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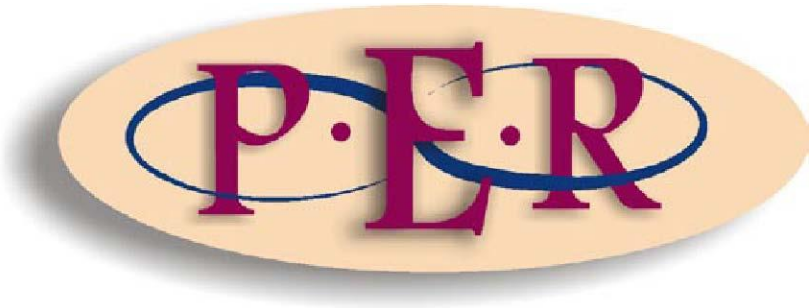

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THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES – A REVIEW OF THE ICRC INTERPRETIVE GUIDE AND SUBSEQUENT DEBATE

S Bosch*

1 Introduction

The phrase "direct participation in hostilities"[1] has a very exacting meaning in the realm of international humanitarian law (IHL), and refers generally to those activities normally undertaken by combatants.[2] As a general rule, all those with combatant status are authorised to participate directly in hostilities and are immune from prosecution for their participation.[3] Civilians, on the other hand, enjoy immunity against direct attack precisely because they refrain from any such direct participation in hostilities.[4] As civilians, they remain protected from any direct targeting for so long as they refrain from participating in combative activities which would otherwise compromise their protected status.[5]

Any civilian activity which amounts to direct participation in hostilities temporarily suspends civilians' inherent immunity against direct targeting, and exposes them to

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1 Some texts use the phrase interchangeably with "taking a direct part" or "taking an active part" in hostilities to refer to the same level of individual participation in hostilities (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 43; Melzer *Targeted Killings* 335).

2 Rogers 2004 *YIHL* 19.

3 Provided they adhere to the limitations imposed upon them by IHL, regarding the methods and means of warfare (Ipsen "Combatants and Non-combatants" 65-67, 68; *Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention IV* 1910 *UKTS* 9 (Hague Regulations (HR)) art 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* 1125 *UNTS* 1979 1391-441 (Additional Protocol I (AP I)) art 43(2)).

4 Schmitt 2010 *NYU J Int'l L & Pol* 714-715.

5 As the ICRC Commentary on AP I art 51(3) explains: "... the immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts ... thus a civilian who takes part in an armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities" (Jensen "Direct Participation in Hostilities" 1995-2003).

direct targeting as a legitimate military target, and to prosecution for their unauthorised participation in hostilities.[6]

This area has been the subject of much controversy, since:

> neither the Geneva Conventions nor their Additional Protocols provide a definition of what activities amount to "direct participation in hostilities".[7]

This lacuna in the law is of particular concern in the light of the realities of contemporary international armed conflict, where non-state actors (often dressed as civilians) are playing an increasing role, states are outsourcing military functions to private contractors, and civilians are increasingly active as "farmers by day, fighters by night".[8] There is a dire need for a consensus understanding of exactly what constitutes direct participation in hostilities, especially when considering to what extent such activities might be deemed unlawful.[9] It is precisely this need that the International Committee for the Red Cross (ICRC) sought to address in the drafting of the Interpretive Guide, which this piece seeks to review.

2 The treaty and customary international law notion of direct participation in hostilities

2.1 "Direct participation" in treaty law

Reference is made to the concept of direct participation in hostilities in many treaty provisions of IHL, including GC common article 3(1)[10] and AP I article 51(3).[11] In the commentary on AP I article 51 it is explained that:

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6 "Once he ceases to participate, the civilian regains his right to the protection under this section… and he may no longer be attacked" (Jensen "Direct Participation in Hostilities" 1995-2012); ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 12; Schmitt 2010 *NYU J Int'l L & Pol* 703.

7 Fenrick 2009 *YIHL* 292; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 12.

8 Jensen "Direct Participation in Hostilities" 2003-2012.

9 Goodman and Jinks 2010 *NYU J Int'l L & Pol* 637.

10 "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".

11 "Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". At the Diplomatic Conference leading to the adoption of the

> … direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.[12]

The commentary goes on to differentiate "direct participation" from general "war effort", which is often simply expected of the whole population, and adopts a more cautious interpretation of the notion of direct participation in hostilities.[13] The commentary limits its understanding of "direct participation in hostilities" to:

> … acts of war which are intended by their nature and purpose to hit specifically the personnel and *matériel* of the armed forces of the adverse Party.[14]

While IHL treaty law makes reference to this concept, the treaty law does not offer a definition of the phrase or specify definitively when an individual's actions might be said to amount to direct participation in hostilities.[15]

2.2 "Direct participation" in customary IHL

At a national level, the principle that civilians lose their immunity against direct attack when they participate in hostilities is endorsed by several states' military manuals,[16] and is also endorsed by reported state practice, official statements and judicial decisions,[17] even by states that were not party to AP I.[18] According to the ICRC's study of the customary international law status of this provision, there is no evidence of contrary state practice,[19] and on the whole the principle (that civilians lose their immunity from prosecution when they participate in hostilities) was seen

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Additional Protocols, Mexico stated that AP I art 51 was so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis", and in the end there were no reservations made to this provision when states signed up to AP I (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 23).

12 Schmitt 2010 *NYU J Int'l L & Pol* 711.

13 Schmitt 2010 *NYU J Int'l L & Pol* 711; Heaton 2005 *A F L Rev* 177.

14 A "relatively direct nexus between that action and the resulting harm should exist; in other words, direct participation must be distinguishable from indirect participation" (Schmitt 2010 *NYU J Int'l L & Pol* 711).

15 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 12; 41.

16 Australia, Belgium, Ecuador, El Salvador, India, Netherlands, the United States and Yugoslavia (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 22).

17 *Public Committee against Torture in Israel v Government of Israel* 2006 HCJ 769/02 s37; Melzer *Targeted Killings* 337.

18 Henckaerts and Doswald-Beck Customary International Humanitarian Law 23.

19 Henckaerts and Doswald-Beck Customary International Humanitarian Law 23.

as a "valuable reaffirmation of an existing rule of customary international law".[20] For the most part states work on the assumption that assessing whether an activity amounts to direct participation in hostilities or not has to be done on a "case-by-case basis"[21] - although very few actually explain what activities amount to direct participation.[22]

At a regional level, the Inter-American Commission on Human Rights understands the term "direct participation in hostilities" to mean "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and matériel".[23]

As evidenced by the ICRC's study into customary international law, "a precise definition of the term direct participation in hostilities does not exist"[24] in either state practice or international jurisprudence.[25] What is clear, however, is that civilian "use of weapons or other means to commit acts of violence against human or material enemy forces",[26] amounts to direct participation in hostilities. Short of this very obvious occurrence, states are having to interpret:

> … the notion of direct participation in hostilities ... in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL.[27]

20 Henckaerts and Doswald-Beck Customary International Humanitarian Law 23.
21 Henckaerts and Doswald-Beck Customary International Humanitarian Law 22.
22 Some states' (Ecuador, United States and Philippines) military manuals cite "serving as guards, intelligence agents, or lookouts on behalf of military forces … spies or couriers" as amounting to direct participation in hostilities (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 22).
23 Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia (Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 22).
24 Henckaerts and Doswald-Beck Customary International Humanitarian Law 22.
25 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 41; Henckaerts and Doswald-Beck *Customary International Humanitarian Law* 23.
26 Henckaerts and Doswald-Beck Customary International Humanitarian Law 23.
27 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 41.

3 The ICRC's Interpretive Guide on the Notion of Direct Participation in Hostilities: an introduction

3.1 The drafting process and the legal implications of the Guide

Between 2003 and 2008, more than 40 legal experts (drawn from NGOs, academia and governmental bodies, including the military) came together on five occasions at the invitation of the ICRC.[28] The resultant discussions informed the ICRC's Interpretive Guide on the Notion of Direct Participation in Hostilities under IHL.[29] Initially, the ICRC had sought a unanimous consensus at these expert meetings, but it soon became apparent (when some experts wanted to remove their names from the final report) that seeking unanimity might scuttle the whole project.[30] In the end, the ICRC elected to omit all the names of the external experts, and instead had the Assembly of the ICRC adopt the final version of the guide on 26 February 2009.[31]

The ICRC's Interpretive Guide was not intended to change the existing binding treaty and customary based rules of IHL, but rather to offer a comprehensive guide as to how to interpret the term legally - giving careful consideration to balancing both military necessity and humanitarian concerns.[32] The 10 recommendations (supported by commentary) strove to:

> … reflect the ICRC's institutional position as to how existing IHL should be interpreted in light of the circumstances prevailing in contemporary armed conflicts.[33]

As an interpretive guide the document is not legally binding - but coming from the ICRC (as the champion of IHL) the guide was intended to have persuasive

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28 Fenrick 2009 *YIHL* 288; Van der Toorn 2009 http://www.works.bepress.com /damien_van_der_toorn/1 22.

29 The Interpretive Guide (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 9) also draws on "the ICRC's institutional expertise … as a humanitarian organisation, having been operational for almost 150 years in countless armed conflicts all over the world" (Melzer 2010 *NYU J Int'l L & Pol* 914).

30 Roberts 2009 *YIHL* 41*;* Fenrick 2009 *YIHL* 288.

31 Fenrick 2009 *YIHL* 288*.*

32 The Interpretive Guide drew on the following sources of law: "customary IHL; treaty IHL (including the *travaux préparatoires* of treaties); international jurisprudence; military manuals and standard works of legal doctrine" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 9-10).

33 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 9; Fenrick 2009 *YIHL* 288.

influence,[34] and some suggest it "may even be viewed as a secondary source of international law ... analogous to writings of the most highly qualified publicists".[35]

Until it becomes binding, or is acknowledged as having crystallised into customary IHL, Fenrick[36] warns that it is not likely that legal advisors to government department will be inclined to adopt it wholesale, unless it can be shown that these recommendations are "well researched, well thought out, relevant and persuasive".

