

KEEPING THE BALANCE BETWEEN
MILITARY NECESSITY AND HUMANITY:
A RESPONSE TO FOUR CRITIQUES OF THE ICRC'S
INTERPRETIVE GUIDANCE ON THE NOTION OF
DIRECT PARTICIPATION IN HOSTILITIES

BY NILS MELZER*

I.	INTRODUCTION	833
II.	WHAT IS "MEMBERSHIP" IN AN ORGANIZED ARMED GROUP?: A RESPONSE TO BRIGADIER-GENERAL KENNETH WATKIN	837
A.	<i>Organized Armed Groups as "Armed Forces"</i>	838
1.	<i>General Concept of Organized Armed Group.</i>	838
2.	<i>Distinction from Participants in a Levée en Masse.....</i>	839
3.	<i>Distinction from "Independent" Armed Groups</i>	840
B.	<i>Formal and Functional Concepts of Membership .</i>	843
1.	<i>Distinction between Regular and Irregular Armed Forces.....</i>	843
2.	<i>Concept and Scope of "Continuous Combat Function".....</i>	846
3.	<i>Perceived Bias against State Armed Forces...</i>	851
C.	<i>Clarity and Practicability of the Guidance.....</i>	852
III.	WHAT ACTIVITIES AMOUNT TO "DIRECT PARTICIPATION IN HOSTILITIES"?: A RESPONSE TO PROFESSOR MICHAEL N. SCHMITT	856
A.	<i>Threshold of Harm</i>	857
1.	<i>Primary threshold of military harm</i>	858
2.	<i>Alternative threshold of death, injury, or destruction.....</i>	861
B.	<i>Direct Causation</i>	865
1.	<i>Equality of standards for State and non-State actors</i>	865

* Dr. Nils Melzer is legal adviser for the International Committee of the Red Cross (ICRC). This article reflects the views of the author alone and not necessarily those of the ICRC.

2.	<i>The “one causal step” and “integral part” components of direct causation</i>	866
3.	<i>“One causal step” or “unlimited casual chain”?</i>	867
4.	<i>Voluntary human shields</i>	869
C.	<i>Belligerent Nexus</i>	872
D.	<i>Inverting the Presumption of Protection</i>	874
E.	<i>Concluding Remarks</i>	877
IV.	HOW LONG DOES LOSS OF CIVILIAN PROTECTION LAST?: A RESPONSE TO AIR COMMODORE WILLIAM BOOTHBY	879
A.	<i>Preparation, Deployment, and Return</i>	879
1.	<i>Preparatory measures</i>	880
2.	<i>Deployment and return</i>	882
B.	<i>Temporary and Continuous Loss of Protection</i>	883
1.	<i>Customary Nature of the Phrase “unless and for such time”</i>	884
2.	<i>Temporal Scope of the Term “Participation”</i>	886
3.	<i>Revolving Door vs. Continuous Loss of Protection</i>	888
V.	HOW MUCH FORCE IS PERMISSIBLE AGAINST LEGITIMATE TARGETS?: A RESPONSE TO COLONEL (RET.) W. HAYS PARKS	892
A.	<i>ICRC Mandate and Scope of the Clarification Process</i>	893
1.	<i>ICRC Mandate regarding Section IX</i>	893
2.	<i>The ICRC’s Clarification Process regarding Section IX</i>	894
B.	<i>Substantive Critique of Section IX</i>	896
1.	<i>The Interpretive Guidance and the lex specialis Principle</i>	898
2.	<i>Distinguishing Section IX from the Law Enforcement Paradigm</i>	899
3.	<i>Legal Basis and Substantive Accuracy of Section IX</i>	904
4.	<i>Support for Section IX in recent State Practice and Case Law</i>	909
VI.	CONCLUSION	913

I. INTRODUCTION

The primary purpose of international humanitarian law (IHL) is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. Keeping that balance is a difficult and delicate task, particularly in contemporary armed conflicts marked by a continued blurring of the traditional distinctions and categories upon which the normative edifice of IHL has been built and upon which its functionality depends in operational practice. Most importantly for the present discussion, the rise of loosely organized and clandestinely operating armed groups, the widespread outsourcing of traditional military functions to private contractors and civilian intelligence personnel, as well as a more general trend towards increased civilian involvement in military operations, have all led to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attack. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, whereas armed forces—unable to properly identify their adversaries—bear an increased risk of being attacked by persons they cannot distinguish from the civilian population.

Concerned about the growing humanitarian implications of this situation, the International Committee of the Red Cross (ICRC) conducted a six-year process of informal research and expert consultation with the aim of clarifying three questions under customary and treaty IHL: First, who is a civilian for the purposes of the principle of distinction and, therefore, is entitled to protection against direct attack? Second, what conduct amounts to direct participation in hostilities and, therefore, entails the loss of that protection? Third, what precise modalities govern that loss of protection? On June 2, 2009, the ICRC published the final product of that clarification process, its “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law,” which provides the organization’s official recommendations as to how IHL relating to civilian participation in hostilities should be

interpreted in light of the circumstances prevailing in contemporary armed conflicts.¹

The purpose of the present article is to respond to four critiques of the ICRC's Interpretive Guidance prepared by Brigadier-General Kenneth Watkin, Professor Michael Schmitt, Air Commodore William Boothby, and Colonel (ret.) W. Hays Parks. All four authors participated along with more than 50 other experts in the ICRC's clarification process on the notion of "direct participation in hostilities" and, through their specific experience and expertise, significantly contributed to bringing it to a successful conclusion. In the course of the expert discussions, a widely shared consensus was achieved on many of the most complex legal questions related to civilian participation in hostilities. Nevertheless, as the topics of the four critiques illustrate, a number of particularly difficult issues remained controversial until the end, including, most notably: (1) the criteria for distinguishing civilians from members of organized armed groups; (2) the so-called "revolving door" of protection according to which civilians can repeatedly lose and regain protection against direct attack; and (3) the restraints imposed on the use of force against legitimate military targets. Finally, although the three defining elements of "direct participation in hostilities," the core piece of the Guidance, were far less controversial, their application to certain activities, such as voluntary human shielding and hostage taking, still gave rise to significant disagreement among the participating experts.

As illustrated by the proceedings of the expert process,² a number of participants, including Watkin, Schmitt, Boothby,

1. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, June 2009 (prepared by Nils Melzer) [hereinafter *Interpretive Guidance*], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf).

2. The complete proceedings of the ICRC's clarification process (including expert meeting reports, drafts of the Interpretive Guidance, other background documents, and expert papers) have been published and are available at ICRC Proceedings, <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709> (last visited Mar. 25, 2010). The expert meeting reports were drafted based on complete audio recording-transcripts of the expert discussions (on file with the present author and archived at the ICRC) and were sent to the participating experts for comments and amendments prior to formal finalization.

and Parks, consistently advocated for a more permissive targeting regime than is proposed in the Interpretive Guidance, whereas just as many others argued that the Guidance was too permissive and insisted on a more protective interpretation of the law. For example, while Watkin argues that the Interpretive Guidance defines “membership” in organized armed groups too restrictively and, thus, limits the loss of civilian status and protection attached to such membership to an unrealistically narrow group of persons, other experts would insist that IHL does not foresee any loss of civilian status other than for State combatants and that, therefore, members of organized armed groups must be regarded as civilians protected against direct attack unless and for such time as they directly participate in hostilities. Similarly, while Schmitt contends that the Interpretive Guidance’s definition of “direct participation in hostilities” is too restrictive, essentially because it excludes support activities not directly causing harm to the enemy, other experts would criticize the Guidance’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. Further, while Boothby rejects the Guidance’s interpretation of the treaty phrase “unless and for such time” as implying that civilians can repeatedly regain their protection in the interval between specific hostile acts, other experts would contend that this interpretation is not only appropriate for civilians, but should also be applied to members of organized armed groups fighting on behalf of non-State belligerents. And while Parks argues that there is no legal basis in IHL for restricting the use of force against legitimate military targets based on the principles of military necessity and humanity, other experts would vehemently reject the Interpretive Guidance’s approach as too permissive and insist that, particularly in non-international armed conflict, all persons other than State combatants must be protected under the stricter use-of-force standards developed in international human rights jurisprudence. Moreover, a third group of experts expressed strong support for the position taken in the final text of the Interpretive Guidance on each of these questions.

Consequently, the positions expressed in the Interpretive Guidance are not necessarily based on a unanimous view or majority opinion of the participating experts. Rather, they reflect the ICRC’s own position, which takes the wide variety of

expert opinions into account but, ultimately, aims to ensure a clear and coherent interpretation of IHL consistent with its underlying purposes and principles. The resulting Interpretive Guidance consists of 10 recommendations, each of which summarizes the ICRC's position on the interpretation of IHL relating to a particular legal question, and includes a commentary explaining the bases of each recommendation. The sections and recommendations of the Interpretive Guidance are closely interrelated and can only be properly understood if read as a whole. For example, read in isolation, the ICRC's position that members of organized armed groups lose civilian status and protection for the entire duration of their membership (Section II) could be misunderstood as automatically permitting direct attacks against anyone somehow affiliated with an insurgent group. The ICRC's position on that question can only be accurately understood if read in conjunction with the strictly *functional* definition of membership in organized armed groups (Section II), the presumption of civilian protection in case of doubt (Section VIII), and the restriction of the force used against legitimate targets to what is militarily necessary in the circumstances (Section IX). Similarly, the restriction of the notion of "direct participation in hostilities" to specific hostile acts or operations (Sections IV and V) entails that civilians regain protection in the interval between hostile acts (Section VII), which in turn supports the conclusion that members of organized armed forces or groups belonging to a party to the conflict should not be regarded as civilians (Section I and II).

When discussing specific aspects of the ICRC's Interpretive Guidance in the framework of academic critiques, therefore, it should always be kept in mind that the Guidance constitutes a holistic and carefully balanced "package deal," the various components of which cannot be dissected and modified without due regard to the consequences for the equilibrium of the proposed interpretive framework as a whole.

II. WHAT IS “MEMBERSHIP” IN AN ORGANIZED ARMED GROUP?: A RESPONSE TO BRIGADIER-GENERAL

KENNETH WATKIN

Brigadier-General Ken Watkin’s critique³ focuses on the Interpretive Guidance’s treatment of membership in organized armed groups. While he agrees with the Guidance’s basic proposition that members of organized armed groups cease to be civilians and, therefore, lose protection against direct attack for as long as their membership lasts, he disagrees with its distinct analysis of membership in regular armed forces and organized armed groups. In his view, the approach taken in the Interpretive Guidance “creates a bias against State armed forces”⁴ and does “not reflect either the nature of warfare or the historical and contemporary scope of armed conflict.”⁵ Accordingly, Watkin argues, the Guidance runs the risk of “undermining the credibility of the DPH rule,[⁶] and the ability to ensure it is applied during the conduct of operations.”⁷ Overall, Watkin regards the ICRC’s Interpretive Guidance as “a lost opportunity for clarifying this area of international humanitarian law”⁸ and “certainly not a re-statement of existing law.”⁹ Watkin concludes his critique by proposing an alternative theory of membership in organized armed groups which, in his view, “reinforces the distinction principle”¹⁰ and recognizes that “civilian participation has to be limited in time and frequency so as not to undermine the protection associated with civilian status.”¹¹ In the following, it shall therefore be examined whether Watkin’s alternative theory of membership in organized armed groups provides more accurate, clear, and practicable guidance to operational forces than the ICRC’s In-

3. Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in the Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010).

4. *Id.* at 694.

5. *Id.*

6. The “DPH rule” refers to the rule of customary and treaty international humanitarian law (IHL) according to which civilians are protected against direct attack unless and for such time as they directly participate in hostilities.

7. Watkin, *supra* note 3, at 648.

8. *Id.* at 695.

9. *Id.*

10. *Id.*

11. *Id.*

terpretive Guidance. More particularly, the two approaches shall be scrutinized with regard to: 1) their basic conception of “organized armed groups,” 2) their interpretation of membership in such groups, and 3) the clarity and practicability of the resulting guidance.

A. *Organized Armed Groups as “Armed Forces”*

1. *General Concept of Organized Armed Group*

In international legal discussions, the notion of an “organized armed group” is not always used consistently, and its meaning and implications may vary according to the political context and the applicable law. Most commonly, the notion of an organized armed group is used in contrast to regular State armed forces. Thus, in *international armed conflict*, the term usually refers to irregular armed forces belonging to a State, such as certain militias and volunteer corps, including organized resistance movements,¹² whereas in *non-international armed conflict* it normally describes the armed forces of a non-State party to the conflict.¹³ In line with this terminology, the Interpretive Guidance is based on the understanding that the no-

12. See Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4(A)(1) and (2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (distinguishing between “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces” and “[m]embers of *other* militias and members of *other* volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict”, emphasis added); Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (including the reference to organized armed groups in its definition of “armed forces”). For a formulation of the corresponding customary rule see: ICRC, *Customary International Humanitarian Law: Volume 1: Rules* 14 (2005) (*prepared by* Jean-Marie Henckaerts & Louise Doswald-Beck) [hereinafter *Customary International Law Rules*] (“Rule 4. The armed forces to a party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to the party for the conduct of its subordinates.”).

13. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (distinguishing between the “armed forces” of a “High Contracting Party” and “dissident armed forces or other organized armed groups”). Article 3 common to the Geneva Conventions, on the other hand,

tion of “organized armed groups” refers to irregularly constituted “armed forces” of a State or non-State party to an armed conflict. As such, organized armed groups constitute armed forces in a strictly functional sense, in that they are *de facto* charged with the conduct of hostilities on behalf of a party to the conflict. In contrast to membership in regular armed forces, membership in organized armed groups is defined functionally rather than formally and, according to the Guidance, includes only those individuals whose continuous function it is to directly participate in hostilities (“continuous combat function”).¹⁴ Just as with regular combatants, members of organized armed groups cease to be civilians and lose protection against direct attack for as long as they assume their continuous combat function.¹⁵ Watkin agrees with the Interpretive Guidance’s basic understanding of organized armed groups as the “armed forces” of a State or non-State belligerent,¹⁶ but finds that the Guidance lacks both clarity and precision in its treatment of two related issues, namely the criteria for “membership” in a *levée en masse* and the status of “independent” armed groups, which do not belong to a belligerent party.¹⁷

2. *Distinction from Participants in a Levée en Masse*

The only armed actors that are not regarded as civilians although they lack sufficient organization to qualify as armed forces are participants in a *levée en masse*. This concept refers to a special category of persons traditionally entitled to combatant privilege that includes the “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs

refers to members of the “armed forces” of *each* party to the conflict, thus necessarily including those of the non-State belligerent.

14. *Interpretive Guidance*, *supra* note 1, at 27-36.

15. *Id.* at 70.

16. Watkin, *supra* note 3, at 690-691 (suggesting that “groups organized to participate in the armed conflict” are “simply members of armed forces regardless of which Party to a conflict they fight for”).

17. *Id.* at 644.

of war.”¹⁸ As Watkin rightly observes, treaty and customary law provides participants in a *levée en masse* with “a unique status, being neither civilians nor members of the armed forces,”¹⁹ which is recognized only in situations of international armed conflict. It is true that this comparatively exceptional category of persons did not give rise to detailed substantive discussions during the expert meetings and that the Interpretive Guidance does not express a definite position with regard to criteria based on which participants in a *levée en masse* can be targeted.²⁰ However, in this context, it may be noted that treaty law expressly defines the *levée en masse* as a *spontaneous and unorganized* form of participation in hostilities. Consequently, individual involvement in a *levée en masse* cannot be based on “membership,” which would imply a minimum of continuity and organization. As soon as an initially spontaneous and unorganized resistance by inhabitants of a non-occupied territory becomes continuous and organized, it almost certainly would no longer be regarded as a *levée en masse*, but as an organized resistance movement or other irregular militia belonging to a belligerent party and, thus, as an “organized armed group” within the meaning of the Interpretive Guidance.²¹ Overall, therefore, it seems most convincing to refer to “participants” in a *levée en masse* (rather than “members”) and to determine their loss of protection based on the same criteria that apply to civilians, since both take a direct part in hostilities on a merely spontaneous, sporadic, or unorganized basis, albeit with different consequences as far as their entitlement to combatant privilege is concerned.²²

3. *Distinction from “Independent” Armed Groups*

According to the Interpretive Guidance, groups engaging in organized armed violence against a party to an international

18. Regulations annexed to Convention (IV) Respecting the Laws and Customs of War on Land art. 2, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV Regulations]. See also Geneva Convention III, *supra* note 12, art. 4(6) (echoing language of article 2 of the Hague IV Regulations); Additional Protocol I, *supra* note 12, art. 50(1) (referencing article 4(6) of the Geneva Convention III).

19. Watkin, *supra* note 3, at 653.

20. *Id.*

21. See *supra* note 12 and accompanying text.

22. See also table accompanying *infra* notes 75-78.

armed conflict without “belonging to” another party to the conflict (“independent” armed groups) cannot qualify as members of the armed forces of a party to that conflict, and must be regarded as civilians.²³ According to Watkin, this approach “has the potential to significantly erode the validity of civilian status as a means of protecting those not involved in the conflict.”²⁴ This critique overlooks that it is precisely because independent armed groups are not, strictly speaking, “involved in the conflict” that they must be regarded as civilians.

Whether or not a group is involved in hostilities does not only depend on whether it resorts to organized armed violence temporally and geographically coinciding with a situation of armed conflict, but also on whether such violence is designed to support one of the belligerents against another (belligerent nexus).²⁵ If that is the case, the group in question can be regarded as an irregular armed force “belonging to” the supported party to the conflict, and its members are not entitled to civilian protection against attack.²⁶ Conversely, a group resorting to organized armed violence for political or criminal purposes without fighting for a party to the conflict cannot possibly be considered to “take part” in the surrounding hostilities. Hence, they either remain civilians with regard

23. *Interpretive Guidance*, *supra* note 1, at 23 (“The concept of ‘belonging to’ requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting. Without any doubt, an organized armed group can be said to ‘belong to’ a State if its conduct is attributable to that State under the international law of State responsibility. The degree of control required to make a State responsible for the conduct of an organized armed group is not settled in international law. In practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities on behalf and with the agreement of that party.”).

24. Watkin, *supra* note 3, at 666.

25. On the concept and significance of “belligerent nexus” for the qualification of individual acts as direct participation in hostilities, see *Interpretive Guidance*, *supra* note 1, at 58-64; *infra* Part III.C (response to Schmitt).

26. In treaty law, the requirement of “belonging to” a party to the conflict is expressly mentioned in Geneva Convention III, *supra* note 12, art. 4(A)(2); see also *Interpretive Guidance*, *supra* note 1, at 23-24 (“In order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict.”).

to the surrounding armed conflict or, if their use of violence meets the threshold of intensity and organization required under IHL,²⁷ become independent parties to a separate armed conflict. If they become independent parties, their fighting personnel (i.e. those assuming a continuous combat function) no longer qualify as civilians. If they remain civilians, however, independent armed groups may well be regarded as terrorists, drug-traffickers, or other organized criminals subject to the use of force in law enforcement and individual self-defense, but they cannot qualify as “armed forces” within the meaning of IHL, whether formally or functionally (i.e., through the assumption of a “continuous combat function”).²⁸ While the presence of independent armed groups or the co-existence of several international and/or non-international armed conflicts within the same temporal and geographical space may give rise to legal questions of a certain complexity, nothing in Watkin’s critique indicates that the existing framework of international law would be insufficient to rise to the challenge.²⁹

27. The threshold of intensity and organization required for a situation to qualify as a non-international armed conflict has been defined, most notably, in: Prosecutor v. Tadic, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, § 70 (Oct. 2, 1995) (“[A]rmed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”); Prosecutor v. Haradinaj, Case No. IT-04-84, Judgment, § 49 (Apr. 3, 2008) (explaining that “protracted armed violence” refers “more to the intensity of the armed violence than to its duration”); *id.* § 60 (“Armed conflict can exist only between parties that are sufficiently organized to confront each other with military means.”).

28. In practice, the consequence of excluding independent armed groups from civilian status would be a complete blurring of the distinction between law enforcement and the conduct of hostilities. Thus, in a situation of armed conflict, members of a mafia organization resorting to armed violence against State representatives would become legitimate military targets although their criminal activities remain exactly the same as during peace time and although the violence they use is not designed to support either belligerent.

29. See also *Interpretive Guidance*, *supra* note 1, at 23-24.

B. *Formal and Functional Concepts of Membership*

1. *Distinction between Regular and Irregular Armed Forces*

The Interpretive Guidance is based on alternative concepts of “membership” in the armed forces, depending on whether such forces were constituted regularly (*formal* membership according to national law) or irregularly (*functional* membership based on *de facto* exercise of continuous combat function).³⁰ In Watkin’s view, this distinction is the “primary weakness” of the Interpretive Guidance, as it “fails to recognize . . . that the conduct of military operations across the broad scale of armed conflict is a group activity which requires fundamentally the same organization regardless whether one fights for a State or a non-State actor.”³¹ Watkin argues that “[t]he approach to determining membership which best reflects how warfare is conducted is to treat all armed forces the same. . . . As a result they are simply members of armed forces regardless of which party to a conflict they fight for, the domestic law basis of their enrolment, or whether they wear a uniform.”³² Watkin’s critique on this point is surprising, particularly as the Interpretive Guidance goes to great lengths to assimilate, as far as reasonably possible, all organized armed forces, groups, and units, regardless of whether they fight for a State or non-State party to an armed conflict, or whether they wear uniforms or distinctive signs. The Guidance clearly reflects the understanding of the Commentary that non-international armed conflicts “are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war.”³³ It is precisely in recognition of the fact that the core function shared by all armed forces is to conduct hostilities on behalf of the parties to an armed conflict,³⁴ and that the concept of “hostilities” refers to the (collective) resort by the belligerent parties to

30. See also table accompanying *infra* notes 75-78.

31. Watkin, *supra* note 3, at 690.

32. *Id.* at 690-691.

33. See *Interpretive Guidance*, *supra* note 1, at 27-30, especially n.35 (the footnote refers to ICRC, *Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War* 37 (Jean S. Pictet ed., 1960) [hereinafter *Commentary on Geneva Convention III*] (*italics in original*)).

34. *Interpretive Guidance*, *supra* note 1, at 11, 23, 33.

means and methods of injuring the enemy,³⁵ that the Interpretive Guidance regards all armed actors showing a sufficient degree of military organization and fighting on behalf of a party to an armed conflict as part of the “armed forces” of that party, regardless of whether they distinguish themselves from the civilian population.³⁶ However, even the legitimate desire “to treat all armed forces the same” cannot justify ignoring the basic implications of existing treaty law, or the significant differences in how regular and irregular armed forces are structured and organized in operational practice.

Treaty law clearly indicates that membership in the regular armed forces of States depends not on functional criteria, but primarily on formal integration into uniformed armed units in accordance with domestic law. For example, the Hague Regulations clarify that “[i]n countries where militias or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army.’”³⁷ Thus, whether or not such forces are part of a State’s “army” depends on the rules and regulations applicable in the respective State. Given that State armed forces “may consist of combatants and non-combatants,”³⁸ including personnel assigned to exclusively medical, religious, or civil defence functions, and given that civilians may retain their status although they are integrated, for example, into military aircraft crews,³⁹ membership in regular armed forces clearly depends on formal rather than functional criteria. Similarly, the distinction made

35. *Id.* at 43.

36. *Id.* at 22, 28, 32. The wearing of uniforms or other distinctive signs is indicative, not constitutive, of membership. Even with regard to irregular armed forces within the meaning of article 4(A)(2) of the Geneva Convention III, *supra* note 12, whose entitlement to prisoner of war status depends on their fulfillment of the “4 criteria” including the wearing of a distinctive sign and the open carrying of weapons, the Interpretive Guidance clearly states that “it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population.” *Interpretive Guidance, supra* note 1, at 22.

37. Hague IV Regulations, *supra* note 18, art. 1.

38. *Id.* art. 3. During the *travaux préparatoires* to the Geneva Conventions, this understanding was considered to be implicit also in the concept of regular armed forces in Art. 4(1) of the Geneva Convention III. See *Commentary on Geneva Convention III, supra* note 33, at 51.

39. Geneva Convention III, *supra* note 12, art. 4(4).

in the Geneva Conventions between militias and volunteer corps “forming part” of (regular) armed forces and “other” (irregular) militias and volunteer corps⁴⁰ cannot have its basis in different functions assumed by these forces, but only in formal criteria determined by domestic law. Thus, although Watkin finds that “[t]he emphasis on ‘domestic law’ to define the international standard for membership in an armed force is particularly problematic,”⁴¹ and that “[i]t is not clear at all why domestic law should be determinative as to whether a person should be able to be targeted,”⁴² the straightforward answer is that this is how States regulated the matter in existing treaty law.⁴³ As will be shown in Part II.B(2), this formal notion of membership, which is recognized for State armed forces only, is complemented by a functional concept of membership, which takes into account the more informal and fluctuating membership structures of irregularly constituted armed forces fighting on behalf of State and non-State belligerents.

Indeed, in practice, the formal concept of membership in regular State armed forces reflected in treaty law cannot be transposed to irregularly constituted armed groups. For example, while organized resistance movements may “belong to” a State,⁴⁴ individual membership in such groups generally does not depend on formal enrollment in accordance with domestic law, but on *de facto* integration into an organized armed structure conducting hostilities on behalf of the State in question. As far as non-State armed groups are concerned, there is a particularly wide spectrum of varying degrees of affiliation, which may in one context depend on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions, such as membership in a tribe, clan, or family. The fact that irregularly constituted armed groups may, exceptionally, show a degree of sophistication and mili-

40. *Id.* arts. 4(1)-(2).

