the armed forces of a non-State party and those who fulfill roles similar to civilian contractors may be difficult and, as such, could possibly lead to policy decisions restricting the targeting of all individuals who are not fulfilling a clear combat role through the implementation of more restrictive rules of engagement. However, while the determination may be difficult, it should remain clear that in those instances where formal or functional membership in the non-State armed forces can be reasonably established under a totality of the circumstances, the law of armed conflict permits that individual in question to be targeted so long as he remains a member of the armed group. It diminishes the law of armed conflict to argue that *de facto* combatants should not be considered to be members of non-State armed forces, and therefore provided greater protections than members of State armed forces, because identifying them may require difficult factual determinations.

B. Direct Participation in Hostilities

The Law of War Manual also provides a broader approach to the concept of direct participation in hostilities. By providing a non-exhaustive list of important considerations, the Manual essentially establishes those critical factors that the ICRC focuses on – such as causation and a belligerent nexus – but in a manner more applicable to the realities and uncertainties of modern combat. For example, similar to its armed group membership analysis, the Manual includes as direct participation in hostilities those actions that would ordinarily be attributed to combat service or combat service support roles rather than simply combat arms roles. While this raises some of the distinction concerns addressed *supra* in Section 4.A. and may not actually result in a significant change in who is targeted, it provides for its legality while leaving open its possible regulation as a matter of policy such as through the implementation of rules of engagement.[169]

The argument to include as targetable those serving combat support or combat service support roles for a non-State armed group is about more than just equity vis-à-vis their State armed forces counterparts. Rather, it focuses on the real contribution that those individuals provide to the overall support of their group's military mission. As Professor Michael Schmitt notes, "[t]he concept of harmful acts extends beyond engaging in combat with the enemy."[170] Rather, direct participation in hostilities includes not only harming the adversary, but enhancing one's own "military operations or military capacity" as well.[171] In other words, "harm and benefit are related in the sense that conflict is usually a zero sum game – a contribution to one

[169] *See, e.g.*, LAW OF WAR MANUAL, *supra* note 3, ¶ 5.5.5 (noting that "[f]or policy or operational reasons, military orders, such as applicable rules of engagement, may limit the locations where attacks on otherwise lawful military objectives may be conducted."); *see also id.* ¶ 5.9.3.3 (noting that "[i]n the practice of the United States, offensive combat operations against people who are taking a direct part in hostilities have been authorized through specific rules of engagement.").
[170] Schmitt, *supra* note 160, at 715.
[171] *Id.* at 719.

side typically weakens its opponent."[172] Thus, the ICRC's threshold of harm analysis is under-inclusive by restricting the analysis to a focus on harm caused without similarly accounting for benefits bestowed.[173] This highlights a weakness in the ICRC Guidance's "one causal step" analysis. By focusing solely on harm, it precludes consideration of benefits bestowed since "such a causal link [of a benefit] to specific harm may not be apparent."[174] The Law of War Manual, on the other hand, appropriately accounts for this distinction by including war-sustaining activities within the list of criteria that may be considered in determining whether a particular act constitutes direct participation in hostilities.

Additionally, the Law of War Manual's rejection of so-called "revolving door" protection better accounts for the realities of modern combat. The ICRC Guidance is wrong to consider the revolving door concept of direct participation in hostilities as being an integral part of the law of armed conflict. Contrary to the ICRC's position, at some point it does, in fact, become reasonable to conclude that an individual's continuous participation in hostilities has risen above a sporadic level and constitutes functional membership in the armed group.[175] If continuous participation in hostilities has occurred, and a demonstrated intent to continue similar participation can be reasonably established, it is unreasonable to require the military to wait until that individual has begun his next attack in order to target him. Rather, those who are