3.2 The ICRC's Interpretive Guide's limitations and controversies

The Interpretive Guide explicitly limits its analysis of the notion of direct participation in hostilities to decisions around military targeting. It does not purport to deal with issues of how direct participation impacts on questions around detention, or how this impacts on a combatant's claim to immunity from prosecution.[37]

Once it is ascertained that an issue of direct participation has an impact on targeting decisions, the first enquiry that the Interpretive Guide directs is to whether or not the particular hostile act (often referred to as the specific hostile act) falls within the ambit of those restricted acts which amount to direct participation in hostilities.[38] Determining which specific activities amount to direct participation in hostilities is not dependent on one's "status, function, or affiliation",[39] neither does it matter whether the act is carried out by civilians or members of the armed forces:

> … on a spontaneous, sporadic, or unorganised basis; or as part of a continuous combat function assumed for an organised armed force or group belonging to a party to the conflict.[40]

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34 "A legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the states themselves" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 10); Fenrick 2009 *YIHL* 300.

35 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 22.

36 Fenrick 2009 *YIHL* 300.

37 Watkin 2010 *NYU J Int'l L & Pol* 670; Goodman and Jinks 2010 *NYU J Int'l L & Pol* 638.

38 "The notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 45-46).

39 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 10.

40 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 10.

Even prior to the first meeting of the experts, it was apparent that there were divergent opinions on how one should interpret the concept of direct participation in hostilities. Some academics favoured a more restricted interpretation, equating direct participation with actual combat.[41]Others believed a more liberal interpretation was appropriate,[42] and favoured:

> … an approach … which essentially encompasses all conduct that functionally corresponds to that of government armed forces, including not only the actual conduct of hostilities, but also the activities such as planning, organising, recruiting and assuming logistical functions.[43]

These competing approaches were not new to the ICRC. Already in the commentary on AP I, the ICRC has noted that:

> … to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad.[44]

Given this background, it was not surprising that the guide has generated some heated academic debates.[45] At the heart of much of the generalised criticism leveled at the Interpretive Guide is its alleged failure to adequately balance humanitarian concerns and military necessity in the manner intended by the Geneva Conventions and Additional Protocols.[46] Schmitt and Boothby are critical of what they claim is an overly-restrictive interpretation.[47] Boothby[48] argues that "the ICRC interprets the concepts of preparation, deployment, and return too restrictively", and Schmitt[49] is concerned with the fact that the definition "excludes support activities not directly causing harm to the enemy". On the contrary:

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41 See, for example, Ben-Naftali and Michaeli 2003 *Cornell Int'l LJ* 233; Schondorf 2007 *JICJ* 301; Melzer *Targeted Killings* 335.

42 See, for example, Schmitt 2004 http://www.michaelschmitt.org/images/Schmitfinal.pdf; Heaton 2005 *A F L Rev* 155.

43 As Melzer notes, the liberal approach "stands in contradiction not only to the prevailing opinion in the doctrine, but also to state practice, and to the express distinction drawn in convention law between direct participation in hostilities on the one hand, and work of a military character, activities in support of military operations and an activity linked to the military effort, on the other hand" (Melzer *Targeted Killings* 338-339).

44 Melzer *Targeted Killings* 336.

45 Schmitt 2010 *NYU J Int'l L & Pol* 698.

46 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 45.

47 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 45.

48 Boothby 2010 *NYU J Int'l L & Pol* 743.

49 Melzer 2010 *NYU J Int'l L & Pol* 835.

> … other experts would criticise the Interpretive Guide's definition as too generous because, in certain circumstances, it might allow the targeting of civilians who do not pose an immediate threat to the enemy.[50]

Some academics have concluded that "the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare".[51]

Others have questioned whether the Interpretive Guide achieves what it set out to do - to provide a generally accepted interpretation of the term.[52] Some have argued that, rather than re-stating the law in a manner that would prove useful for practitioners and courts, terms like:

> … "revolving door of protection", "continuous combat function", and "persistent recurring basis" inject new, confusing, and difficult-to-justify concepts into the lexicon of IHL.[53]

In response to these criticisms, Melzer (the chief author of the guide) maintains that the Interpretive Guide adopted a neutral, impartial and balanced approach - resisting proposals coming from both extremes, while ensuring "a clear and coherent interpretation of IHL consistent with its underlying purposes and principles".[54] Aside from these differences in the degree of interpretation, there is much less controversy around the all-important heart of the guidance: determining how one defines direct participation in hostilities.[55] All in all, after careful consideration of the critiques prepared by Watkin, Schmitt, Boothby, and Parks, nothing indicates that the ICRC's Interpretive Guide is:

> … substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice.[56]

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50 Melzer 2010 NYU J Int'l L & Pol 835.
51 Schmitt 2010 *NYU J Int'l L & Pol* 699.
52 Watkin 2010 *NYU J Int'l L & Pol* 694.
53 Watkin 2010 *NYU J Int'l L & Pol* 693; 837.
54 Melzer 2010 *NYU J Int'l L & Pol* 836.
55 Watkin 2010 *NYU J Int'l L & Pol* 834.
56 Watkin 2010 *NYU J Int'l L & Pol* 915.

4 The specific hostile acts which amount to direct participation in hostilities

The concept of direct participation in hostilities is the means of determining when civilians' actions compromise their otherwise protected civilian immunity.[57] According to the ICRC's Interpretive Guide, before an act amounts to direct participation in hostilities it must meet three cumulative criteria:

(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 that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and

(3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[58]

4.1 The threshold of harm

The first criterion - also called the "threshold of harm" determination - requires that harm:[59]

(a) of a military quality, or[60]

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57 Until such time as the civilian's actions amount to direct participation in hostilities, any "use of force against him or her must comply with the standards of law enforcement or individual self-defence" (Boothby 2010 *NYU J Int'l L & Pol* 755-756). Since the "loss is temporary", Melzer suggests that it is "better described as a 'suspension' of protection" (Melzer *Targeted Killings* 347); Schmitt 2010 *NYU J Int'l L & Pol* 704.

58 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 46-47.

59 The degree of harm includes "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" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 97).

(b) harm ("by inflicting death, injury or destruction")[61] of a protected person or object,

must be reasonably expected to result from a civilian's actions before the civilian can be said to be participating directly in hostilities.[62] Or to put it another way, in order for civilians to lose their immunity from direct attack:

> … they must either harm the enemy's military operations or capacity, or they must use means and methods of warfare directly against protected persons or objects.[63]

All that is required is the likelihood that the act bring about this sort of harm, not that the harm necessarily materialise.[64] Moreover, it is not the "quantum of harm caused the enemy" which determines whether or not it reaches the necessary threshold of harm criterion [65] - but rather the nature of the intended harm. I turn now to unpack these two categories of harm in more detail.

4.1.1 Military harm

As Melzer[66] points out, while military harm is commonplace in armed conflicts, the term applies only to objects which "contribute militarily" to the belligerent's success. The term military harm cannot be used in respect of civilian objects, despite the fact

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60 From a cursory examination of the criterion, it is apparent that the test is framed in the alternative, that is, "the harm contemplated may either adversely affect the enemy or harm protected persons or objects" (Schmitt 2010 *NYU J Int'l L & Pol* 713).

61 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 47.

62 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 47.

63 Melzer 2010 *NYU J Int'l L & Pol* 862.

64 This is assessed objectively as "harm which may reasonably be expected to result from an act in the prevailing circumstances" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 33, 47). As was discussed at the expert meeting, "wherever a civilian had a subjective 'intent' to cause harm that was objectively identifiable, there would also be an objective 'likelihood' that he or she would cause such harm" (Schmitt 2010 *NYU J Int'l L & Pol* 724). Schmitt concedes that this is a sensible requirement since it would be "absurd to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted" (Schmitt 2010 *NYU J Int'l L & Pol* 724).

65 Schmitt observes that perhaps the choice of the label "threshold", which is a quantitative concept, was "unfortunate", when the substance of the test talks to the "nature of the harm", the performance of a specified act, and not that the act reaches a "particular threshold" (Schmitt 2010 *NYU J Int'l L & Pol* 716).

66 Melzer 2010 *NYU J Int'l L & Pol* 858.

that these objects may contribute to the military success of a particular belligerent.[67] This interpretation, in line with the universally accepted definition of what constitutes a military objective, excludes those political, economic and psychological contributions which might play a role in a military victory but ain isolation are not considered military objects.[68] The term military harm includes:

> … 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.[69]

4.1.2 Attacks against protected persons

In accordance with treaty law, a civilian's actions might amount to direct participation in hostilities when their actions constitute attacks specifically aimed at civilians and civilian objects - despite the fact that such actions might cause no specific military harm.[70] However, acts which fall short of causing military harm are required at a minimum to "cause at least death, injury, or destruction of these civilians or civilian objects".[71] Such acts are distinguished from harm resulting from "political, diplomatic, economic, or administrative measures like for example deportation".[72] Where protected persons are the target of an attack, these actions

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67 Schmitt 2010 *NYU J Int'l L & Pol* 717.

68 For example, when a "broadcast station is used to demoralise the enemy civilian population" by "broadcasting negative messages to the enemy civilian population" (Schmitt 2010 *NYU J Int'l L & Pol* 717).

69 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 47.

70 The Interpretive Guide relies on AP I art 49's definition of "attack", which "does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities" (Schmitt 2010 *NYU J Int'l L & Pol* 723). Legal precedence for this position can be found in the jurisprudence emerging from the ICTY, where it was concluded that "sniping attacks against civilians and bombardment of civilian villages or urban residential areas" constitutes an "attack" in the IHL sense of the word (Schmitt 2010 *NYU J Int'l L & Pol* 723). Melzer 2010 *NYU J Int'l L & Pol* 860-861; ICRC 2009 www.icrc.org 49.