41. Watkin, *supra* note 3, at 651.

42. *Id.* at 671.

43. It is precisely because formal membership cannot easily be identified that a “generally accepted practice of States” has developed “with respect to the wearing of the uniform by combatants assigned to the regular, uniformed units of a Party to the conflict.” Additional Protocol I, *supra* note 12, art. 44(7). However, the wearing of uniforms or other distinctive signs is indicative, not constitutive, of membership.

44. See Geneva Convention III, *supra* note 12, art. 4(A)(2).

tary organization comparable to State armed forces does not, as Watkin seems to suggest, make them “regular” armed forces,⁴⁵ but merely raises the question as to how broadly membership in irregular armed forces should be interpreted.

2. *Concept and Scope of “Continuous Combat Function”*

The Interpretive Guidance’s concept of “organized armed group” refers to irregularly constituted armed forces in a strictly functional sense.⁴⁶ For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness, or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a belligerent party. As treaty and customary law ties *temporary loss of civilian protection* to conduct amounting to direct participation in hostilities, it would be contradictory to attach an even more serious consequence, *continuous loss of protection*, to a function further removed from the conduct of hostilities. Accordingly, the decisive criterion for individual membership in an organized armed group should be whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (“continuous combat function”).⁴⁷ This illustrates that, just as with States, a conceptual distinction must be made between the non-State “party” to an armed conflict (i.e., the insurgency or rebellion as a whole) and its “armed or military wing”, which is charged with the conduct of hostilities on its behalf (i.e., the “organized armed group” or “armed force” in a functional sense).

45. Watkin, *supra* note 3, at 675. See Geneva Convention III, *supra* note 12, art. 3(4) (confirming that, *inter alia*, the denomination of an organized armed group as the “armed forces” of a party to the conflict has no impact on their formal legal status). Conversely, the fact that dissident armed forces have turned against their own government does not, *ex post facto*, change the formal nature of the process which initially established their membership in the subsequently dissident units.

46. *Interpretive Guidance*, *supra* note 1, at 33-35 (setting forth criteria for membership in organized armed groups in non-international armed conflict).

47. *Id.* at 25 (suggesting that membership in irregular armed forces should be determined by criteria similar to those applying to organized armed groups in non-international armed conflict).

Continuous combat function does not, of course, imply *de jure* entitlement to combatant privilege. Rather, it distinguishes, for the purposes of the conduct of hostilities, members of organized armed groups from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative, or other non-combat functions for a party to the conflict.⁴⁸

In his alternative theory, Watkin recognizes that “[i]ndicia of membership in an organized armed group should include whether a person is carrying out a combat function,”⁴⁹ but emphasizes that such function “is not a definitive determinant . . . but rather one of a number of factors that can be taken into consideration.”⁵⁰ However, in his subsequent argument, Watkin provides no indications as to what might be other valid factors for the determination of membership but, instead, concentrates exclusively on developing a more liberal interpretation of the concept of “continuous combat function.”⁵¹ Thus, Watkin’s main disagreement does not appear to concern the primarily functional determination of membership, but rather the range of functions which can be regarded as entailing membership and, therefore, continuous loss of protection against direct attack. According to Watkin:

Such a function would involve combat, combat support, and combat service support functions, carrying arms openly, exercising command over the armed group, carrying out planning related to the conduct of hostilities, or other activities indicative of membership in an armed group. This would include intelligence gathering, maintaining communications, or conducting logistics. However, it is not necessary that the member of the organized armed group carry a weapon at the time they are being targeted. . . . Further, a combat function does not have to be carried out either full time or on an exclusive basis in order to establish membership in an organized armed group.⁵²

48. *Id.* at 33-34.

49. Watkin, *supra* note 3, at 691.

50. *Id.*

51. *Id.* at 691-92.

52. *Id.* at 691.

At first sight, Watkin's description of combat function does not appear to deviate significantly from that proposed by the Interpretive Guidance. Clearly, according to the Guidance, the planning, preparation, command, and execution of combat operations would amount to direct participation in hostilities. Likewise, "combat support" activities would almost invariably constitute an integral part of combat operations, because they generally involve direct support to combat units (such as tactical intelligence, communications, logistics, and engineering) having relatively immediate impact on the hostilities.⁵³ Also, according to the Interpretive Guidance, the assumption of a continuous combat function does not presuppose constant involvement in combat, nor does it exclude the parallel, or even predominant, exercise of non-combat functions.⁵⁴ As Watkin's somewhat anachronistic example of Mao Tse Tung's "Table of Organization" for a guerrilla regiment illustrates, even in the highly sophisticated insurgencies of the past century, most individuals assigned to predominantly administrative functions were issued firearms and, in all likelihood, were expected to directly participate in hostilities whenever needed.⁵⁵ Of course, such "dual function" personnel would have to be regarded as members subject to direct attack on a continuous basis. Watkin's approach becomes more problematic, however, with regard to persons assuming *exclusively* "combat service support" functions—a term that refers to a wide range of administrative, technical, and logistical support activities in favor of operational forces, including not only the provision of fuel, equipment and transport, but also of food and shelter, administrative and legal services, and even

53. For the definition of "combat support," see U.S. DEP'T OF DEFENSE, JOINT PUBL'N 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 99 (last amended Aug. 19, 2009) (defining "combat support" as "[f]ire and operational assistance provided to combat elements" and further referring to "combat service support"); U.S. DEP'TS OF THE ARMY, NAVY, AIR FORCE & COAST GUARD, JOINT PUBL'N 4-0, JOINT LOGISTICS, at gl. 6 (July 18, 2008) (defining "combat support" as "[f]ire and operational assistance provided to combat elements"). For a definition of "combat service support," see *infra* note 55.

54. *Interpretive Guidance*, *supra* note 1, at 32-35 (explaining the Interpretive Guidance's concept of "continuous combat function").

55. Watkin, *supra* note 3, at 676-677.

medical and religious care.⁵⁶ Thus, Watkin's *unqualified* assertion that "cooks and administrative personnel [i.e., of an organized armed group], can be targeted in the same manner as if that person was a member of regular State armed forces"⁵⁷ cannot be reconciled with the more nuanced approach of the Interpretive Guidance. Watkin concedes, however, that individual civilians accompanying organized armed groups and "selling food under contract or otherwise" or "providing supplies to armed forces in the immediate area of operations" cannot be regarded as operating "under command" and, "much like civilian contractors working with regular State armed forces . . . cannot be targeted unless and for such time as they participate directly in hostilities."⁵⁸

Overall, Watkin's alternative theory of membership reflects a well-intentioned attempt to transpose the formalized command and membership structures of regular State armed forces to irregularly constituted armed groups. In order for this approach to be viable, however, it would have to be conceptually and practically possible to distinguish between non-combatant members performing mere "combat service support" functions (who, according to Watkin, would be legitimate military targets), and civilians "selling food" or "providing supplies to armed forces in the immediate area of operations" (who would remain protected against direct attack). Certainly, as far as regular State armed forces are concerned, the distinction between "non-combatant" members (e.g. administrative personnel or cooks) and civilian contractors or employees assuming the same function generally does not pose a conceptual or practical problem.⁵⁹ However, the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups

56. For a definition of "combat service support," see U.S. DEP'T OF DEFENSE, JOINT PUBL'N 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Oct. 31, 2009) (defining "combat service support" as "the essential capability, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war"); see also U.S. DEP'T OF THE ARMY, FIELD MANUAL 4-0, COMBAT SERVICE SUPPORT 1-1 (Aug. 2003) (providing a virtually identical definition).

57. Watkin, *supra* note 3, at 692.

58. *Id.*

59. In fact, the category of civilians accompanying State armed forces is even expressly foreseen in Geneva Convention III, *supra* note 13, arts. 4(4), (5).

make it not only practically impossible, but also conceptually meaningless to distinguish between "non-combatant" members of such groups and civilian supporters accompanying them without taking a direct part in the hostilities.⁶⁰ For example, in operational reality, soldiers may be confronted with men and women carrying weapons and supplies for insurgent forces, villagers serving as scouts, lookouts, and smugglers for an armed group operating in the area, local teenagers watching as an army unit walks into a mine field or booby-trap laid by them a few days earlier, inhabitants regularly providing food and shelter to insurgents, or skilled individuals assembling or maintaining weapons and equipment for an insurgent force. However, neither Mao Tse Tung's "Table of Organization" nor the formalized command and membership structures of contemporary State armed forces provide useful guidance as to whether such persons are to be regarded as "members" or merely as civilian "supporters" or "contractors."

As a consequence, there are essentially two solutions: First, the notion of "organized armed group" can be overextended to include *all persons accompanying or supporting that group* (i.e., regardless of their function); an excessively wide approach which would completely discard the distinction between "direct" and "indirect" participation in hostilities inherent in treaty and customary law. Alternatively, the notion of "organized armed group" can be limited to those persons who represent the *functional equivalent of "combatants"* in the regular armed forces. In other words, while membership in State armed forces generally implies a "right" to directly participate in hostilities, membership in organized armed groups implies a "function" to do so. As has been illustrated, the latter approach best reflects the understanding of organized armed groups as irregularly constituted "armed forces" of a party to the conflict and, therefore, was adopted in the Interpretive Guidance.

60. Depending on the circumstances, both categories of persons may include, for example, cooks, secretaries, administrative, medical, and religious personnel, as well as representatives and supporters of the non-State belligerent's political wing.

3. *Perceived Bias against State Armed Forces*

In his critique, Watkin contends that the Interpretive Guidance's limitation of membership in organized armed groups to persons assuming a continuous combat function, in conjunction with what he perceives to be a "narrow concept of direct participation in hostilities,"⁶¹ entails that "individuals who may be carrying out substantial and continuing integrated support functions for such groups are considered to be civilians even though the functions they perform are the same ones for which members of State armed forces can be attacked."⁶² As a result, in Watkin's view, the Interpretive Guidance "adopts a position which clearly disadvantages States in relation to the organized armed groups against which they are engaged in armed conflict."⁶³

Watkin's critique is not justified. First, it should be recalled that members of regular State armed forces are legitimate military targets not because of the "functions they perform," but because of their formal status as regular combatants. Second, as far as irregularly constituted armed forces are concerned, the criterion for membership is identical for State and non-State actors, namely the assumption of a continuous combat function. It is therefore not quite accurate when Watkin claims that, according to the Guidance, "an individual cannot be targeted for performing certain logistics functions for an organized armed group while that same person would be a lawful target if they performed that role in support of State armed forces."⁶⁴ The question is not whether an individual supports a State or a non-State belligerent, but whether his membership depends on formal *de jure* integration (regular forces) or, rather, on the function *de facto* performed (irregular forces).

While it is true that the resulting notion of regular armed forces may be wider than that of their irregularly constituted counterparts, the practical relevance of this conceptual difference should not be overestimated. In practice, almost all non-

61. Watkin, *supra* note 3, at 644. For a discussion of the Interpretive Guidance's understanding of the notion of "direct participation in hostilities," see *infra* Part III (response to Schmitt).

62. Watkin, *supra* note 3, at 644.

63. *Id.* at 693.

64. *Id.* at 694.

combatant members of regular armed forces (except medical and religious personnel), such as cooks and administrative personnel, are not only entitled, but also trained, armed, and expected to directly participate in hostilities in case of enemy contact and, therefore, also assume a continuous combat function. Likewise, in reality, non-combat tasks such as cooking for an organized armed group will more often be carried out in addition to, rather than instead of, a continuous combat function.⁶⁵ Be this as it may, as has been shown, the distinct approaches for determining membership in regular and irregular armed forces are not the result of the Interpretive Guidance's purported "bias against State armed forces,"⁶⁶ but are rooted in existing treaty and customary law and reflect the reality observed in operational practice.

C. *Clarity and Practicability of the Guidance*

As Watkin rightly notes, the ICRC's Interpretive Guidance "was not meant to be simply a theoretical or academic exercise. It is its practical effect and the ability to apply its findings which are key determinants of the success or failure of the document."⁶⁷ Ultimately, therefore, "the question must be asked whether the Interpretive Guidance presents a useful guide for practitioners, academics, and the courts to use in order to clarify this difficult and often confusing area of law."⁶⁸ Watkin answers this question in the negative. After a lengthy analysis of the ICRC's Interpretive Guidance in the light not only of contemporary IHL, but also of less likely sources, such as the medieval "Just War" theory⁶⁹ and Mao Tse Tung's doctrine of communist guerrilla warfare,⁷⁰ he concludes: "It does not appear that after six years of work the Interpretive Guidance has accomplished what it set out to do: find an interpretation of direct participation in hostilities that enhances the protection

65. See Watkin, *supra* note 3, at 676 (noting that Mao Tse-Tung envisioned that guerrilla fighters would be asked to prepare food if the guerrilla company had an insufficient number of cooks) (citing MAO TSE-TUNG, ON GUERRILLA WARFARE app., tbl.1, cmt. 4 (Samuel B. Griffith trans., University of Illinois Press 2000) (1961)).