[172] *Id.*
[173] *Id.*
[174] *Id.* at 720; *see also id.* at 728 (discussing the practical inapplicability of the one causal step rule even under the ICRC's own analysis) and 739 (arguing that a better standard is whether the act "constitute[s] an integral part of the conduct that adversely harms one party or benefits another militarily. In other words, there must be a close relationship between the act and the harm or benefit. The phrase 'integral part' encompasses both acts that in themselves cause the harm or benefit and those which contribute in a relatively direct sense to the causation of such harm or benefit.").
[175] *See* Watkin, *supra* note 155, at 688 (noting that in regard to the alleged inherent difficulties in determining if an individual will directly participate in hostilities again, "it is not difficult logically, operationally, or factually to determine future activity from past conduct. This is an intelligence issue involving the same considerations as determining who is performing a 'continuous combat function.'")

continuously directly participating in hostilities are effective members of the organized armed group who should be targetable until such time as it can be reasonably established that they have ceased functioning as such. A goal of the law of armed conflict should be to deter direct participation in hostilities by civilians. The ICRC approach would serve only to encourage it.

The Law of War Manual's approach to direct participation is as permissive as the ICRC's is restrictive. While this may benefit State actors, the United States would be prudent to remember that while favoring a broad scope in defining direct participation in hostilities may be beneficial in the non-international armed conflicts that the United States currently fights, it may result in unintended consequences in future conflicts. For example, the Law of War Manual provides "planning, authorizing, or implementing a combat operation against the opposing party" as an example of direct participation in hostilities.[176] While the authorization or implementation of combat operations would largely fall within the purview of members of the armed forces,[177] civilians participate in the planning process at combatant commands every day. Under the Manual's analysis, a civilian planner at a combatant command may be directly participating in hostilities by virtue of performing his duties if, for example, he is assisting with the planning of ongoing operations or future operations for an ongoing conflict. Furthermore, by showing up for work on a daily basis, he would likely be considered to be engaging in a pattern of directly participating in hostilities such that he would remain targetable at all times until permanently ceasing such activity. Such an analysis would theoretically result in the individual not only being targetable while at work but also, for example, during his daily commute or while sleeping at

[176] LAW OF WAR MANUAL, *supra* note 3, ¶ 5.8.3.1. The ICRC would agree with this proposition. *See* Melzer, *supra* note 162, at 848 (noting that "[c]learly, according to the Guidance, the planning, preparation, command, and execution of combat operations would amount to direct participation in hostilities.)"

[177] For example, the President or Secretary of Defense can authorize operations, but they are civilian members within the chain of command.

home. That could additionally result in his family and neighbors being considered collateral damage in a proportionality analysis, something that would never happen if he were only considered to be directly participating in hostilities while actually conducting planning.

In all likelihood, a State armed force in an international armed conflict would deem it sufficient to target the headquarters itself rather than individual planners, whether military or civilian, in their homes or elsewhere. However, this example, extreme as it may be, demonstrates how important it is for the United States to interpret the law of armed conflict with a focus on the fight today while simultaneously keeping in mind the fight of tomorrow. War in the future could very likely present entirely different factual scenarios than those the United States currently faces, to include a return to more conventional international armed conflict against an enemy with a far greater reach than the current enemy. In that regard, it is important to approach these topics not only with an eye towards fighting the enemy but also towards protecting our own personnel, both military and civilian.

CONCLUSION

Civilian forfeiture of the protection against attack is not something that should be addressed lightly. The importance to the law of armed conflict of protecting the civilian population simply cannot be overstated. That being said, civilians forfeit their protection by taking up arms against State armed forces or directly supporting and sustaining those who do. Whether formally or functionally becoming members of a non-State armed group, or otherwise directly participating in hostilities, forfeiture of protection from attack should not be limited to those who actually pull the triggers. The line may be difficult to discern, but the law of armed conflict is ultimately meant to protect those who are actually outside the fight; it should not be misused as a shield for *de facto* combatants. Just as a member of a State armed force who does

not ordinarily serve a combat role may be targeted at any time, so should similarly situated members of non-State armed forces. Increased restrictions are always permissible as a matter of policy depending on the needs of the particular situation, but it is crucial not to confuse the law with a particular policy. That being said, the United States must always strive to keep tomorrow's conflicts in mind when interpreting the law of armed conflict to fight the conflicts of today.