71 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 49.

72 Examples of these include the "building of fences or road blocks; the interruption of electricity, water, or food supplies; and the manipulation of computer networks not directly resulting in death, injury, or destruction. While all of these activities may adversely affect public security, health, and commerce, they would not, in the absence of military harm, qualify as direct participation in hostilities" (Melzer 2010 *NYU J Int'l L & Pol* 862); Schmitt 2010 *NYU J Int'l L & Pol* 723.

must not only rise to this minimum degree of harm, but they must also be part of the armed hostilities.[73]

4.1.3 Activities which have been cited as satisfying the threshold of harm requirement[74]

These include "acts of violence against human and material enemy forces";[75] sabotaging or causing "physical or functional damage to military objects, operations or capacity";[76] hindering military "deployments, logistics and communications";[77] controlling or hindering the use of "military personnel, objects and territory, to the detriment of the adversary";[78] demining the opposition's mines; "guarding captured military personnel to prevent them being forcibly liberated";[79] interfering with "military computer networks";[80] "wiretapping the adversary's high command or transmitting tactical targeting information for an attack";[81] directly targeting civilians or civilian objects;[82] "building defensive positions at a military base certain to be attacked";[83] and "repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft".[84]

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73 For example, a "prison guard may kill a prisoner for purely private reasons" without his actions amounting to direct participation in hostilities, but were he to engage in "a practice of killing prisoners of a particular ethnic group during an ethnic conflict", those actions would meet the standard (Schmitt 2010 *NYU J Int'l L & Pol* 862, 723).

74 According to Schmitt, most of these examples proved uncontroversial (Schmitt 2010 *NYU J Int'l L & Pol* 715).

75 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.

76 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 47-48.

77 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.

78 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.

79 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.

80 Schmitt 2010 *NYU J Int'l L & Pol* 715.

81 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.

82 Solis *Law of Armed Conflict* 203; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 49.

83 Melzer 2010 *NYU J Int'l L & Pol* 859.

84 Melzer 2010 *NYU J Int'l L & Pol* 859.

4.1.4 Activities which have been cited as falling short of the threshold of harm requirement

These include "building fences or roadblocks";[85] disturbing "electricity, water, or food supplies";[86] assuming control of cars and fuel;[87] manipulating computer networks;[88] arresting or deporting individuals who potentially have a "serious impact on public security, health, and commerce";[89] declining appeals "to engage in actions that would positively affect one of the parties";[90] the civilian rescuing of aircrew members;[91] and producing improvised explosive devices.[92]

4.1.5 Critique of the threshold of harm requirement

The threshold of harm requirement has been criticised mainly for being under-inclusive and unduly difficult to satisfy. Jensen[93] gives expression to this when he comments that the:

> … actual harm standard from the ICRC commentary is too restrictive in that it fails to address individuals who, although they are not members of an armed group that is party to the conflict, still openly support hostilities by constructing, financing, or storing weapons and materials of warfare.

He is in favour of an interpretation which would see some differentiation between those civilians found financing, storing or assembling weapons, and civilians who steer clear of any association with the hostilities.[94] Jensen[95] would also support an interpretation of direct participation, which would:

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85 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.
86 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.
87 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.
88 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.
89 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 48.
90 Schmitt 2010 *NYU J Int'l L & Pol* 719.
91 Melzer 2010 *NYU J Int'l L & Pol* 860.
92 Melzer 2010 *NYU J Int'l L & Pol* 860.
93 Jensen "Direct Participation in Hostilities" 2221-2228.
94 Jensen "Direct Participation in Hostilities" 2221-2228.
95 Jensen "Direct Participation in Hostilities" 2221-2228.

> … include not only those who cause actual harm, but those who directly support those who cause actual harm … this would also include those who gather intelligence, or act as observers and supply information to fighters, those who solicit others to participate in hostilities, and those who train them on military tactics.

In his critique Schmitt raises a similar concern:

> … strict application of the threshold of harm constitutive element would exclude conduct that by a reasonable assessment should amount to direct participation.[96]

Having said that, Schmitt[97] himself concedes that the treaty definition of a military objective favours limiting the notion of direct participation to refer only to harm of a military nature; in short, "an act of direct participation must impact the enemy's military wherewithal". Nevertheless, Schmitt[98] argues that the military harm requirement is "under-inclusive because it excludes loss of protection for support activities which do not adversely affect the enemy". In respect of attacks which target protected persons Schmitt[99] disputes the ICRC's interpretation, which requires death or destruction, because he argues that such an interpretation will exclude activities such as civilian deportation or civilian hostage taking. Instead, he suggests:

> … a better standard is one which includes any harmful acts directed against protected persons or objects, when said acts are either part of the armed conflict's war strategy … or when there is an evident relationship with ongoing hostilities,[100]

even if such acts do not result in death or destruction. Schmitt[101] argues that this strict requirement clearly favours humanitarian concerns over notions of military necessity.

Heaton[102] is also critical of this strict interpretation for its failure to include within its ambit the "essential links in the chain immediately preceding that final step".

96 Schmitt 2010 *NYU J Int'l L & Pol* 714.
97 Melzer 2010 *NYU J Int'l L & Pol* 859.
98 Melzer 2010 *NYU J Int'l L & Pol* 859; 861.
99 Schmitt 2010 *NYU J Int'l L & Pol* 723.
100 Melzer 2010 *NYU J Int'l L & Pol* 861.
101 Schmitt 2010 *NYU J Int'l L & Pol* 714.
102 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 37.

Heaton[103] argues that the final act of the combatant is heavily reliant on the personnel who support and make combative actions possible.

In reply to his critics, Melzer[104] cautions against any suggestion of diluting the required threshold of harm. He fears that such a move would result in a wide range of support personnel losing their immunity against direct targeting, and would result in:

> … undermining the generally recognised distinction between direct participation in hostilities and mere involvement in the general war effort.

4.2 The direct causation requirement

The second requirement, also termed the direct causation test, was included as a response to the controversy traditionally surrounding questions about whether or not a "general war effort"[105] and activities aimed at sustaining war[106] would amount to direct participation in hostilities. While it is certainly true that war-sustaining activities are indispensable to the war effort, which in effect harms the adversary, a line must be drawn between the two degrees of involvement.[107] All the experts present at the ICRC's expert meetings were:

> … agreed on the centrality of a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities.[108]

Schmitt[109] expresses it well:

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103 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 37.

104 Melzer 2010 *NYU J Int'l L & Pol* 877.

105 This includes, for example, the "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" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 53).

106 This would additionally include "political propaganda, financial transactions, production of agricultural or non-military industrial goods" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 53*).*

107 During the expert meetings emphasis was placed on the "idea that direct participation in hostilities is neither synonymous with 'involvement in' or 'contribution to' hostilities, nor with 'preparing' or 'enabling' someone else to directly participate in hostilities, but essentially means that an individual is personally 'taking part in the ongoing exercise of harming the enemy' and personally carrying out hostile acts which are 'part of' the hostilities" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 53).

108 Schmitt 2010 *NYU J Int'l L & Pol* 725.

109 Schmitt 2010 *NYU J Int'l L & Pol* 726.

> … sometimes causation is so direct that the shield of humanitarian considerations must yield in the face of military necessity, while in other situations the causal connection is too weak (or indirect) to overcome humanitarian factors.

As a result, and so as to prevent depriving the civilian population of their protected status, there must be a close causal link between the hostile act and the resulting harm before the action can be said to qualify as direct participation in hostilities.[110]

According to the ICRC's Interpretive Guide, this notion of direct causation is understood as meaning that there is only one causal step between the hostile act and the resulting harm.[111] This notion of direct causation excludes activities that indirectly cause harm.[112] Similarly mere "temporal or geographic proximity"[113] is insufficient to justify a finding of direct participation. Moreover, in cases of collective operations, the ICRC's Interpretive Guide does recognise that:

> … the resulting harm does not have to be directly caused by each contributing person individually, but only by the collective operation as a whole.[114]

In short, where a particular activity does not result in the required degree of harm, those individual actions might nevertheless constitute direct participation in hostilities where the actors are "part of a collective operation"[115] that directly causes harm of the required threshold.

4.2.1 Activities which have been cited as satisfying the direct causation requirement

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110 Schmitt 2010 *NYU J Int'l L & Pol* 726.

111 In short, where an "individual's conduct ... merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, these actions do not amount to direct participation in hostilities" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 53, 55; Melzer 2010 *NYU J Int'l L & Pol* 866).

112 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 56.

113 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 56.

114 Melzer 2010 *NYU J Int'l L & Pol* 866.

115 Examples of such acts would include, *inter alia*, "the identification and marking of targets; the analysis and transmission of tactical intelligence to attacking forces; and the instruction and assistance given to troops for the execution of a specific military operation" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 55); Melzer 2010 *NYU J Int'l L & Pol* 865; Kalshoven and Zegveld *Constraints on the Waging of War* 102.