66. Watkin, *supra* note 3, at 694.

67. *Id.* at 646.

68. *Id.* at 693.

69. *Id.* at 667-74.

70. *Id.* at 675-78.

of civilians and which will promote a better understanding and faithful application of international humanitarian law.”⁷¹

Watkin goes to great lengths to illustrate the purported complexity and impracticability of the Interpretive Guidance. Most notably, he provides a set of charts supposedly “summarizing” the various categories of persons, as well as the corresponding criteria for loss and regaining of protection, identified in the Interpretive Guidance.⁷² In what looks more like sophistic distortion than a practice-oriented summary of the framework proposed in the Interpretive Guidance, Watkin provides separate charts for international and non-international armed conflicts comprising no less than sixteen categories and sub-categories of persons, each with a separately listed set of criteria for the loss and regaining of protection against direct attack. Not surprisingly, he subsequently asks “whether these categories of participants and the different tests impacting targeting can be translated into a format by which soldiers can make split-second decisions regarding the use of deadly force,”⁷³ and concludes that “[t]hese charts do not suggest the Study has provided that level of clarity or the necessary practical and credible guidance by which participants in hostilities can effectively identify and engage their adversaries.”⁷⁴

Needless to say, IHL foresees numerous categories of persons with distinct status, rights, and duties, and many of them must be analyzed separately in order to establish the relevance of their particular characteristics for the issue under discussion. For the purposes of the principle of distinction, however, it is sufficient to regroup these categories according to the relevant criteria by which they lose and regain protection against direct attack. In other words, for the practical purposes of targeting, there are no more categories of persons than there are distinct sets of criteria for the distinction between legitimate military targets and persons protected against direct attack. Accurately summarized for the purposes of the principle of distinction, therefore, the Interpretive Guidance distinguishes no more than three categories of persons:

71. *Id.* at 693.

72. *Id.* at 662-64.

73. *Id.* at 662.

74. *Id.*

TABLE: TARGETING OF PERSONS IN INTERNATIONAL & NON-INTERNATIONAL ARMED CONFLICTS

Categories:	Targeting criterion:	Temporal scope:
I. Regular armed forces ⁷⁵ All armed forces regularly constituted or formally incorporated in accordance with national law, incl. regular armed forces having turned against their government (dissident armed forces).	Formal membership: Enrolment in accordance with national law.	For the duration of active duty (until formal discharge, retirement, etc. or, for dissident forces, until full <i>de facto</i> disengagement).
II. Irregular armed forces ⁷⁶ All other organized armed forces, groups, or units <i>de facto</i> conducting hostilities on behalf of a State or non-State party to an armed conflict.	Functional Membership: Exercise of a continuous combat function.	For as long as a continuous combat function is assumed (until full <i>de facto</i> disengagement from combat function).
III. Civilians ⁷⁷ (& <i>levée en masse</i>) ⁷⁸ All persons directly participating in hostilities on a merely spontaneous, sporadic, or unorganized basis.	Individual Participation: Direct participation in hostilities (spontaneous, sporadic, or unorganized).	For the duration of each hostile act or operation (including preparation, deployment & return).

While Watkin does not provide a similar chart for his alternative theory of membership, his arguments seem to suggest that he distinguishes only two categories of persons, namely armed forces and civilians.⁷⁹ However, he does not clarify how these categories are to be distinguished in opera-

75. *Interpretive Guidance*, *supra* note 1, at 25, 31 (explaining the basic concept of regular armed forces, as well as the formal criteria for membership therein).

76. *Id.* at 21-25, 31-35, 71-73 (explaining the basic concept of irregular armed forces, the functional criteria for membership therein, as well as the temporal scope of the ensuing loss of protection against direct attack).

77. *Id.* at 20-21, 27-28, 70-71 (explaining the basic concept of civilian in international and non-international armed conflict, as well as the temporal scope of loss of protection against direct attack due to the direct participation of civilians in hostilities).

78. *Id.* at 25 (explaining the basic concept of the *levée en masse*). The inclusion of the *levée en masse* in this table is not based on an express position taken in the *Interpretive Guidance*, but on the argument made above. See *supra* text accompanying notes 20-22.

79. See generally Watkin, *supra* note 3, at 690-93 (discussing his "preferred approach").

tional practice. For example, at the outset of his analysis, Watkin already lacks the criteria required for the distinction of organized armed groups from a *levée en masse* and from independent armed groups.⁸⁰ Further, while he emphasizes that combat function is but “one of a number of factors” for determining membership in an organized armed group, he fails to provide any alternative factors.⁸¹ Similarly, although Watkin emphasizes that a person providing “logistics support as a member of an organized armed group, including cooks and administrative personnel” would be a legitimate military target,⁸² whereas civilians “providing supplies to armed forces in the immediate area of operations” would remain protected against direct attack,⁸³ he fails to provide the criteria permitting this rather consequential distinction in operational practice.

Perhaps most surprising, however, is Watkin’s critique of the Interpretive Guidance’s distinction between members of an organized armed group (who lose their protection on a continuous basis) and individual civilians directly participating in hostilities on a persistently recurrent basis (who lose their protection only for the duration of each specific act).⁸⁴ In practice, of course, persons directly participating on a persistently recurrent basis will almost always be members of an organized armed group. Nevertheless, it is conceivable, for example, that teenagers living in an occupied territory might decide to throw “Molotov cocktails” at the occupation forces every time a military patrol or convoy passes through their village. According to Watkin, even though these teenagers are civilians and not members of an armed resistance group, they should remain legitimate military targets at all times until they affirmatively disengage through “concrete, objectively verifiable facts,”⁸⁵ whatever this may mean in practice. In his view, a soldier cannot realistically be expected “to distinguish between a civilian who participates on a ‘persistent recurring basis’ and

80. See discussion *supra* Part II.A(2)-(3).

81. Watkin, *supra* note 3, at 691.

82. *Id.* at 691-92.

83. *Id.* at 692.

84. For a more comprehensive discussion of the distinction between membership and recurrent participation, see *infra* Part IV.2(b)-(c) (response to Boothby).

85. Watkin, *supra* note 3, at 693.

a member of an organized armed group who performs a ‘continuous combat function.’”⁸⁶ However, on the question as to how the same soldier should distinguish between “persistently recurrent” and merely isolated or sporadic direct participation in hostilities, Watkin himself provides the following, rather obscure guidance: “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.”⁸⁷ Needless to say, such formulations are unlikely to make Watkin’s alternative approach appear more clear, credible, and practicable to operational forces.

Certainly, the identification and targeting of individuals operating in the factual grey-zone between peaceful civilians and regular combatants will always raise difficult practical questions that require tailor-made answers taking into account the specific circumstances of each case. Therefore, the ICRC’s Interpretive Guidance cannot, and does not purport to, replace the issuing of contextualized rules of engagement or the judgment of the operational commander. Instead, it aims to facilitate the task of those responsible for the planning and conduct of operations by providing useful and coherent concepts and principles based on which the required distinctions and determinations ought to be made. As has been shown, Watkin’s critique fails to disprove both the legal accuracy and the operational practicability of the Interpretive Guidance’s recommendations. His alternative theory of membership, on the other hand, deviates from existing treaty and customary IHL and fails to provide operational forces with sufficiently clear and coherent guidance for the conduct of their operations in accordance with their obligations under IHL.

III. WHAT ACTIVITIES AMOUNT TO “DIRECT PARTICIPATION IN HOSTILITIES”? A RESPONSE TO PROFESSOR

MICHAEL N. SCHMITT

Professor Michael Schmitt’s critique⁸⁸ focuses on the heart of the ICRC’s Interpretive Guidance, namely the consti-

86. *Id.* at 694.

87. *Id.* at 692.

88. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010).

tutive elements of the notion of “direct participation in hostilities,” which formulate concrete criteria for the distinction between activities that entail loss of civilian protection against direct attack, and those that do not. According to the Guidance, in order to qualify as direct participation in hostilities, any act or operation must meet three cumulative criteria, which can be summarized as follows: 1) the harm likely to result from the act must reach a certain threshold (*threshold of harm*); 2) there must be a direct causal link between the act and the expected harm (*direct causation*); and 3) the act must be specifically designed to support a belligerent party to the detriment of another (*belligerent nexus*).⁸⁹ The Interpretive Guidance also stipulates that all feasible precautions must be taken in determining whether the targeted person is a civilian and, if so, whether he directly participates in hostilities. In case of doubt as to whether a person is a civilian, he must be presumed to be a civilian; and in case of doubt as to whether a civilian is directly participating in hostilities, it must be presumed that he is not and, therefore, that he remains protected against direct attack.⁹⁰

Though Schmitt agrees with all three constitutive elements in principle, he finds that the Interpretive Guidance defines them too restrictively, thus resulting in what he perceives as an “overly narrow interpretation” of direct participation in hostilities.⁹¹ Schmitt also agrees with the obligation of the attacker to take all feasible precautions and to presume civilian status. Contrary to the Interpretive Guidance, however, Schmitt believes that, in case of doubt, a civilian should be presumed to be directly participating in hostilities and, thus, to have lost protection against direct attack.

A. *Threshold of Harm*

According to the Interpretive Guidance, in order for an activity to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold. This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.

89. *Interpretive Guidance*, *supra* note 1, at 46.

90. *See id.* at 74.

91. Schmitt, *supra* note 88, at 720.

1. *Primary threshold of military harm*

The most common form of harm inflicted during the conduct of hostilities certainly is of a military nature and, according to the Interpretive Guidance, includes all activities that “adversely affect the military operations or military capacity of a party to an armed conflict.”⁹² Schmitt agrees with this requirement in principle, but finds it “under-inclusive” because it excludes loss of protection for support activities which do not adversely affect the enemy.⁹³ While Schmitt recognizes that activities enhancing one belligerent’s military operations or capacity would normally adversely affect its opponent,⁹⁴ he cautions that the causal relationship between such support and the resulting harm may not always be direct, as would be required under the Interpretive Guidance. Schmitt fails to illustrate, however, how the Interpretive Guidance’s rather wide concept of military harm could result in an “overly narrow interpretation of direct participation.”⁹⁵ On the contrary, as will be shown, both his analysis of treaty law and his practical examples confirm the accuracy and appropriateness of the Interpretive Guidance’s approach.

As far as treaty law is concerned, the underlying concept of hostilities clearly refers to the use of means and methods of “injuring the enemy.”⁹⁶ In fact, Schmitt himself asserts that

92. *Interpretive Guidance*, *supra* note 1, at 47-49.

93. Schmitt, *supra* note 88, at 718-19.

94. *Id.* at 719.

95. In fact, during the expert meetings, the Interpretive Guidance’s equation of military harm with “adversely affecting” military operations or capacity was even criticized as being too wide. ICRC, SUMMARY REPORT: FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 41-42 (2006) [hereinafter SUMMARY REPORT 2006], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2006-03-report-dph-2006-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2006-03-report-dph-2006-icrc.pdf).

96. See Hague IV Regulations, *supra* note 18, art. 22. According to the ICRC’s Commentary, the notion of “direct participation in hostilities” refers to “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,” ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* § 1944 (Yves Sandoz et al. eds., 1987) [hereinafter *Additional Protocol Commentary*], and “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place, *id.* § 1679. Similar also is the Commentary’s definition of “hostilities” as “acts of war which are intended by their

the notion of “acts *harmful* to the enemy” is central to treaty regulation of loss of protection,⁹⁷ that the treaty definition of military objective “supports restricting the notion of direct participation to *harm* which is military in nature,”⁹⁸ and that “an act of direct participation *must impact* the enemy’s military wherewithal.”⁹⁹ Not surprisingly, therefore, Schmitt does not attempt to base his proposed extension of the threshold requirement on treaty law.

But even the practical examples advanced by Schmitt fail to prove his point. Contrary to what he seems to suggest, under the criteria provided by the Interpretive Guidance, both “building defensive positions at a military base certain to be attacked”¹⁰⁰ and “repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft”¹⁰¹ would clearly amount to direct participation in hostilities; the former because it is likely to directly and adversely affect the enemy’s impending attack, and the latter because it constitutes a measure preparatory to specific combat operations likely to directly inflict harm on the enemy. As far as the “the rescue and return of enemy aircrew members” downed on land is concerned,¹⁰² treaty law requires a more nuanced approach, because belligerents are obliged to permit civilians to “spontaneously collect and care for wounded and sick of whatever nationality.”¹⁰³ In reality, rescue and return activities carried out by civilians could only be regarded as direct participation in hostilities where they are designed to harm the enemy’s capacity or effort to target or capture able-bodied military personnel. Similarly, it is the direct harm caused by improvised explosive devices (IED), and not some vague notion of “asym-

nature or purpose to hit specifically the personnel or matériel of the armed forces of the adverse Party.” *Id.* §§ 1679, 4788.