These include "bearing, using or taking up arms";[116] "taking part in military or hostile acts, activities, conduct or operations";[117] "participating in attacks against enemy personnel, property or equipment";[118] "coordinated tactical operations which directly cause harm";[119] engaging in sabotage of military installations;[120] manning an anti-aircraft gun;[121] supervising the operation of weaponry;[122] "gathering tactical intelligence on the battlefield";[123] transmitting military information for immediate use;[124] "identifying and marking targets";[125] "instruction and assistance given to troops for the execution of a specific military operation";[126] transporting weapons in proximity to combat operations;[127] "transporting unlawful combatants to or from the place where the hostilities are taking place";[128] "serving as guards, intelligence agents, lookouts, or observers on behalf of military forces";[129] "capturing combatants or their equipment";[130] "sabotaging lines of communication";[131] "performing mission-essential work at a military base";[132] "providing logistical support";[133] and "delivering ammunition to combatants".[134]

4.2.2 Activities which have been cited as falling short of the direct causation requirement

116 Watkin 2010 *NYU J Int'l L & Pol* 707; Schmitt 2010 *NYU J Int'l L & Pol* 708.
117 Watkin 2010 *NYU J Int'l L & Pol* 707.
118 Watkin 2010 NYU J Int'l L & Pol 707.
119 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 55.
120 Watkin 2010 *NYU J Int'l L & Pol* 707.
121 Watkin 2010 *NYU J Int'l L & Pol* 707.
122 Schmitt 2010 *NYU J Int'l L & Pol* 708.
123 Melzer 2010 *NYU J Int'l L & Pol* 867; Heaton 2005 *A F L Rev* 177-178; Schmitt 2010 *NYU J Int'l L & Pol* 708.
124 Watkin 2010 *NYU J Int'l L & Pol* 707; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 55.
125 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 55.
126 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 55.
127 Watkin 2010 *NYU J Int'l L & Pol* 707.
128 Schmitt 2010 *NYU J Int'l L & Pol* 708.
129 Watkin 2010 *NYU J Int'l L & Pol* 707; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 49
130 Schmitt 2010 *NYU J Int'l L & Pol* 708.
131 Schmitt 2010 *NYU J Int'l L & Pol* 708.
132 Heaton 2005 *A F L Rev* 177-178.
133 Heaton 2005 *A F L Rev* 177-178.
134 Schmitt 2010 *NYU J Int'l L & Pol* 708.

These include "designing, producing and shipping weapons";[135] "transporting arms and munitions";[136] purchasing materials in order "to build suicide vests";[137]purchasing, smuggling, assembling or storing "improvised explosive devices";[138] gathering and transmitting military information;[139] work undertaken by civilians in military vehicle maintenance depots;[140] work undertaken by civilians in munitions factories;[141] "driving military transport vehicles" where the driver is a civilian;[142] "activities in support of the war or military effort";[143] "the recruitment and general training of personnel";[144] "providing specialist advice regarding the selection of military personnel, their training, or the correct maintenance of the weapons";[145]"general strategic analysis";[146] "voluntary human shielding";[147] "expressing sympathy for the cause of one of the parties to the conflict";[148] distributing war propaganda;[149] "failing to act to prevent an incursion by one of the parties to the conflict";[150] "contributing funds to a cause";[151]"economic sanctions";[152] and "providing an adversary with supplies (for example food and medicine) and services".[153]

4.2.3 Critique of the direct causation requirement

Schmitt raises a number of technical issues in respect of the ICRC's explanation relating to the direct causation requirement. His first critique questions why the

135 Fenrick 2009 *YIHL* 293.
136 Watkin 2010 *NYU J Int'l L & Pol* 707. While the "act of driving a munitions truck might not amount to direct participation in hostilities ... the truck itself remains a targetable military objective" (Schmitt 2010 *NYU J Int'l L & Pol* 710).
137 Melzer 2010 *NYU J Int'l L & Pol* 865.
138 Melzer 2010 *NYU J Int'l L & Pol* 865.
139 Watkin 2010 *NYU J Int'l L & Pol* 707.
140 Watkin 2010 *NYU J Int'l L & Pol* 706.
141 Watkin 2010 NYU J Int'l L & Pol 710.
142 Watkin 2010 *NYU J Int'l L & Pol* 706.
143 Watkin 2010 *NYU J Int'l L & Pol* 707; Schmitt 2010 *NYU J Int'l L & Pol* 710.
144 Solis *Law of Armed Conflict* 204; Melzer 2010 *NYU J Int'l L & Pol* 865 and 867; Schmitt 2010 *NYU J Int'l L & Pol* 728.
145 Watkin 2010 *NYU J Int'l L & Pol* 707.
146 Schmitt 2010 *NYU J Int'l L & Pol* 708.
147 Melzer 2010 *NYU J Int'l L & Pol* 865.
148 Watkin 2010 *NYU J Int'l L & Pol* 707.
149 Schmitt 2010 *NYU J Int'l L & Pol* 708.
150 Watkin 2010 *NYU J Int'l L & Pol* 707.
151 Schmitt 2010 *NYU J Int'l L & Pol* 708, 727.
152 Schmitt 2010 *NYU J Int'l L & Pol* 728.
153 Schmitt 2010 *NYU J Int'l L & Pol* 728; Watkin 2010 *NYU J Int'l L & Pol* 707.

authors of the interpretive guide settled on direct causation being linked to a physical act causing harm, when in modern warfare "acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy"[154] may have a marked effect on the belligerent's capacity to win. Schmitt[155] argues that:

> … the key is whether the acts in question are sufficiently causally related to the resulting harm/benefit to qualify as directly caused.

Moreover, Schmitt[156] argues, the effect of the one causal step requirement is that a range of activities aimed at building capacity (which Schmitt concedes are indirect in nature) are excluded from those parameters. Schmitt[157] prefers the "integral part test" which makes it possible to "extend participation as far up and downstream as there is a causal link". In a similar vein, Watkin[158] argues that the role played by logistics in a military sense has not been adequately recognized in the direct causation requirement. Watkin[159] warns that the causal-chain requirement limits responses to a "reactive posture focused on acts rather than on the capacity of an opponent to plan and attack in the future".

Van der Toorn[160] raises a related criticism when he suggests a sound interpretation of direct participation in hostilities should extend beyond the specific activities to "include precursor operational activities that facilitate and are closely connected with the materialisation of harm".[161]

As the ICRC's interpretation stands at the moment, participation is understood as "single, discrete acts"[162] which in effect allow civilians to interrupt their hostilities

154 Schmitt 2010 *NYU J Int'l L & Pol* 736, 725.
155 Schmitt 2010 *NYU J Int'l L & Pol* 736.
156 Schmitt 2010 *NYU J Int'l L & Pol* 727. Melzer notes that "states frequently use civilian contractors or employees to carry out roughly equivalent activities" (Melzer 2010 *NYU J Int'l L & Pol* 865).
157 Schmitt 2010 *NYU J Int'l L & Pol* 729; Melzer 2010 *NYU J Int'l L & Pol* 866-867.
158 Watkin 2010 *NYU J Int'l L & Pol* 684.
159 Watkin 2010 *NYU J Int'l L & Pol* 658.
160 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 39.
161 Which might include: "operational level planning; general intelligence activities; military logistics; military communications; and IED assembly and combat instruction" (Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 39).
162 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 30.

with numerous periods during which they continue with their civilian lifestyles. Van der Toorn[163] argues that the ICRC's direct causation requirement needs to balance the needs of military necessity and humanitarian concerns more effectively. In this regard, his proposal would:

> … permit the targeting of the precursor operational activities that make possible the ultimate infliction of harm.[164]

Melzer[165] warns that Schmitt's "integrated part test" would translate into an unnecessarily permissive understanding of direct causation, and that in effect:

> … any act connected with the resulting harm through a causal link would automatically qualify as direct participation in hostilities, no matter how far removed the act may be from the final harm caused.

Melzer[166] warns that any such relaxation of the direct causation test would result in

> "excessively broad targeting policies, prone to error, arbitrariness, and abuse".

According to Melzer,[167] there is no indication on the part of states by way of general *opinio juris* that would favour Schmitt's integrated part interpretation over the ICRC's direct causation requirement.

4.3 The belligerent nexus requirement

According to the ICRC's Interpretive Guide, the final requirement is that the specific harm must have a link to the hostilities.[168] The belligerent nexus requirement is there to ensure that those criminal activities which are simply facilitated by the hostilities and not intended to specifically support one party while causing the requisite threshold of harm to the opposing party are excluded from the purview of direct participation in hostilities.[169] As Rogers[170] points out, in "the case of children throwing

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163 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 37.
164 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 37.
165 Melzer 2010 *NYU J Int'l L & Pol* 867.
166 Melzer 2010 *NYU J Int'l L & Pol* 867.
167 Melzer 2010 *NYU J Int'l L & Pol* 868.
168 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 62.
169 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 63, 64.
170 Rogers 2004 *YIHL* 19.

petrol bombs or stones at enemy military patrols", members of the patrol will have to assess carefully whether their actions are just common criminal activities or whether the children have forfeited their inherent civilian immunity from direct targeting through these actions.

In short, this leg of the test requires that:

> … an act must be specifically designed to directly cause the required threshold of harm, in support of a party to the conflict and to the detriment of another.[171]

In other words hostile actions (for example looting or other civil unrest) which are not intended to harm a specific party to the conflict while supporting the opposing party do not amount to direct participation in hostilities.[172]

So, for example, if civilians are found causing harm:

(c) in individual self-defence or defence of others;[173]

(d) in exercising power or authority over persons or territory;

(e) as part of civil unrest against such authority; or

(f) during inter-civilian violence,

their acts will not be regarded as participating in hostilities, since these acts lack the requisite belligerent nexus.[174] Moreover:

> … when civilians are totally unaware of the role they are playing in the conduct of hostilities… or when they are completely deprived of their physical freedom of action... they cannot be regarded as performing an action in any meaningful sense

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171 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 64.

172 Schmitt 2010 *NYU J Int'l L & Pol* 735; Melzer 2010 *NYU J Int'l L & Pol* 873.

173 "If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimising a previously unlawful attack" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 61).

174 Consequently they must be dealt with by means of the regular law-enforcement mechanisms (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 64; Melzer 2010 *NYU J Int'l L & Pol* 873; Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 19).

> and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalised.175

4.3.1 Activities cited as satisfying the belligerent nexus requirement

These include the "preparatory collection of tactical intelligence";[176] "loading explosives in a suicide vehicle";[177] "transporting personnel";[178] and "positioning weapons and equipment".[179]

4.3.2 Activities cited as falling short of the belligerent nexus requirement

These include "hiding or smuggling weapons";[180] and "financial or political support of armed individuals".[181]

4.3.3 Critique of the belligerent nexus requirement

While Schmitt[182] supports the notion that there must be a link to the hostilities, he favours the belligerent nexus test's being formulated in the alternative: "in support of a party to the conflict *or* to the detriment of another". Melzer[183] warns that a disjunctive interpretation of these two aspects of the belligerent nexus test would permit a belligerent to respond with military force against criminal elements who had no connection to the armed conflict. IHL does not permit a person to be categorised as a military target until it can be shown that the person has some link to a belligerent party. Instead, as IHL stands at present, such instances will be dealt with as any other threat to security.[184]

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175 For example, when a driver is "unaware that he is transporting a remote-controlled bomb", or when involuntary human shields are "physically coerced into providing cover in close combat" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 60).
176 Solis Law of Armed Conflict 204-205.
177 Solis Law of Armed Conflict 204-205.
178 Solis Law of Armed Conflict 204-205.
179 Solis Law of Armed Conflict 204-205.
180 Solis Law of Armed Conflict 204-205.
181 Solis Law of Armed Conflict 204-205.
182 Schmitt 2010 *NYU J Int'l L & Pol* 736.
183 Melzer 2010 *NYU J Int'l L & Pol* 873.
184 Melzer 2010 *NYU J Int'l L & Pol* 873.

4.4 General comments regarding specific hostile acts which amount to direct participation in hostilities

Schmitt[185] concedes that all three legs of the test for direct participation in hostilities represent legitimate factors which have a valid role to play in assessing when civilians' actions compromise their immunity against direct targeting. However, the thrust of his criticism is that there are insufficiencies to be found in each of the elements, which give rise to what he considers to be an "under-inclusive"[186] notion of direct participation in hostilities. Schmitt's[187] concern is that this pro-humanitarian treatment of the concept of direct participation reveals an ignorance of the realities of the modern battlefield. Rogers[188] is of the opposite view and supports a narrow interpretation of direct participation, which will not risk jeopardising the IHL principle of distinction and civilian immunity from direct targeting. To this end Melzer[189] notes that there were several safeguards built into the three constitutive elements to ensure that the test would not permit the arbitrary or erroneous targeting of civilians. Despite their criticism, many like Schmitt[190] concede that the Interpretive Guide is:

> … superior to the various ad hoc lists because it provides those tasked with applying the norm on the battlefield with guidelines against which to gauge an action.

5 The temporal element of loss of protection "for such time as" civilians take a direct part in hostilities

In terms of IHL, civilians normally enjoy complete immunity against attack for such time as they refrain from any direct participation in hostilities. However, as soon as civilians compromise their civilian immunity by electing to participate directly in hostilities, their actions expose other truly innocent civilians to "erroneous or

185 Schmitt 2010 *NYU J Int'l L & Pol* 739.
186 Schmitt 2010 *NYU J Int'l L & Pol* 739.
187 Schmitt 2010 *NYU J Int'l L & Pol* 739.
188 Rogers 2004 *YIHL* 19.
189 Melzer 2010 *NYU J Int'l L & Pol* 877.
190 Melzer 2010 NYU J Int'l L & Pol 877.

arbitrary attack".[191] Consequently, in order to dissuade civilians from abusing their civilian immunity, IHL condones the temporary suspension of their civilian immunity against direct targeting, for so long as they participate directly in hostilities.[192] Expressed another way:

> … considerations of military necessity are presumed to override those of humanity for such time as a civilian "directly participates in hostilities".[193]

While their civilian immunity is temporarily suspended, this has no effect on their primary IHL status as civilians.[194] At no time do they lose their civilian status and assume primary combatant status.[195] Moreover, when they cease their participation, they resume full civilian immunity against attack. This temporary suspension of a civilian's immunity against direct attack is afforded only "civilians who participate in hostilities in a spontaneous, unorganised or sporadic basis".[196] Consequently, once it has been determined that a civilian has carried out a specific act which amounts to direct participation in hostilities, the next level of enquiry must address determining the beginning and end of the loss of civilian immunity.[197]

The notion that direct participation has a temporal limitation has a longstanding history in IHL, having been in existence since the mid-nineteenth century.[198] The phrase "for such time as", as it appears in AP I, "is binding as a matter of treaty law

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191 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 71.

192 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 70.

193 Melzer Targeted Killings 331.

194 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 70.

195 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 70.

196 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 71. The same cannot be said, however, of civilians who become members of organised armed groups belonging to a non-state party to an armed conflict. While this category of participant also loses immunity from direct attack - as is the case with any civilian - in this case they "cease to be civilians … for as long as they assume their continuous combat function" and for the duration of their membership of the group (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 70; Melzer 2010 *NYU J Int'l L & Pol* 883).

197 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 65, 70.

198 Boothby 2010 NYU J Int'l L & Pol 774.

on ... approximately eighty-five per cent of the world's states".[199] Not surprisingly, the ICRC's study into the customary international law status of the phrase "and for such time as" concluded that it was widely recognised as constituting customary international law.[200]

While the "for such time as" criterion might reflect customary international law, its practical implementation has not been without controversy. For the most part, the controversy lies in that fact that when civilians are no longer engaged in direct participation, and consequently no longer pose a threat to the opposition, they regain their full civilian immunity from direct attack, giving rise to what is called the "revolving door" of civilian protection.[201] The terminology "revolving door" - whereby civilians might vacillate between being a belligerent and reserving the right to reclaim their civilian status - was first coined by Hays Parks[202] in his 1990s commentary on the practical effect of AP I.

5.1 The parameters of the "for such time" window: execution, preparation, deployment and withdrawal

The Interpretive Guide expressly recognises that the concept of direct participation in hostilities includes not only the obvious individual armed activities but also those unarmed activities which have an adverse effect on the opposing belligerent.[203] Naturally the execution of a specific hostile act, which amounts to direct participation in hostilities, will fall within the "for such time" window and amount to a temporary loss of immunity from attack.[204] Furthermore, given the fact that contemporary military activities are often the result of several collective actions, an interpretation of direct participation in hostilities must include those activities which cause harm only "in conjunction with other acts".[205] Consequently, the ICRC's Interpretive Guide

199 Melzer 2010 NYU J Int'l L & Pol 884.
200 Henckaerts and Doswald-Beck Customary International Humanitarian Law rule 6.
201 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 70-71.
202 Parks 1990 A F L Rev 87-88; Watkin 2010 NYU J Int'l L & Pol 686.
203 Melzer 2010 NYU J Int'l L & Pol 882.
204 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 65; Melzer 2010 *NYU J Int'l L & Pol* 880-881.
205 Melzer 2010 *NYU J Int'l L & Pol* 882.

includes "measures preparatory to the execution of a specific act ... as well as the deployment to and the return from the location of its execution",[206] as comprising an "integral part of the specific hostile act".[207] The ICRC Guide cites as examples:

> … equipping, instructing, and transporting personnel; gathering intelligence; and preparing, transporting and positioning weapons and equipment,[208]

if these are carried out as preparation for the undertaking of a specific hostile act. These preparations for a specific hostile act are to be distinguished from preparatory activities which merely establish a generalised capability to perpetrate hostile actions, which do not amount to direct participation in hostilities.[209] Preparations which are part of a generalised "campaign of unspecified operations"[210] or are merely capacity building do not fall within the scope of the activities for which civilian immunity can be forfeited. Examples of such general preparations include:

> … the purchase, smuggling, production, and hiding of weapons; recruitment and training of personnel; and financial, political, and administrative support to armed actors.[211]

Where the particular hostile act does not necessitate any prior deployment, the loss of civilian immunity is limited to the integral preparations and the actual execution of the hostile act.[212] On the other hand, where the specific hostile act necessitates preparatory deployment to a particular location, those preparatory deployment activities will also form an integral part of the hostile act - and result in the loss of civilian immunity.[213] For an activity to amount to a deployment which will compromise a civilian's immunity, a deploying individual must be seen to be relocating in a physical manner with the intention of carrying out the specific hostile

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206 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 65; Boothby 2010 *NYU J Int'l L & Pol* 750; Melzer 2010 *NYU J Int'l L & Pol* 880-881.

207 Melzer 2010 *NYU J Int'l L & Pol* 882-883.

208 Boothby 2010 *NYU J Int'l L & Pol* 747.

209 Melzer 2010 *NYU J Int'l L & Pol* 881.

210 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 66.

211 Boothby 2010 *NYU J Int'l L & Pol* 747.

212 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 68; Boothby 2010 *NYU J Int'l L & Pol* 752.

213 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 67.

act.[214] Similarly, in instances where withdrawal activities remain integral to the hostile action, such withdrawal remains a part of the "for such time window",[215] and full civilian immunity is fully restored only once it is evident that the civilian has physically distanced himself from the hostile operation.[216] Civilians can demonstrate their complete disengagement "by laying down, storing or hiding the weapons or other equipment used, and resuming activities distinct from that operation".[217]

5.2 A critique of the "revolving door" concept

The most commonly cited criticism leveled at the "revolving door" phenomenon is that it gives rise to a profound operational advantage for those civilians who vacillate between hostile acts and peaceful civilian existence.[218] It is suggested that this revolving door creates an uneven playing field, in that regular combatants (be they cooks or infantry) are at all times potential targets for attack, while civilians abusing this revolving door can claim full immunity from direct targeting and yet launch "spontaneous, unorganised or sporadic"[219] attacks from behind these protected positions.[220] In this regard Watkin[221] agrees that it is difficult to rationalise the tactical advantage which the revolving door affords the civilian, particularly since there appears to be no limitation[222] on the number of times the civilian can walk through the door. Some even suggest that "a civilian can go through the revolving door on a persistently recurring basis".[223]

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214 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 67.

215 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 67.

216 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 67-68.

217 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 67.

218 Watkin 2010 *NYU J Int'l L & Pol* 687; Roberts 2009 *YIHL* 41; Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 24, 45.

219 Boothby 2010 *NYU J Int'l L & Pol* 757.

220 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 1; Watkin 2010 *NYU J Int'l L & Pol* 682; Roberts 2009 *YIHL* 41.