97. Schmitt, *supra* note 88, at 714-16 (emphasis added).

98. *Id.* at 717 (emphasis added).

99. *Id.* (emphasis added).

100. *Id.* at 720.

101. *Id.*

102. *Id.* at 719 n.62.

103. Geneva Convention I, *supra* note 13, art. 18; *see also* ICRC, SUMMARY REPORT: SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 12 (2004) [hereinafter SUMMARY REPORT 2004], *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2004-07-report-dph-2004-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2004-07-report-dph-2004-icrc.pdf).

metrical advantage,"¹⁰⁴ which makes their use qualify as direct participation in hostilities. To suggest loss of civilian protection for the mere development and production of such devices simply because they "necessitated costly investment in counter-technologies," "hurt the morale of Coalition forces," and "negatively affected perceptions as to the benefits of the conflict at home,"¹⁰⁵ contradicts not only the generally recognized distinction between direct participation in hostilities and mere involvement in the general war effort.¹⁰⁶ It also contradicts Schmitt's own recognition that civilians working in a State's weapons industry are "not direct participants,"¹⁰⁷ although it is precisely the enormous industrial and technological capacity of many States which ensures their own "asymmetrical advantage" and leads their insurgent adversaries to develop relatively primitive "counter-technologies" such as IEDs.

In sum, Schmitt fails not only to support his argument as a matter of law, but also to demonstrate that the Interpretive Guidance's wide concept of military harm is "under-inclusive" as a matter of practice. In providing the alternative threshold of death, injury, or destruction inflicted on protected persons or objects, the Interpretive Guidance does not, as suggested by Schmitt,¹⁰⁸ discard the causation of harm as a central element of direct participation in hostilities but, again in accordance with treaty law,¹⁰⁹ simply recognizes that such harm does not necessarily have to be of a military nature.

104. Schmitt, *supra* note 88, at 719.

105. *Id.*

106. See Interpretive Guidance, *supra* note 1, at 51.

107. Schmitt, *supra* note 88, at 718.

108. *Id.* at 720.

109. The fact that the harm caused in the course of hostilities does not necessarily have to be of a military nature is illustrated, e.g., by the numerous references in treaty law to "attacks" against protected persons and objects which, albeit prohibited, and although not necessarily causing harm of a military nature, are clearly discussed as part of the conduct of hostilities. See, most notably, the prohibition of attacks against civilians, Additional Protocol I, *supra* note 12, art. 51(2), civilian objects, *id.* art. 52(1), objects indispensable to the survival of the civilian population, *id.* art. 54(2), the natural environment, *id.* art. 55(2), and works and installations containing dangerous forces, *id.* art. 56; the prohibition of indiscriminate attacks, *id.* art. 51(4), and of reprisals against civilians, *id.* art. 51(6); the principle of proportionality, *id.* arts. 51(5)(b), 57(2)(iii); and the requirement of precaution, *id.* art. 57.

2. *Alternative threshold of death, injury, or destruction*

According to the Interpretive Guidance, in the absence of military harm, civilian activities can still amount to direct participation in hostilities if they are likely to inflict death, injury, or destruction.¹¹⁰ Most commonly, this alternative threshold of harm would become relevant where a party to the conflict directs its attacks not against legitimate military targets but, for example, specifically against the civilian population or civilian objects. While such attacks would invariably amount to grave violations of IHL or even war crimes, the relevant criterion for their qualification as direct participation in hostilities is not that they are unlawful or criminal, but that they constitute an integral part of armed confrontations occurring between belligerents. Schmitt agrees that, in order to qualify as direct participation in hostilities, civilian activities do not necessarily have to cause harm of a military nature. However, he disagrees with the Guidance's alternative threshold of death, injury, or destruction because it may exclude unlawful conduct such as the deportation of civilians or hostage taking from the ambit of direct participation in hostilities.¹¹¹ To remedy this perceived inadequacy, Schmitt proposes an alternative approach, which would attach loss of protection to "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."¹¹²

Again, Schmitt's proposal does not withstand closer scrutiny. First, the term "war strategy" refers not only to the tactical conduct of hostilities but, depending on one's interpretation, may include the totality of a belligerent's military, political, industrial, agricultural, and financial mobilization. Under this formula, almost any act occurring for reasons related to an armed conflict and perceived as harmful to the civilian population could be regarded as direct participation in hostilities, including unlikely examples such as economic sanctions, travel restrictions, and political propaganda. Schmitt's alternative criterion of a "relationship with ongoing hostilities,"¹¹³ on the

110. *Interpretive Guidance*, *supra* note 1, at 49-50.

111. Schmitt, *supra* note 88, at 723-24.

112. *Id.* at 724.

113. *Id.*

other hand, roughly replicates the Interpretive Guidance's separate requirement of belligerent nexus, which is a decisive element of the notion of direct participation in hostilities, but is not relevant for determining the required threshold of harm.¹¹⁴

The more fundamental problem with Schmitt's critique, however, is that it loses sight of the rationale underlying the rule on direct participation in hostilities. The object and purpose of attaching loss of protection to hostile activities is not to punish criminal conduct or to safeguard the civilian population against all forms of harm, but to enable parties to an armed conflict to react militarily against all persons taking up arms against them as enemies. Accordingly, in order for civilians to lose their protection against 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. Consequently, the direct infliction of harm on protected persons and objects qualifies as direct participation in hostilities unless: 1) it falls short of the required threshold of death, injury or destruction, or 2) it lacks belligerent nexus. As Schmitt's critique does not properly distinguish these aspects, both shall be briefly discussed.

The quantitative threshold of "death, injury, or destruction" becomes relevant only where civilian conduct is not likely to result in military harm. Its purpose is to distinguish actual war fighting from political, diplomatic, economic, or administrative measures, which may well be harmful to the civilian population, but which are not part of the hostilities. Examples provided in the Interpretive Guidance include, *inter alia*, 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. Indeed, it is difficult to imagine a civilian activity that could constitute part of the hostilities without being likely to cause either military harm, or death, injury, or destruction. Rather, Schmitt's critique seems to be rooted in a misunderstanding of the separate requirement of belligerent nexus. That requirement ex-

114. See *infra* Part III.C; Interpretive Guidance, *supra* note 1, at 58-64.

cludes from the concept of hostilities, *inter alia*, harm inflicted in exercise of authority or power over persons or objects having fallen into the hands of a party to the conflict.¹¹⁵ Accordingly, the use of force in exercise of authority over prisoners, internees, or the civilian population in territory under effective control does not amount to direct participation in hostilities, regardless of the lawfulness of such force. For example, while murder, hostage-taking, torture, rape, looting, and deportation may amount to grave violations of IHL or even war crimes, they are not part of the hostilities conducted between the belligerents and, therefore, do not entail loss of protection against direct attack.

It is important to recall that immunity from direct attack does not preclude the permissibility of the use of force, even on a significant scale, if necessary to prevent the commission of grave crimes. It merely entails that the force used against perpetrators not qualifying as legitimate military targets remains governed by the standards of law enforcement and individual self-defense and not by those of the conduct of hostilities. The fact that this may “preclude classic military operations” against the perpetrators is not, as Schmitt suggests, a disadvantage.¹¹⁶ Quite to the contrary: While law enforcement standards generally require a more escalatory approach to the use to force, they are flexible enough to adapt to contexts of collective violence and permit tailor-made responses to specific threats, such as terrorism, piracy, hostage-taking, or massive civil unrest. An often underestimated advantage of law enforcement standards is that they expand the range of means and methods available to the operational commander beyond what would be permissible in the battlefield, while at the same time improving the protection of uninvolved bystanders. Most

115. Schmitt is mistaken when he suggests that the exclusion of acts committed against persons “under the effective control” was discarded in the final Interpretive Guidance. Schmitt, *supra* note 88, at 721-24. As he correctly notes, previous drafts of the Interpretive Guidance had excluded acts committed against persons finding themselves “under the effective control” of the perpetrators as a matter of threshold of harm. Still, strictly speaking, this distinction does not involve a question of “threshold of harm,” but of the “belligerent nexus” of the act, wherefore the relevant discussion was subsequently moved to that section of the Guidance. *Interpretive Guidance, supra* note 1, at 60-62.

116. Schmitt, *supra* note 88, at 722.

notably, while it would be prohibited to use teargas,¹¹⁷ expanding bullets,¹¹⁸ or undercover forces¹¹⁹ to attack legitimate military targets, these may be important options when facing inter-civilian violence, riots, looting, or hostage-taking outside situations of actual combat, particularly in densely populated areas, where the use of military means and methods incur enormous risks for the civilian population.¹²⁰ Thus, the distinct standards governing the use of force in law enforcement and in hostilities do not necessarily lend themselves to simplistic categorization as “restrictive” or “permissive,” but must in-

117. The Chemical Weapons Convention prohibits the use of riot control agents as a method of warfare. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction art. 1(5), Jan. 13, 1993, 1974 U.N.T.S. 45. However, the Convention expressly permits the use of such chemicals for “law enforcement including domestic riot control purposes.” *Id.* arts. 2(9)(d), 6(1).

118. In the conduct of hostilities it is prohibited to resort to “expanding bullets,” that is, bullets which expand or flatten easily in the human body. Hague Declaration Concerning Expanding Bullets, July 29, 1899, 1 AM. J. INT’L L. 157-59 (Supp.); Rome Statute of the International Criminal Court art. 8(2)(b)(xix), U.N. Doc. A/CONF.183/9, 37 I.L.M. 1002 (July 17, 1998); see also The Secretary-General, *Secretary-General’s Bulletin*, § 6.2, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999). The ICRC’s study on customary IHL affirms the customary nature of this prohibition. *Customary International Law Rules*, *supra* note 12, at 268 (Rule 77).

119. In the conduct of hostilities, it is prohibited to kill, injure, or capture an adversary by resort to perfidy, such as by feigning of civilian, non-combatant status. Additional Protocol I, *supra* note 12, art. 37(1)(c). The prohibition of treachery in Hague IV Regulations, *supra* note 18, art. 23(1)(b) refers only to “killing” and “injuring,” but not to “capture.” According to the ICRC, the prohibition of perfidy as expressed in Additional Protocol I, *supra* note 12, art. 37 has attained customary nature in both international and non-international armed conflict. See *Customary International Law Rules*, *supra* note 12, at 221 (Rule 65); *Prosecutor v. Tadic*, Case No. IT 94-I-T, Judgment, § 125 (May 7, 1997) (confirming the customary nature of the prohibition of perfidy in non-international armed conflict).

120. The reason for the permissibility of these means and methods for the purpose of law enforcement is that, in this context, they are used in a much less destructive manner. For example, in a law enforcement context, the use of tear gas is designed to contain violence and control or disperse crowds rather than to kill or injure enemies. Similarly, expanding bullets fired from pistols used by police officers carry only a fraction of the energy deposited by a standard military rifle bullet and, therefore, do not have a comparable destructive effect. Such “low energy” expanding bullets are also safer for uninvolved bystanders because they are more likely to remain within the body of the targeted person.

stead be understood and applied in full appreciation of the different purposes for which they have been designed.

B. *Direct Causation*

According to the Interpretive Guidance, the qualification of an act as direct participation in hostilities requires a direct causal link between that act and the harm likely to result from it.¹²¹ In the case of collective operations, the resulting harm does not have to be directly caused by each contributing person individually, but by the collective operation as a whole. Consequently, even persons playing a minor role can lose their protection, provided that their contribution constitutes an integral part of an operation likely to directly cause harm of a sufficient threshold. Similarly, measures preparatory to the execution of a predetermined act or operation likely to directly cause harm, as well as deployments to and the return from the location of its execution, constitute an integral part of that act or operation.¹²² The Interpretive Guidance recommends that, in the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step.¹²³

1. *Equality of standards for State and non-State actors*

Schmitt criticizes the “one causal step” criterion because it does not permit the qualification of certain capacity-building activities as direct participation in hostilities, such as the “recruitment of suicide bombers,”¹²⁴ the “purchase of materials in order to build suicide vests,”¹²⁵ the “assembly or storage of an improvised explosive device in a workshop, or the purchase or smuggling of its components,”¹²⁶ and “voluntary human shielding.”¹²⁷ While most of these examples are typical for non-State actors engaged in asymmetric confrontations with States, it should be noted that States frequently use civilian contractors or employees to carry out roughly equivalent activ-

121. *Interpretive Guidance*, *supra* note 1, at 51-58.

122. *Id.* at 65-68.

123. *Id.* at 53.

124. Schmitt, *supra* note 88, at 727.

125. *Id.*

126. *Id.* at 730.