221 Watkin 2010 *NYU J Int'l L & Pol* 688.

222 Except to say that civilians who "'go beyond spontaneous, sporadic, or unorganised direct participation … and become members of an organised armed group are no longer able to make use of the revolving door of protection" (Watkin 2010 *NYU J Int'l L & Pol* 686).

223 Watkin 2010 *NYU J Int'l L & Pol* 662.

Moreover, there is always potential for this interpretation of the "revolving door of protection" to be abused by non-state actors.[224]

Some writers, like Boothby,[225] argue that the notion of a revolving door is not found in customary IHL, and that the way the Guide has interpreted the treaty reference to "participation" excludes the possibility that a civilian might be classified as a "persistent civilian participator". [226] Boothby[227] argues that there must be a way to distinguish between genuinely sporadic acts and "repeated or persistent acts" of direct participation in hostilities. Boothby[228] proposes that the time dimension to the rule:

> … must permit the targeting of those who, whether voluntarily or otherwise, choose to participate on a persistent or regular basis in the conflict, whether they are or are not members of organised armed groups.

Boothby[229] argues that states (like Israel and the US) are unlikely to adopt an interpretation which would afford the benefit of the revolving door to those civiliains who engage in regular (albeit unorganised) direct participation by a civilian, when he suggests they should lose their protected status "while such persistent or repeated involvement in hostilities continues".

The Interpretive Guide warns that it would be too difficult to reliably ascertain whether a civilian had previously carried out a hostile act in a manner which might be said to be "persistently recurring" and whether they might be said to have the requisite intent to do so again.[230]

Moreover, as Melzer[231] points out, Boothby fails to provide a reliable tool to assess these notions of "sporadic and repeated" hostile acts in practice.

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224 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 45.
225 Boothby 2010 *NYU J Int'l L & Pol* 758, 743.
226 Boothby 2010 *NYU J Int'l L & Pol* 758.
227 Boothby 2010 *NYU J Int'l L & Pol* 758.
228 Boothby 2010 *NYU J Int'l L & Pol* 798.
229 Boothby 2010 *NYU J Int'l L & Pol* 758; Watkin 2010 *NYU J Int'l L & Pol* 687.
230 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 71; Watkin 2010 *NYU J Int'l L & Pol* 687-688.
231 Melzer 2010 *NYU J Int'l L & Pol* 892.

Furthermore, as Jensen[232] asserts:

> … any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL[233] between temporary activity-based loss of protection (due to direct participation in hostilities) and continuous, status- or function-based loss of protection (due to combatant status or continuous combat function).

While it does seem bizarre to afford civilians immunity from direct targeting when they have already participated directly in hostilities and show continuing intent to do so again,[234] Melzer[235] maintains that this scenario is unlikely to pose a major problem in reality. In the rare instances where it does occur,[236] these civilians can be dealt with through normal legal enforcement channels during the intermissions between hostile acts.[237]

Another aspect of the temporal approach adopted by the ICRC's Interpretive Guide which has come under criticism is its interpretation of which preparatory, deployment or withdrawal activities amount to unprotected direct participation in hostilities. Jensen[238] proposed that:

> … a modern view of "for such time" must include the full time that an individual is directly participating, not just the time that results in actual harm.

Consequently, Jensen[239] is of the view that even those instructing or training those intending to take part in hostile acts can lose their immunity from direct targeting. Boothby[240] is also critical of what he describes as a "restrictive" interpretation of the preparatory activities that amount to direct participation in hostilities. According to

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232 Jensen "Direct Participation in Hostilities" 2101-2108.

233 "The treaty text leaves no doubt that loss of civilian protection attaches to individual activity (direct participation in hostilities) rather than status or function, and is temporary ('unless and for such time') rather than continuous" (Melzer 2010 *NYU J Int'l L & Pol* 887). Moreover, this "interpretation of the term 'participation' as referring to individual involvement in specific hostile acts or operations is also supported by the commentaries" (Melzer 2010 *NYU J Int'l L & Pol* 887).

234 Jensen "Direct Participation in Hostilities" 2108-2116.

235 Melzer 2010 *NYU J Int'l L & Pol* 891.

236 For example, "teenagers using every opportunity to throw 'Molotov cocktails' at occupation forces, or civilians being forced to perform limited acts of direct participation in support of an armed group each time it operates in the vicinity of their village" (Melzer 2010 *NYU J Int'l L & Pol* 891).

237 Melzer 2010 *NYU J Int'l L & Pol* 891.

238 Jensen "Direct Participation in Hostilities" 2235-2241.

239 Jensen "Direct Participation in Hostilities" 2235-2241.

240 Boothby 2010 *NYU J Int'l L & Pol* 797.

Boothby:[241]

> … "participate" could also refer to individual involvement in "groups or sequences of activity spread over a period," with the effect that the civilian in question would lose protection for the entire period of his involvement, including in the intervals between specific hostile acts.

Boothby[242] favours an interpretation which regards any preparatory acts (including any necessary prior deployment) as constituting direct participation.

The ICRC's Interpretive Guide acknowledges that the net effect of the "revolving door" phenomenon will limit attacks on civilian participants.[243] It justifies the revolving door position as being a necessary safeguard rather than a "malfunction"[244] of the Guide aimed at preventing civilians being targeted arbitrarily or in error when they do not constitute a military objective.[245] Any interpretation which has the effect of increasing the degree of risk to innocent civilians is squarely at odds with any reading of the treaty provisions read in the light of their object and purpose.[246]

6 The "continuous combat function" and its implications for civilians participating directly in hostilities

6.1 The rationale behind the concept of the "continuous combat function"

The term "continuous combat function" was first coined at the expert discussions which gave rise to the ICRC's Interpretive Guide.[247] During the discussions the view was expressed that, since the revolving door of protection was intended to apply only to those spontaneous and unorganised acts of participation, it should not also be applied to members of organised non-state armed groups, since their activities were oftentimes neither unorganised nor spontaneous.[248] It was felt that organised

241 Melzer 2010 *NYU J Int'l L & Pol* 886, 887.
242 Boothby 2010 *NYU J Int'l L & Pol* 750, 752.
243 Boothby 2010 *NYU J Int'l L & Pol* 757.
244 Boothby 2010 *NYU J Int'l L & Pol* 757.
245 Jensen "Direct Participation in Hostilities" 2235-2241.
246 Melzer 2010 *NYU J Int'l L & Pol* 886.
247 Watkin 2010 *NYU J Int'l L & Pol* 655.
248 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 71; Melzer 2010 *NYU J Int'l L & Pol* 840.

armed groups (who fell short of the requirements for full combatant status) would benefit unfairly from a considerable tactical advantage if the revolving door phenomenon were extended to them - while the state's armed force would be vulnerable to potential attacks on a continuous basis.[249] While there is, under IHL, no express provision authorising civilians to participate directly in hostilities, that fact does not necessarily translate into "an international prohibition (or criminalisation) of such participation".[250] Nevertheless, at the expert meetings the concern was raised that such inequality between the states' armed forces and organised non-state armed groups would not only undermine any respect for IHL but as a consequence would further endanger innocent civilian lives.[251] Rogers[252] agrees that:

> … there is certainly a case for arguing that a person who becomes a member of a guerrilla group, or armed faction that is involved in attacks against enemy armed forces, forfeits his protected status for so long as he participates in the activities of the group.

As a consequence of these concerns, the general consensus at the expert discussion was that there was a legitimate and defensible[253] need for a special legal regime applicable to organised armed groups who participated in hostilities in a more organised, structured and continuous manner, as compared with those civilians who participated only intermittently in hostilities, and who benefitted from the revolving door of civilian immunity. Rather than apply the revolving door of protection, which limits their protection from attack only for such time as they participate directly in hostilities, as is the case with civilians, this group of participants lose their civilian protection for the duration of their membership of the organised group - by virtue of their "continuous combat function".[254] In other words, the "revolving door of protection starts to operate based on membership"[255] in the organised group, and

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249 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 19; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 72.

250 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 83.

251 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 19.

252 Rogers 2004 *YIHL* 19.

253 Fenrick 2009 *YIHL* 209.

254 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 71; Melzer 2010 *NYU J Int'l L & Pol* 883.

255 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 72.

the door revolves again, rendering the individual once again a protected civilian, but only once his or her membership of the group has ceased. The net effect of this regime for non-state actors, who like child soldiers and PMSCs are affiliated with organised armed groups, is that they stand to forfeit their immunity from direct targeting not only during their continuous combative acts but "even when they put down their weapons and walk home for lunch with their family".[256]

While this approach does draw on notions of group membership, it is nevertheless different from the regime applicable to those who are members of the regular armed forces. For members of the state's armed forces, their status as combatants is determined by their formal membership of the armed group, regardless of the function the individual might perform, and until the individual leaves the force.[257] As Melzer[258] points out, any legal regime aimed at organised armed groups needs to take into consideration the:

> … more informal and fluctuating membership structures of irregularly constituted armed forces fighting on behalf of state and non-state belligerents.

6.2 Activating the loss of protection based upon a "continuous combat function"

The effect of this regime is that, once it is *de facto* evidenced that individual members of the organised armed group have functioned in a continuous combative matter, their membership results in their loss of civilian immunity against direct targeting for the duration of their membership.[259]

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256 Solis *Law of Armed Conflict* 206; Melzer 2010 *NYU J Int'l L & Pol* 845; ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 73.

257 Watkin 2010 *NYU J Int'l L & Pol* 671.

258 Melzer 2010 *NYU J Int'l L & Pol* 845.

259 Jensen "Direct Participation in Hostilities" 2141-2149; Solis *Law of Armed Conflict* 206; Melzer 2010 *NYU J Int'l L & Pol* 838, 843.

259 Melzer 2010 *NYU J Int'l L & Pol* 843.

According to the ICRC Interpretive Guide:

> … membership in an organised armed group begins in the moment a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.[260]

Such an assessment requires proof of repeated direct participation in hostilities, along with a degree of integration into an armed group, with indications that:

> … such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.[261]

There is no assessment based upon the donning of a uniform or the possession of an identification card - it is determined solely by function.[262]

6.3 Exclusion and cessation of the "continuous combat function" classification

At their core, these members of organised armed groups still enjoy primary civilian status (ie they do not acquire combatant status). As Melzer[263] points out, "continuous combat function does not, of course, imply *de jure* entitlement to combatant privilege". Consequently, it is imperative that only those members of the group who actually engage in the continuous combat function stand to lose their otherwise civilian immunity from attack.[264] Those who, while affiliated with an organised armed group, fail to participate directly in the hostilities, cannot be said to perform a continuous combat function, and consequently are excluded from the loss of protection on account of their failure to directly participate in hostilities.[265] Moreover:

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260 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 72.

261 Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 7, 28-29; Jensen "Direct Participation in Hostilities" 2141-2149.

262 Solis Law of Armed Conflict 206; Melzer 2010 NYU J Int'l L & Pol 846.

263 Melzer 2010 *NYU J Int'l L & Pol* 847.

264 Jensen "Direct Participation in Hostilities" 2141-2149; Melzer 2010 *NYU J Int'l L & Pol* 846.

265 Fenrick 2009 *YIHL* 292; Jensen "Direct Participation in Hostilities" 2003-2012; Van der Toorn 2009 http://www.works.bepress.com/damien_van_der_toorn/1 7; Schmitt 2010 *NYU J Int'l L & Pol* 704.

> … once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing, he regains his civilian immunity against attack.[266]

The Interpretive Guide suggests that disassociation from the group "need not be openly declared", [267] but it might be manifested:

> … through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life, or the permanent resumption of an exclusively non-combat function.[268]

Consequently, the Guide favours a reasonable assessment as to whether an individual has disengaged from an organised armed group to be carried out in good faith on the basis of the presumption of civilian status in instances where doubt prevails.[269]

6.4 A critique of the continuous combat function

The ICRC's "continuous combat function" has not been without criticism. In particular, some academics have raised concerns around the issue that the specific treaty language, which the Interpretive Guide was attempting to interpret, states that civilians lose their immunity from attack for such time as they participate directly in hostilities.[270] The ICRC's interpretation of the continuous combat function effectively arrives at a conclusion which makes it permissible to directly target civilians at *all* times, provided they are engaged in a continuous combat function.[271] The potential increased risk to civilians posed by the creation of the continuous combat function category has seen critics of the concept call for the "the other constituent parts of the guidance (ie the threshold of harm, direct causation and belligerent nexus criteria) not [to] be diluted"[272] so as to adequately protect civilians

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266 Melzer 2010 *NYU J Int'l L & Pol* 891.

267 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 72-73.

268 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 72-73.

269 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 73.

270 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Phillip Alston: Addendum - Study on Targeted Killings A/HRC/14/24/Add.6 (2010) para 65 (hereafter Report of the Special Rapporteur).

271 Report of the Special Rapporteur para 65.

272 Report of the Special Rapporteur para 69.

in times of armed conflict. Melzer - and others who defend the proposed continuous combat function category - cite principle XI[273] in the ICRC's Interpretive Guide as providing the necessary counterbalance to prevent the continuous combat function category posing an increased risk to civilians, around whom there might be some doubt as to their degree of involvement in hostilities (ie as a sporadic direct participant or having a continuous combat function).

Watkin is critical that the continuous combat function approach still gives rise to a tactical disadvantage for the state's armed forces, in that the regularly-constituted armed forces can target only those within the organised armed group who exhibit a continuous combat function, while their own non-combatant members can be targeted at all times.[274] Watkin is skeptical that, at a split second's notice, a soldier can:

> … realistically be expected to distinguish between a civilian who participates on a "persistent recurring basis", and a member of an organised armed group who performs a "continuous combat function".[275]

Fenrick concurs. In essence he argues that a smaller proportion of members of non-state organised armed groups will find themselves liable to direct targeting, as compared to their counterparts employed by the state.[276]

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273 "In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, 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".

274 Melzer 2010 *NYU J Int'l L & Pol* 837; Watkin 2010 *NYU J Int'l L & Pol* 659-660

275 Watkin 2010 *NYU J Int'l L & Pol* 662; Melzer 2010 *NYU J Int'l L & Pol* 855.

276 Fenrick 2009 *YIHL* 291.

Furthermore, protected immunity against attack is afforded to persons:

> … who are an integral part of the combat effectiveness of an organised armed group when their regular force counterparts performing exactly the same function can be targeted.[277]

In response to these criticisms, Melzer[278] points out that this perceived bias is not a fiction developed by the Interpretive Guide, but has its foundations in both treaty and customary IHL, which prohibits the direct targeting of civilians until such time as they participate directly in the hostilities. Melzer[279] concedes that, while notionally more of the regular armed forces might be exposed to direct targeting than the members of their non-state counterparts,

> … the actual practical effect will have very little consequence, since in organised armed groups many of the so-called non-combative roles are performed by the very individuals who engage in the continuous combat function.280

Moreover, as Melzer[281] points out:

> … almost all non-combatant members of regular armed forces, with the exception of medical and religious 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.[282]

Another criticism raised by Watkin[283] is that a restrictive interpretation of which activities amount to a combat function is at odds with interpretations adopted in legal writings. Watkin[284] argues that the criteria for attaining membership in an organised armed group is couched so restrictively as to make the potential unlikely that an otherwise civilian may lose that status and thus be targetable. Watkin[285] prefers to apply the continuous loss of civilian immunity from attack:

> … not only to fighting personnel of organised armed groups, but essentially to any person who could be regarded as performing a "combat", "combat support", or

277 Watkin 2010 *NYU J Int'l L & Pol* 664, 675; Melzer 2010 *NYU J Int'l L & Pol* 837.
278 Melzer 2010 *NYU J Int'l L & Pol* 852.
279 Melzer 2010 *NYU J Int'l L & Pol* 851.
280 Melzer 2010 *NYU J Int'l L & Pol* 852.
281 For example, "cooks and administrative personnel" (Melzer 2010 *NYU J Int'l L & Pol* 851).
282 Melzer 2010 *NYU J Int'l L & Pol* 852.
283 Watkin 2010 *NYU J Int'l L & Pol* 683.
284 Melzer 2010 *NYU J Int'l L & Pol* 835.
285 Melzer 2010 *NYU J Int'l L & Pol* 913.

> even "combat service support" function for such a group, including unarmed cooks and administrative personnel.

Van der Toorn[286] shares a similar concern, that the continuous participation requirement "imposes a very high threshold and would likely exclude a large number of individuals" who, for all intents and purposes, are "carrying out substantial and continuing integrated support functions for such groups", but "who fight for the group on a regular but not continuous basis".[287] Van der Toorn[288] suggests relaxing the strict continuous combat function requirement in favour of regular participation, or to require an individual's "primary function" to be direct participation in hostilities for the group.

Watkin[289] also suggests a similar formulation which would state that:

> … after the first involvement, any subsequent act demonstrating direct participation would start to provide the basis to believe that there is the beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities.

So, for Watkin,[290] repeated acts of participation can factor into one's determination of whether an individual's actions amount to continuous combat or not, and when such repetition has taken place "affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities".

These criticisms certainly do give expression to legitimate concerns surrounding the ability of the state's armed forces to deal with an enemy which flouts the principle of distinction and whose actions at time might be perfidious and even in violation of IHL.[291]

That being said, any interpretation which gives rise to overly permissive direct targeting of civilians will result in an unjustifiable level of arbitrary targeting of civilians.[292] In response to this critique, Melzer[293] cautions that what Watkin and Van

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286 Watkin 2010 *NYU J Int'l L & Pol* 664.
287 Melzer 2010 *NYU J Int'l L & Pol* 837.
288 Melzer 2010 *NYU J Int'l L & Pol* 837.
289 Melzer 2010 *NYU J Int'l L & Pol* 856.
290 Watkin 2010 *NYU J Int'l L & Pol* 692.
291 Melzer 2010 *NYU J Int'l L & Pol* 913.
292 Melzer 2010 *NYU J Int'l L & Pol* 913.
293 Melzer 2010 *NYU J Int'l L & Pol* 848.

der Toorn refer to as combat support activities would in any event be considered integral to the hostile act, and consequently would result in the loss of immunity from attack. As Melzer[294] explains, any civilian who participates directly in hostilities on a regular basis will very likely have some affiliation to an organised armed group and "thus, may be regarded as a *de facto* member assuming a continuous combat function for that force or group". According to Melzer[295] this would apply to all participants from the armed full-time combatant to the private security contractors who are employed to defend military objectives, and also to the "farmer by day and fighter by night" who plants "IEDs, mines, or booby-traps, or provid[es] tactical intelligence or logistic support as part of specific attacks or combat operations".

Moreover, Melzer[296] argues that to adopt an over reaching notion of who could be targeted in an organised armed group to include any civilians who are merely accompanying or supporting an armed group (regardless of their specific function) would not respect the distinction between "direct" and "indirect" participation in hostilities, which is well established in both treaty and customary IHL.