127. *Id.* at 739.

ities, such as the recruitment and training of personnel for specialist functions, and the evaluation and purchase, or the production, assembly, and storage, of weapons and equipment. Admittedly, in most cases, the construction of an improvised explosive device or booby-trap by non-State actors is more likely to qualify already as a measure preparatory to a predetermined attack than the assembly of an aviation bomb by civilian factory workers. Nevertheless, whether an act constitutes a measure preparatory or otherwise integral to a specific hostile act or operation, or whether it remains limited to general capacity-building, must be determined separately for each case, and it is clear that the same objective criteria must apply to all civilians, regardless of whether they happen to support an unsophisticated insurgency or a technologically advanced State.

2. *The “one causal step” and “integral part” components of direct causation*

Unfortunately, Schmitt’s critique appears to be based on a near complete misunderstanding of how the “one causal step” and “integral part” components interact in giving meaning to the Interpretive Guidance’s requirement of “direct causation.” Accurately understood, the Interpretive Guidance’s “one causal step” criterion distinguishes “direct” from “indirect” causation, both in case of individual acts and in case of collective operations. Accordingly, only acts or operations causing the required threshold of harm in “one causal step” can be regarded as “directly” causing that harm. In contrast, the “integral part” criterion recognizes that, in case of collective operations, the resulting harm does not have to be directly caused (i.e. in one causal step) by each contributing person individually, but only by the collective operation as a whole. Nevertheless, any person whose conduct represents an integral part of such an operation can be regarded as directly participating in hostilities. In other words, subject to the additional requirements of threshold of harm and belligerent nexus, the “one causal step” criterion identifies those acts and operations that qualify as “direct” participation in hostilities, whereas the “integral part” criterion identifies those persons who will lose their protection because their conduct represents an integral part of such acts or operations.

In proposing to replace the “one causal step” criterion by that of “integral part” alone, therefore, Schmitt essentially confirms that any person whose conduct constitutes an integral part of a hostile act or operation may be regarded as directly participating in hostilities but, at the same time, declines to provide the criteria necessary for the practical identification of such acts or operations. Without a definition of direct causation such as the “one causal step” criterion proposed in the Interpretive Guidance, however, the “integral part” test alone by no means “satisfactorily and sufficiently encompasses the essence of direct causation on the battlefield,”¹²⁸ but rather leaves operational forces without any reliable guidance as to the distinction between “direct” and “indirect” participation in hostilities.

Contrary to what Schmitt suggests, under the Interpretive Guidance, “gathering tactical intelligence on the battlefield”¹²⁹ would clearly amount to direct participation in hostilities—not because that activity alone is likely to harm the enemy in “one causal step,” but because it constitutes a preparatory measure integral to the subsequent tactical operation which, in turn, is designed to harm the enemy in “one causal step.” Similarly, the qualification as direct participation in hostilities of “training for a particular type of mission”¹³⁰ will depend on whether it can reasonably be regarded as a preparatory measure integral to a predetermined hostile act or operation, and not on whether the trainer knows precisely when or where that hostile act or operation will be conducted.

3. “One causal step” or “unlimited casual chain”?

While Schmitt criticizes the Interpretive Guidance’s “one causal step” criterion as too restrictive, he fails to provide a sustainable argument as to how the requirement of direct causation should be interpreted in operational practice. From the examples he provides¹³¹ and, more importantly, from his generalized proposition that “it is necessary to . . . extend participation as far up and downstream as there is a causal

128. *Id.* at 729.

129. *Id.* at 728.

130. *Id.* at 730.

131. See the examples provided in text accompanying *supra* notes 124-127.

link,”¹³² it would seem that Schmitt advocates an extremely permissive approach, according to which essentially any act connected with the resulting harm through a causal link would automatically qualify as “direct” participation in hostilities. Thus, not only the planting or detonation of an improvised explosive device, but also its assembly and storage, as well as the purchase or smuggling of its components, would make legitimate military targets of all those involved, no matter how far their action is removed from the actual causation of harm. While this unlimited “causal chain” approach may be useful for the *ex post facto* determination of criminal responsibility, it provides no reliable criteria for the operational distinction between direct and indirect participation in hostilities, a distinction which is inherent in treaty and customary law. In practice, such an extreme relaxation of the requirement of direct causation would invite excessively broad targeting policies prone to error, arbitrariness, and abuse. Indeed, it is precisely with the aim of avoiding these kinds of argumentative “slippery slopes” that the Interpretive Guidance limits loss of protection for individual civilians to situations where their own conduct, or a coordinated operation of which that conduct constitutes an integral part, is likely to inflict harm in one causal step. While Schmitt seems to presume that, in this respect, the ICRC’s Interpretive Guidance contradicts the prevailing legal opinion of States, he fails to provide any support for that assumption.¹³³ So far, there certainly is no evidence for a general *opinio juris* of States that would condone the targeting of all persons who, at some point, have causally contributed to a hostile act, no matter how far removed from the potential materialization of harm.

132. *Id.* at 41.

133. Schmitt, *supra* note 87, at 731, asserting that, “few States would hesitate, on the basis that the action is not ‘direct enough,’ to attack those in the process of assembling IEDs”. Moreover, while Schmitt rightly points out that “[t]he experts were divided on this issue”, his assertion that “[n]early all those with military experience or who serve governments involved in combat supported the characterization of IED assembly as direct participation” does not accurately reflect the diverging views of several experienced military experts originating from States currently or previously involved in armed conflicts. *Id.* at 731, n. 99.

4. *Voluntary human shields*

Somewhat surprisingly, Schmitt comes to the erroneous conclusion that, under the criteria proposed in the Interpretive Guidance, “to be direct, the harm caused must have resulted from a physical act.”¹³⁴ On the contrary, the Interpretive Guidance expressly includes, *inter alia*, “electronic interference with military computer networks,” “wiretapping the adversary’s high command,” and “transmitting tactical targeting information” as examples of direct participation in hostilities.¹³⁵ Schmitt’s perception seems to be rooted in a misunderstanding of the Guidance’s discussion of voluntary human shields, which shall therefore briefly be addressed.

According to the Interpretive Guidance, whether an act of “human shielding” qualifies as direct participation in hostilities depends on exactly the same criteria as would apply to any other activity.¹³⁶ In line with these criteria, except where a human shield has been completely deprived of his freedom of action, such as by being chained to a military objective, the voluntary or involuntary nature of his conduct is not decisive for its qualification as direct participation in hostilities.¹³⁷ Clearly, the use of human shields, whether voluntary or not, is invariably prohibited by IHL and seriously jeopardizes the protection of the civilian population. As pointed out earlier, however, the unlawfulness of an act has no bearing on its qualification as direct participation in hostilities. Instead, in line with the requirements of “threshold of harm” and “direct causation”, the decisive question must be whether the presence of human shields directly adversely affects the enemy’s *capability*, and not merely his *willingness*, to attack and destroy the shielded objective. This may be the case, for example, where the presence of human shields impedes the visibility or accessibility of a legitimate target, but not where it poses an exclusively legal obstacle to an attack.

134. Schmitt, *supra* note 88, at 732.

135. *Interpretive Guidance*, *supra* note 1, at 48 nn. 101-03.

136. *Id.* at 56-57.

137. *Id.* at 59-60. Concerning the general relevance of voluntary or involuntary involvement in hostilities, consider that those forcibly conscripted into the regular armed forces of States lose protection although they do not necessarily “voluntarily” take a direct part in hostilities.

Schmitt agrees with the Interpretive Guidance that the qualification of an activity as direct participation in hostilities does not depend on subjective intent. In his own words, “the question is not whether the participants *wanted* to harm the enemy, but instead whether their actions were *of a nature* to do so,” wherefore even “civilians impressed into fighting or children under the age of 15 can be treated as direct participants even though their participation is, as a matter of fact or law, involuntary.”¹³⁸ When it comes to human shields, however, Schmitt changes the rules. Faced with the prospect that, “[b]y operation of the principle of proportionality, a sufficient number of voluntary human shields . . . could absolutely immunize the target as a matter of law because their death or injury would be excessive in relation to the military advantage,”¹³⁹ he concludes that voluntary human shields “logically must” be legitimate military targets.¹⁴⁰ The problem with this reasoning is not only that it deviates from the criteria applicable to all other activities, but also that the same “immunizing” effect could just as well be achieved by “involuntary” human shielding, an activity which Schmitt seems to accept as not entailing loss of protection.¹⁴¹

Apart from these theoretical contradictions, although Schmitt acknowledges that voluntary human shielding must be narrowly defined based on the subjective desire held by each concerned individual,¹⁴² he fails to provide any guidance as to how the relevant subjective desire could realistically be identi-

138. Schmitt, *supra* note 88, at 735.

139. *Id.* at 732.

140. *Id.* at 734.

141. While Schmitt does not fully develop his argument in favor of a dichotomy between voluntary and involuntary human shields in this article, he has done so in previous works. See, e.g., Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 299 (2009).

142. See, e.g., *id.* at 316 (“That ‘voluntary shielding’ only occurs, as a matter of law, consequent to the shield’s intent to frustrate enemy operations cannot be overemphasized. Consider a military force based in a village. The mere presence of villagers does not render them voluntary shields. This is so even if they elect to remain in the village despite an opportunity to depart. Those who remain may be too elderly or infirm to leave. They may be too frightened to leave, for fleeing from the village may be dangerous. They may wish to remain to safeguard their property and possessions. Whatever the rationale for their presence, it is only when they refuse to depart because they wish to complicate the enemy’s actions that they qualify as voluntary shields.”).

fied in operational practice. Admittedly, there may be obvious cases on both ends of the scale, such as civilian activists publicly declaring their desire and intent to serve as human shields, or civilian hostages forcibly being chained to military objectives. The vast majority of situations involving human shields, however, are likely to fall into a grey-zone full of intricate questions no military commander or soldier should be expected to resolve: How much “free will” is required for an act of human shielding to become “voluntary,” how much coercion or social pressure to make it “involuntary”? For example, can civilians be regarded as voluntary human shields if they refuse to leave their home although a rocket launch-pad has been positioned on their roof? Do all inhabitants of a village, including women and children, necessarily act voluntarily when they gather around the house of an insurgent commander to prevent an impending aerial attack? What about civilians providing soldiers with food and overnight shelter in an area prone to insurgent attacks? Schmitt’s approach leaves the military commander without answer to these questions and thus provides no reliable safeguards against error and abuse.

More surprising still is Schmitt’s claim that the Interpretive Guidance’s position on voluntary human shielding “ignores State practice to the contrary”¹⁴³ and, in particular, his citation of the US Commander’s Handbook on the Law of Naval Operations, which omits decisive passages and is therefore misleading (all omissions italicized):

*Civilians who voluntarily place themselves in or on a military objective as “human shields” in order to deter a lawful attack do not alter the status of the military objective. While the law of armed conflict is not fully developed in such cases, such persons may also be considered to be taking a direct part in hostilities or contributing directly to the enemy’s warfighting/war-sustaining capability, and may be excluded from the proportionality analysis. Attacks under such circumstances likely raise political, strategic, and operational issues that commanders should identify and consider when making targeting decisions.*¹⁴⁴

143. Schmitt, *supra* note 88, at 733.

144. U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, Doc. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, The Commander’s Handbook on the

As the full citation shows, this provision does not focus on the permissibility of direct attacks against voluntary human shields, but on the question of whether their presence can immunize the shielded military objective by altering its status or by influencing the proportionality assessment, both of which is denied. The qualification of such conduct as direct participation in hostilities is presented as one of several options rather than a definite legal opinion. In view of the express recognition that “the law of armed conflict is not fully developed” with regard to voluntary human shields, the provision in question can hardly be regarded as an example of contrary State practice. In any event, it is not just the practice of the “world’s most powerful military”¹⁴⁵ which gives rise to a binding norm of customary law, but only a “general practice accepted as law.”¹⁴⁶ While the term “general practice” used in the ICJ Statute does not require that State practice be universal and identical, it should be extensive and virtually uniform.¹⁴⁷ Clearly, so far, there has been no generally accepted State practice of directly attacking voluntary human shields separately from the shielded objective. On the contrary, the very fact that States perceive the presence of voluntary human shields as a legal obstacle to their military operations proves the point that they consider them to be protected against direct attack and, therefore, that they do not regard voluntary human shielding as an example of direct participation in hostilities.

C. *Belligerent Nexus*

According to the Interpretive Guidance, in order to amount to direct participation in hostilities, civilian conduct must not only be “*objectively likely*” to directly cause the required threshold of harm, but must also be “*specifically designed to do so in support of a party to an armed conflict and to the detriment*

Law of Naval Operations ch. 8.3.2 (July 2007) [hereinafter Commander’s Handbook] (emphasis added).