7 Presumptions in assessing direct participation in hostilities

IHL operates on the presumption that in cases of doubt an individual will always be afforded the presumption of civilian status and is to enjoy immunity against direct targeting.[297] It is a recognised principle of customary IHL that in instances of doubt, any targeting assessment must be able to show "sufficient indications to warrant an attack".[298] Consequently, prior to and during any attack all reasonable precautions should be taken to ensure that the intended target of a planned attack is in fact a

294 Melzer 2010 *NYU J Int'l L & Pol* 891.
295 Melzer 2010 *NYU J Int'l L & Pol* 891.
296 Melzer 2010 *NYU J Int'l L & Pol* 837.
297 AP I art 50(1): "In case of doubt, the person must be presumed to be protected against direct attack". "One cannot automatically attack anyone who might appear dubious" (ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 74).
298 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 74.

legitimate target. It must constitute a military objective and not be entitled to civilian immunity against direct targeting.[299]

The rationale behind the principle of distinction and this legal presumption is to prevent civilians being targeted in error.[300] The same rationale would make the presumption applicable in instances when an assessment needs to be made as to whether or not an individual has directly participated in hostilities. In the words of the ICRC's Interpretive Guide:

> ... in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not.[301]

7.1 Critique of the presumption's application to assessments of direct participation

Schmitt[302] rejects the ICRC's application of the presumption of civilian status to assessments of direct participation in favour of a presumption in favour of a finding of direct participation. Schmitt[303] argues that once a determination is made that civilians are directly participating in hostilities, they may be legally targeted without further need to justify any resultant injury or death by considerations of proportionality or by taking special precautions in attack.[304] Schmitt[305] defends what he concedes may seem like a "counter-intuitive" approach on the grounds that it:

> … is likely to enhance the protection of the civilian population as a whole, because it creates an incentive for civilians to remain as distant from the conflict as possible.

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299 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 74.

300 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 75.

301 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 75.

302 Schmitt 2004 http://www.michaelschmitt.org/images/Schmitfinal.pdf 505, 509; Melzer 2010 *NYU J Int'l L & Pol* 875.

303 Schmitt 2004 *Chi J Int'l L* 519; AP I art 57(3).

304 The "principle of proportionality prohibits attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated" (AP I art 51(5)(b); Schmitt 2004 *Chi J Int'l L* 511).

305 Schmitt 2004 *Chi J Int'l* 505; Melzer 2010 *NYU J Int'l L & Pol* 875.

Melzer[306] cautions that instructing the armed forces that they are justified in directly targeting civilians whose actions are questionable is clearly contrary to the ethos of IHL and in violation of many of its fundamental provisions. As Melzer[307] points out, it is not surprising, given the radical approach that Schmitt proposes, that there is no state practice or legal jurisprudence which supports this reverse presumption of civilian status. I prefer a more nuanced conclusion: that the proportionality and special precautions test would be easier to satisfy when doubts are raised regarding the degree of a civilian's involvement in hostilities. In other words, there is still an obligation to assess the proportionate result of the impending attack, as well as to take special precautions during the attack.[308] The threshold for justifying these actions is easier to achieve when civilians are playing an active role in the hostilities.

As Melzer[309] correctly points out, if a civilian's actions threaten public law and order while not rising to the level of direct participation in hostilities, then these actions are to be dealt with in terms of civil law enforcement or the regime appropriate to self defence.

8 The legal consequences for civilians found participating directly in hostilities

It is also worth noting that at all times - even whilst participating directly in hostilities - civilians retain their primary civilian status. Their actions alone do not re-classify them as combatants. They are, however, exposed to direct attack for so long as they persist with their direct participation in hostilities, despite their primary civilian status. While they lose their civilian immunity against direct attack, they never lose their inherently civilian status. Once they desist from their direct participation or disengage from the group's continuous combat function, they regain their full civilian immunity against direct attack.

306 Melzer 2010 *NYU J Int'l L & Pol* 875.
307 Melzer 2010 *NYU J Int'l L & Pol* 876.
308 Gasser "Protection of the Civilian Population" 211.
309 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 76.

Civilians, by definition, do not enjoy combatant status, with its attendant authorisation to participate directly in hostilities, associated POW status, and immunity from prosecution. Consequently, when civilians are found to be participating directly in hostilities without the requisite combatant privileges, they are exposed to the potential of criminal prosecution, even if during their participation they observed the laws of war regarding the means and methods of warfare.[310] What is particularly problematic for civilians taking a direct part in hostilities or acting with a continuous combat function is that they very often ambush an adversary whilst failing to adequately distinguish themselves from the civilian population and feigning the right to civilian immunity against direct targeting.[311] This is considered a serious violation of the IHL prohibition against perfidy.[312]

9 Conclusion

At present the ICRC's Interpretive Guide appears to provide a neutral, impartial and balanced interpretation of the longstanding IHL principle against civilian direct participation in hostilities. In setting a minimum threshold of harm, the Interpretive Guide respects the customary IHL distinction between mere general war effort and true direct participation in hostilities.[313] In applying the direct causation requirement, the Interpretive Guide attempts to limit targeting decisions which may be overly broad, arbitrary and simply incorrect.[314] The belligerent nexus link distinguishes occasions of legitimate military targeting from common criminal activities.

As for the temporal scope of the loss of civilian immunity from attack, the revolving door phenomenon ensures maximum protection for the civilian population against arbitrary targeting decisions[315] - in line with the fundamental principles of IHL. The concept of a "continuous combat function" distinguishes those "farmers by day and

310 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 83, 84; Roberts 2009 *YIHL* 41; Melzer *Targeted Killings* 329.
311 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 85.
312 ICRC 2009 http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609 85.
313 Melzer 2010 *NYU J Int'l L & Pol* 877.
314 Melzer 2010 *NYU J Int'l L & Pol* 867.
315 Boothby 2010 *NYU J Int'l L & Pol* 757.

fighters by night" who participate directly in hostilities from those who merely provide indirect support for a belligerent party (and who retain their civilian immunity against attack). This concession, for critics like Schmitt,[316] who feels that the "under-inclusivity" of the Guide does not adequately address the reality of contemporary armed conflict, allows

> … that organised armed groups belonging to non-state belligerents ... constitute legitimate military targets according to the same principles as regular combatants ... for as long as they assume a continuous combat function,[317]

and for the entire duration of their formal or functional membership.

At all times it is evident that the Interpretive Guide adheres to the longstanding IHL principle of presumptive civilian status and immunity against direct attack in cases of doubt. The Interpretive Guide is also clear that, even while participating directly in hostilities, these civilian participants retain their primary civilian status - albeit without immunity against direct attack during their active and direct participation in hostilities. Their participation in hostilities does not render them authorised combatants, which is why they face criminal prosecution for their unauthorised participation in hostilities, in some instances on serious charges of perfidy. Nevertheless, the cessation of their participation in the hostilities restores their full civilian immunity against direct targeting.

While there has been criticism directed at aspects of the Interpretive Guide, mostly on the grounds that it is under-inclusive, even those critics concede that "the three constitutive elements reflect factors that undoubtedly must play into such an analysis",[318] and that the Interpretive Guide is:

> … superior to the various ad hoc lists because it provides those tasked with applying the norm on the battlefield with guidelines against which to gauge an action.[319]

316 Schmitt 2010 *NYU J Int'l L & Pol* 739.
317 Melzer 2010 *NYU J Int'l L & Pol* 914.
318 Schmitt 2010 *NYU J Int'l L & Pol* 739.
319 Melzer 2010 *NYU J Int'l L & Pol* 877.

All in all:

> … after careful consideration of the critiques prepared by Watkin, Schmitt, Boothby and Parks, nothing indicates that the ICRC's interpretive guidance is substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice.[320]

More importantly, the Guide's cautious interpretation of direct participation in hostilities ensures that the fundamental principles of distinction and civilian immunity upon which all of IHL is built are observed.

320 Melzer 2010 *NYU J Int'l L & Pol* 915.

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LIST OF ABBREVIATIONS

AP I	Additional Protocol I
A F L Rev	Air Force Law Review
Chi J Int'l L	Chicago Journal of International Law
Cornell Int'l LJ	Cornel International Law Journal
GC III	eneva Convention III
GC IV	Geneva Convention IV
HR	Hague Regulation
ICRC	International Committee for the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IEDs	Improvised Explosive Devices
IHL	International Humanitarian Law

JICJ	Journal of International Criminal Justice
NYU J Int'l L & Pol	New York University Journal of International Law and Politics
PCATI	Public Committee Against Torture in Israel
PMSC's	Private Military and Security Companies
UK	United Kingdom
UKTS	United Kingdom Treaty Series
UN	United Nations
UNTS	United Nations Treaty Series
US	United States of America
YIHL	Yearbook of International Humanitarian Law

THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT PARTICIPATION IN HOSTILITIES – A REVIEW OF THE ICRC INTERPRETIVE GUIDE AND SUBSEQUENT DEBATE

S Bosch*

SUMMARY

The phrase "direct participation in hostilities" has a very specific meaning in international humanitarian law (IHL). Those individuals who are clothed with combatant status are authorised to participate directly in hostilities without fear of prosecution, while civilians lose their civilian immunity against direct targeting whilst they participate directly in hostilities. Any civilian activity which amounts to "direct participation in hostilities" temporarily suspends their presumptive civilian protection and exposes them to both direct targeting as a legitimate military target and prosecution for their unauthorised participation in hostilities. Since existing treaty sources of IHL do not provide a definition of what activities amount to "direct participation in hostilities", the ICRC in 2009 released an Interpretive Guide on the Notion of Direct Participation in Hostilities - in the hope of providing a neutral, impartial and balanced interpretation of the longstanding IHL principle of direct participation in hostilities. While not without criticism, the Interpretive Guide aims to respect the customary IHL distinction between "direct participation in hostilities" and mere involvement in the general war effort. The Guide proposes a three-pronged test which establishes a threshold of harm, and requires direct causation together with a belligerent nexus. Collectively, these criteria limit overly-broad targeting policies, while distinguishing occasions of legitimate military targeting from common, criminal activities. Together with these three criteria, the Guide introduces the notion of the revolving door of protection, together with the concept of a "continuous combat function". Both these new concepts have been the subject of criticism, as too the idea that a presumption of non-participation status should apply in cases of

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doubt. Nevertheless "nothing indicates that the ICRC's interpretive guidance is substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice"[1] in a way which will ensure that the fundamental principles of distinction and civilian immunity upon which all of IHL is built are observed.

KEYWORDS: direct participation in hostilities; international humanitarian law; revolving door of protection, continuous combative function

* [1] Melzer 2010 *NYU J Int'l L & Pol* 915.