145. Schmitt, *supra* note 88, at 733.

146. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

147. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b; IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (7th ed. 2009); *Customary International Law Rules*, *supra* note 12, at xxxvi.

of another (belligerent nexus).”¹⁴⁸ Armed violence which is not designed to *harm a party* to an armed conflict, or which is not designed to do so *in support of another party*, cannot amount to any form of “participation” in hostilities taking place between these parties. Consequently, unless such violence reaches the threshold required to trigger a separate armed conflict, “it remains of non-belligerent nature and, therefore, must be addressed through law enforcement measures.”¹⁴⁹

Some aspects of the requirement of belligerent nexus have already been discussed in relation to the Interpretive Guidance’s threshold requirement. These remarks shall not be repeated here. Apart from that, Schmitt’s critique focuses on the Guidance’s proposed cumulative requirement of “in support of a party to the conflict and to the detriment of another,” which he would prefer to see formulated in the alternative as “in support of a party to the conflict *or* to the detriment of another.”¹⁵⁰ The problem with a disjunctive reading of the two elements is that it could be interpreted to permit military attacks against persons whose conduct has nothing to do with the conduct of hostilities, such as organized criminals or persons participating in civil unrest.

In international law, “hostilities” is a term of art denoting the resort to means and methods of warfare between parties to an armed conflict. Strictly speaking, therefore, armed violence which is not “part of” armed violence occurring between belligerent parties cannot constitute hostilities. In order to be “part of” or, from the perspective of the individual, “participation in” hostilities, armed violence would have to be carried out both in support of one belligerent party and to the detriment of another. If either element is missing, the violence in question becomes independent of the armed struggle taking place between the parties to a conflict, thus giving rise to the question of whether such “independent” armed violence is sufficiently intense and organized to reach the threshold required for a separate armed conflict, or whether it remains an issue of law enforcement or individual self-defense. Schmitt’s example of “an organized armed group or an individual civil-

148. *Interpretive Guidance*, *supra* note 1, at 58 (emphasis in original).

149. *Id.* at 59.

150. Schmitt, *supra* note 88, at 736 (emphasis in original).

ian . . . opposed to both sides of a conflict” is a case in point.¹⁵¹ While nothing precludes the use of necessary and proportionate force against security threats not amounting to hostilities, IHL simply does not permit categorizing persons as legitimate military targets without positively identifying them as members of a belligerent’s fighting forces or as otherwise directly participating in hostilities occurring between parties to a pre-existing or newly arising armed conflict.¹⁵²

D. *Inverting the Presumption of Protection*

According to the Interpretive Guidance, all feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack.¹⁵³

Schmitt agrees with the Interpretive Guidance that an attacker is obliged to take all feasible precautions in ensuring that a targeted person is a legitimate military target. He also recognizes that, in case of doubt whether a person is a civilian or a combatant, there is a duty to presume civilian status—a provision which he holds may have attained customary nature.¹⁵⁴ Indeed, the presumption of civilian status can be regarded as a logical consequence of the fact that, for the purposes of the principle of distinction, civilian status applies by default to any person who cannot positively be identified as a member of a belligerent’s armed forces.¹⁵⁵ Similarly, the universally recognized rule of treaty and customary law is that per-

151. *Id.*

152. See also the discussion on “independent” armed groups, *supra* Part II.A(3) (response to Watkin).

153. *Interpretive Guidance, supra* note 1, at 74.

154. The ICRC’s Customary Law Study is not clear on the customary nature of that norm. Compare *Customary International Law Rules, supra* note 12, Vol. I, p. 24 with *Additional Protocol Commentary, supra* note 96, § 4789 (according to which the same presumption applies in non-international armed conflict).

155. For the negative definition of civilian see, most notably, Additional Protocol I, *supra* note 12, art. 50. For a more comprehensive discussion of the concept of civilian in international and non-international armed conflict, see *Interpretive Guidance, supra* note 1, 20-36, Sections I, II. As noted during the Diplomatic Conference, the presumption of civilian status for the purposes of targeting (Additional Protocol I, *supra* note 12, art. 50(1)) does not in any way contradict the presumption of entitlement to prisoner of war

sons of civilian status are, by default, protected against direct attack.¹⁵⁶ Again, this rule applies to all civilians, unless and for such time as they can be positively identified as directly participating in hostilities.¹⁵⁷ When it comes to presuming that a civilian is entitled to the protection normally attached to his status, however, Schmitt believes that “[g]ray areas should be interpreted liberally, i.e., in favor of finding direct participation.”¹⁵⁸ While Schmitt concedes that his permissive approach may seem “counter-intuitive”¹⁵⁹ and “harsh,”¹⁶⁰ his solution is to shift the entire “burden of risk” to the concerned civilian who, Schmitt presumes, is “already participating, on his or her own volition, in the conflict in a manner direct enough to raise questions.”¹⁶¹ Schmitt even goes as far as claiming that his permissive approach “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,” with the result that “they can better avoid being charged with participation in the conflict and are less liable to being directly targeted.”¹⁶²

In actual practice, of course, this is not what is going to happen. In the reality faced by operational soldiers today, civilian conduct “raising questions” involves, for example, a pregnant woman approaching a check-point, who may be mistaken for a suicide bomber,¹⁶³ construction workers carrying water pipes that may resemble missiles on surveillance images,

status after capture (Geneva Convention III, *supra* note 12, art. 5). See *Additional Protocol Commentary*, *supra* note 96, § 1920.

156. Additional Protocol I, *supra* note 12, arts. 51(2); Additional Protocol II, *supra* note 13, art. 13(2); see also *Customary International Law Rules*, *supra* note 12, at 3 (Rule 1).

157. Additional Protocol I, *supra* note 12, arts. 51(3); Additional Protocol II, *supra* note 13, art. 13(3); see also *Customary International Law Rules*, *supra* note 12, Rule 6.

158. Schmitt, *supra* note 88, at 738 n.123 (citing Michael N. Schmitt, “Direct Participation in Hostilities” and *21st Century Armed Conflict*, in *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift für Dieter Fleck* 505, 509 (Horst Fischer et. al. eds., 2004)).

159. *Id.* and accompanying text.

160. *Id.*

161. *Id.*

162. *Id.* and accompanying text.

163. See, e.g., *U.S. Agencies Warn of Female Suicide Bombers*, Feb. 12, 2008, CNN.COM, <http://edition.cnn.com/2008/US/02/12/suicide.bombers/index.html>.

civilian villagers surrounding an army truck captured by insurgents in order to benefit from much needed fuel hand-outs,¹⁶⁴ civilians appearing at their doorstep when surprised by night-raid operations conducted in their neighborhood,¹⁶⁵ or civilians not respecting the drive-by distance to military convoys imposed in a particular area.¹⁶⁶ In all of these situations, soldiers will be in doubt, they may fear for their own lives, and they will need practical guidance on how to protect themselves while avoiding erroneous or arbitrary use of force. Instructing them that they are justified in attacking any civilian whose conduct “raises questions” is not only unwise and unhelpful but, it is submitted, plainly unlawful. Not surprisingly, therefore, Schmitt’s inversion of the presumption of protection finds no support in State practice and jurisprudence.

While Schmitt rightly points out that his argument was cited by the Israeli Supreme Court, it is necessary to clarify that the Court did so in a quite different context.¹⁶⁷ As far as the resolution of doubt is concerned, the Court did not even consider presuming loss of protection an option, but expressly rejected the permissibility of attacks based on mere suspicion and emphasized that “[t]he burden of proof on the attacking army is heavy.”¹⁶⁸ The Court concluded its deliberations on

164. See, e.g., *U.S. General Sees Strike Aftermath*, Sept. 5, 2009, BBC NEWS, http://news.bbc.co.uk/2/hi/south_asia/8239790.stm.

165. See, e.g., Tini Tran, *NATO Details Afghan Night Raid Policy*, Mar. 6, 2010, <http://www.washingtonexaminer.com/world/nato-troops-must-bring-afghan-troops-with-them-on-night-raids-a-new-directive-says-86553107.html#ixzz0hpjJqkHN>.

166. See, e.g., Human Rights Watch, *U.S. Data on Civilian Casualties Raises Serious Concerns*, Apr. 11, 2007, <http://www.hrw.org/en/news/2007/04/11/iraq-us-data-civilian-casualties-raises-serious-concerns>.

167. The Court cited the relevant passage of Schmitt’s earlier article (see Schmitt, *supra* note 88, at 738 n.123 and accompanying text) to illustrate that a wide (abstract) definition of conduct amounting to “direct participation in hostilities” might encourage civilians to stay as far away from the hostilities as possible, while a narrow definition might better protect innocent civilians once they find themselves on the battlefield. At no point did the Court suggest that, in case of doubt as to the nature of a specific civilian’s conduct, that civilian should be presumed to be directly participating in hostilities and, therefore, to have lost protection against direct attack. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] § 35.

168. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] § 40.

this point by referring to the following position reflected in the ICRC's Study on Customary IHL: "[W]hen there is a situation of doubt, a careful assessment has to be made under the conditions and restraints governing a particular situation as to whether there are sufficient indications to warrant an attack. One cannot automatically attack anyone who might appear dubious."¹⁶⁹

E. *Concluding Remarks*

In his concluding remarks, Schmitt notes that, of the various Sections of the Interpretive Guidance, the three constitutive elements of direct participation in hostilities are "the most satisfactory" and that they "reflect factors that undoubtedly must play into such an analysis."¹⁷⁰ Schmitt also concedes that "the Interpretive Guidance 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."¹⁷¹ Ultimately, however, and despite his assertion that "[t]heir deficiencies lie at the margins" only,¹⁷² Schmitt's critique ends up discarding almost every safeguard aimed at avoiding erroneous or arbitrary targeting of civilians that was built into the three elements.

First, Schmitt lowers the required "threshold of harm" so as to extend loss of protection to a potentially wide range of support activities, regardless of whether they are likely to cause any harm to the enemy or the civilian population—an approach which undermines the generally recognized distinction between direct participation in hostilities and mere involvement in the general war effort. Second, Schmitt disagrees with the Interpretive Guidance's interpretation of

169. *Id.* (citing *Customary International Law Rules*, *supra* note 12, at 24). During the Expert Meetings, there was wide agreement that, in case of doubt as to whether a civilian constituted a legitimate military target, that civilian had to be presumed to be protected against direct attack. ICRC, SUMMARY REPORT: THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 44-45, 67-68. (2005) [hereinafter SUMMARY REPORT 2005], *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2005-09-report-dph-2005-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2005-09-report-dph-2005-icrc.pdf); SUMMARY REPORT 2006, *supra* note 95, at 69-72.

170. Schmitt, *supra* note 88, at 739.

171. *Id.*

172. *Id.*

“direct causation” and advocates that loss of protection should attach to any act connected to the resulting harm through an unlimited causal chain, that is to say, “as far up and downstream as there is a causal link.”¹⁷³ This approach would seem to permit direct attacks against any civilian who, somehow and at some point, causally contributes to the success of a hostile act, no matter how far his action is removed from the potential materialization of harm. Third, Schmitt would modify the requirement of “belligerent nexus” so as to permit direct attacks against independent armed actors and other persons engaging in acts harmful to a belligerent, irrespective of whether their conduct can actually be regarded as part of the hostilities occurring between parties to an existing or newly arising armed conflict. Finally, Schmitt even goes as far as arguing that, in case of doubt, civilians should be presumed to be directly participating in hostilities and, thus, to have lost protection against direct attack—a proposition which, particularly in conjunction with his other proposals, can but exacerbate the current exposure of the civilian population to erroneous or arbitrary targeting.

Most other Sections of the Interpretive Guidance—including those on the concept of the civilian (Sections I - III),¹⁷⁴ the temporal scope of direct participation (Sections VI, VII),¹⁷⁵ and the restraints on the use of force in direct attack (Section IX)¹⁷⁶—Schmitt discards as “fatally flawed,” albeit without providing any explanation.¹⁷⁷ Particularly confusing is his description as “unnecessary and faulty” of the Interpretive Guidance’s argument that the force used against legitimate military targets must not exceed what is militarily necessary in the circumstances (Section IX).¹⁷⁸ Surprisingly enough, the ICRC’s interpretation corresponds exactly to the position taken by Schmitt himself in one of his highly regarded publications: that “targeting someone meeting the criteria of a com-

173. *Id.* at 737-38.

174. *Interpretive Guidance*, *supra* note 1, at 20-40.

175. *Id.* at 65-73.

176. *Id.* at 77-82.

177. Schmitt, *supra* note 88, at 738.

178. *Id.*

batant in armed conflict, but whose death is not ‘necessary,’ would be illegal.”¹⁷⁹

IV. HOW LONG DOES LOSS OF CIVILIAN PROTECTION LAST?: A RESPONSE TO AIR COMMODORE WILLIAM BOOTHBY

Air Commodore William Boothby’s critique¹⁸⁰ of the Interpretive Guidance focuses on the “time dimension to direct participation in hostilities” or, in other words, on the question as to when direct participation in hostilities, and the ensuing loss of protection against direct attack, begin and end. In essence, Boothby contends that the Guidance’s interpretation of the temporal scope of direct participation in hostilities, and of the ensuing loss of protection, is too restrictive to “make[] sense on the modern battlefield,” and risks being ignored by State armed forces in operational practice.¹⁸¹ Boothby concludes his critique by proposing what he perceives as a “more workable” interpretation of IHL.¹⁸²

A. *Preparation, Deployment, and Return*

The Interpretive Guidance’s concept of direct participation in hostilities includes not only the immediate execution phase of specific acts or operations amounting to direct participation in hostilities, but also measures preparatory to their execution, as well as the deployment to and return from the location of their execution.¹⁸³ According to Boothby, the Interpretive Guidance interprets these concepts too restrictively. As will be seen, however, much of his critique lacks clarity and precision and seems to be rooted in a misperception of the Interpretive Guidance’s approach rather than in a fundamental divergence of opinion.

179. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 644 (1992); see also *id.* at 641.

180. See Bill Boothby, “And for such time as”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010).

181. *Id.* at 768.

182. *Id.* at 760-67.

183. *Interpretive Guidance*, *supra* note 1, at 65 (“Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act”).

1. *Preparatory measures*

Boothby's analysis begins with the rather surprising misinterpretation that, according to the Interpretive Guidance, preparatory measures can only amount to direct participation in hostilities if they are preparatory to an "attack" within the meaning of IHL.¹⁸⁴ As the text of the Guidance clearly states, however, the decisive criterion for the qualification of a preparatory measure as direct participation in hostilities is not that it is preparatory to an attack, but that it is "preparatory to the execution of a specific act of direct participation in hostilities"¹⁸⁵—a much wider notion which does not appear to differ significantly from Boothby's alternative proposal of "military operations preparatory to the act of direct participation in hostilities".¹⁸⁶

Similarly, Boothby proposes to replace the Guidance's criterion of "measures preparatory to the execution of a specific act of direct participation in hostilities"¹⁸⁷ with the phrase "any action carried out with a view to combat" taken from the Commentary,¹⁸⁸ without making quite clear what he sees as the relevant difference between these two formulations.¹⁸⁹ In fact, Boothby's proposal seems to be rooted in his mistaken conclusion that, under the Interpretive Guidance, "a civilian . . . who smuggles weapons *to a fighter's position* and conceals them there without taking any other active role in the hostilities, may be regarded as not participating in the hostilities."¹⁹⁰ In reality, the Interpretive Guidance recognizes that "[t]he delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as

184. Boothby, *supra* note 180, at 746 ("[The Interpretive Guidance] assumes that the ultimate act will indeed be an attack, which is not of course necessarily so."), 765 ("the Interpretive Guidance is wrong to limit the preparatory acts that involve a loss of protected status to preparation for an attack; the ICRC compounds this error by further restricting the notion to preparation for a particular attack."). In IHL, the term "attack" refers to "acts of violence against the adversary, whether in offence or in defence." Additional Protocol I, *supra* note 12, art. 49(1).

185. *Interpretive Guidance*, *supra* note 1, at 65.

186. Boothby, *supra* note 180, at 746.

187. *Interpretive Guidance*, *supra* note 1, at 65-66.

188. *Additional Protocol Commentary*, *supra* note 96, § 1692.

189. Boothby, *supra* note 180, at 749-50.

190. *Id.* at 747 (emphasis added).

an integral part of ongoing combat operations and, therefore, as direct participation in hostilities.”¹⁹¹

Next, Boothby criticizes the Guidance for distinguishing between measures preparatory to specific hostile acts (which amount to direct participation in hostilities) and preparatory measures establishing the general capacity to carry out hostile acts (which do not).¹⁹² Instead, he argues, the relevant distinction must be made between “preparation for combat or hostilities” and “the generation of a general capacity to undertake military activity.”¹⁹³ Again, if there is any difference in the ordinary meaning of the respective phrases, it surely is too slight to be relevant from a practical point of view. As a result, it is difficult to detect the implied tension between the Interpretive Guidance’s recommendations and Boothby’s view that:

the person who assembles an IED with a view to its employment by himself or another on a particular occasion or mission is directly participating while assembling the device. On the other hand, the assembly of IEDs for possible use on unspecified future occasions during unspecified attacks merely creates the capacity to undertake such operations and would not, on this interpretation, be ‘preparation.’¹⁹⁴

Further, Boothby incorrectly cites the Guidance as stating that “civilians should be liable to attack only during ‘recognizable and proximate preparations’ [such as] loading a gun” and then offers the criticism that this example “does little to recognize the complexities of differing types of involvement in modern warfare.”¹⁹⁵ In reality, however, the reference to “recognizable and proximate preparations” and the example of “loading a gun” are not taken from the recommendations or the commentary of the Guidance itself, but from a footnote clearly referring to specific views expressed and examples raised by some of the participants during the expert process.¹⁹⁶ As far as the Interpretive Guidance itself is concerned, it expressly recognizes that the notion of direct participation

191. *Interpretive Guidance*, *supra* note 1, at 56.

192. Boothby, *supra* note 180, at 746-47.

193. *Id.* at 750.

194. *Id.* at 749.

195. *Id.* at 747.

196. *Interpretive Guidance*, *supra* note 1, at 67 n.182.

in hostilities must be interpreted so as to accommodate, *inter alia*, “unarmed activities” adversely affecting the enemy,¹⁹⁷ as well as “the collective nature and complexity of contemporary military operations” in which certain activities will cause harm only in conjunction with other acts.¹⁹⁸ Once more, Boothby’s substantive disagreement with the Interpretive Guidance’s approach to preparatory measures seems to vanish upon closer scrutiny.

2. *Deployment and return*

Boothby’s analysis of the Interpretive Guidance’s approach to geographical deployments and return continues in the same vein. Thus, contrary to what he seems to imply, nothing in the Interpretive Guidance contradicts his observation that direct participation in hostilities does not necessarily have to start with a geographical deployment, but that such deployment may well be preceded by other preparatory measures already entailing loss of protection.¹⁹⁹ Practical examples fitting this description are readily available and may include, for instance, the loading of weapons and equipment onto a vehicle before deployment to an ambush position.

Similarly unproductive is Boothby’s somewhat tortuous reflection that “if preparation is direct participation . . . , deployment for preparatory acts to be undertaken and return thereafter will also be direct participation. By the same token, preparation for the . . . activity of deploying will also itself amount to [direct participation in hostilities].”²⁰⁰ Needless to say, the Interpretive Guidance contemplates no such extension of the notion of direct participation in hostilities to what would have to be described as “measures preparatory to preparatory measures preparatory to preparatory acts.” Instead, as the text of its Recommendation VI plainly states: “Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of *that* act.”²⁰¹ In other words, deployments and preparatory mea-

197. *Id.* at 48.

198. *Id.* at 54.

199. Boothby, *supra* note 180, at 748.

200. *Id.* at 751.

201. *Interpretive Guidance*, *supra* note 1, at 65 (emphasis added).

asures do not become *independent acts* of direct participation that can *ad infinitum* be preceded by further deployments and preparatory measures, but they are regarded as *an integral part of an act or operation*, which qualifies as direct participation in hostilities because it meets the three requirements of threshold of harm, direct causation, and belligerent nexus.²⁰² To the extent that this integrality is given, even preparatory measures preceding deployments amount to direct participation. Where this link is broken, the preparatory measure or deployment becomes one of general capacity building and, therefore, of mere indirect participation in hostilities.

Boothby concludes his observations on this point with the argument that “underlying law would appear to characterize both deployment and return as direct participation so long as the activity with which they are each associated is itself direct participation.”²⁰³ In making this statement, yet again, he does little more than reformulate the Interpretive Guidance’s position in different terms. Overall, therefore, it is difficult to understand how Boothby can perceive the Interpretive Guidance’s approach to preparatory measures, deployments and return as “unrealistically narrowing”²⁰⁴ or “inappropriately restricting”²⁰⁵ the scope of direct participation in hostilities.

B. *Temporary and Continuous Loss of Protection*

According to treaty and customary IHL, civilians are protected against direct attack “unless and for such time” as they take a direct part in hostilities.²⁰⁶ Consequently, civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostili-

202. *Interpretive Guidance*, *supra* note 1, at 46; *supra* Part III.A-C (response to Schmitt).

203. Boothby, *supra* note 180, at 752.

204. *Id.*

205. *Id.*

206. Additional Protocol I, *supra* note 12, art. 51(3); Additional Protocol II, *supra* note 13, art. 13(3). For the customary nature of this rule in international and non-international armed conflict, see *Customary International Law Rules*, *supra* note 12, at Rule 6; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment, § 157 (July 29, 2004). For recent domestic jurisprudence expressly accepting the customary nature of Additional Protocol I, *supra* note 12, art. 51(3), including the phrase “for such time as,” see HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] § 30.

ties. This legal mechanism is sometimes colloquially referred to as the “revolving door” of civilian protection. Members of organized armed forces, groups or units belonging to a State or non-State party to an armed conflict, on the other hand, cease to be civilians and lose protection against direct attack for the entire duration of their membership.²⁰⁷ In line with this logic, the Guidance’s interpretive recommendation regarding the duration of loss of protection in case of direct participation in hostilities (civilians) and in case of continuous combat function (members of organized armed groups) reads: “Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . , and lose protection against direct attack, for as long as they assume their continuous combat function.”²⁰⁸

1. *Customary Nature of the Phrase “unless and for such time”*

In trying to extend loss of civilian protection against direct attack beyond the duration of specific hostile acts or operations, Boothby first contends, contrary to the findings of the ICRC’s customary law study and the declared opinion of States such as the United Kingdom,²⁰⁹ that the treaty phrase “unless and for such time” may not have attained customary nature.²¹⁰ Given that the phrase in question is binding as a matter of treaty law on 169 States,²¹¹ which represent approximately 85% of the world’s States, such a claim would require a solid and well-researched basis in contrary State practice and legal

207. On the different concepts of membership in regular and irregular armed forces, see the discussion in Part II.B(1) *supra* (response to Watkin). See also *Interpretive Guidance*, *supra* note 1, at 20-36.

208. See *Interpretive Guidance*, *supra* note 1, at 70.

209. At the Diplomatic Conference of 1974-77, the United Kingdom voted in favor of Additional Protocol I, *supra* note 12, draft Article 46 (now Article 51), describing its first three paragraphs as containing a “valuable reaffirmation of existing customary rules of international law designed to protect civilians” (UK, Statement at the CDDH, Official Records, Vol. VI, CDDH/SR.41, May 26 1977, at 164, § 119). For further State practice supporting the customary nature of the rule, see *Customary International Law Rules*, *supra* note 12, §§ 754-864.

210. Boothby, *supra* note 180, at 764-65.

211. By November 2009, 169 States had ratified Additional Protocol I, and another 5 were signatories.

opinion. However, Boothby looks at no more than two non-contracting States and bases his entire argument on sources that can hardly be regarded as authoritative. First, he refers to an outdated position of the Israeli government which, as Boothby himself concedes, was subsequently overturned by the Israeli High Court's express recognition that "all of the parts of article 51(3) of The First Protocol express customary international law."²¹² Second, he asserts without any valid evidence that the United States "entirely rejects the notion of the revolving door of protection"²¹³ and that, according to the US position, "civilians . . . lose protection only for the *approximate duration* of direct participation."²¹⁴ Although the only source Boothby provides in support of the United States' alleged legal opinion is a "private correspondence between the author and W. Hays Parks,"²¹⁵ he even goes as far as accusing the Interpretive Guidance of ignoring the "*declared position* of a P5 state that is still, arguably, the world's only superpower."²¹⁶

More authoritative sources of official U.S. legal opinion reveal no contradiction with the customary nature of the treaty phrase "unless and for such time." On the contrary, the historically important US Air Force Pamphlet of 1976, which predated the Additional Protocols of 1977, already stated that "civilians enjoy the protection afforded by law *unless and for such time* as they take a direct part in hostilities."²¹⁷ Similarly, the recent Commander's Handbook on the Law of Naval Opera-

212. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] § 30. Note also that the two other sources Boothby refers to in support of the purported Israeli position are: 1) an article, which predates the High Court decision, and in which Yoram Dinstein contends that "Israel does not accept the qualifying phrase 'for such time'" as customary law, albeit without providing any support for that claim (Yoram Dinstein, *The ICRC Customary International Law Study*, 36 *Isr. Y.B. on Hum. Rts.* 11 (2006)), and 2) a footnote in a United Nations Fact Finding Mission report, which refers to the very same article by Dinstein to point out that Israel "*reportedly* does not accept the qualifying phrase 'and for such time' as reflective of customary law" (Human Rights Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, at 132 n.289, *delivered to the General Assembly*, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) (emphasis added)).

213. Boothby, *supra* note 180, at 758.

214. *Id.* at 763 (emphasis added).

215. *Id.* at 758 n.56.

216. *Id.* at 763 (emphasis added).

217. U.S. AIR FORCE PAMPHLET 110-31, § 5-3(a)(1)(c) (1976) (emphasis added).

tions (2007) states that “protected persons directly participating in hostilities lose their protected status and may be attacked *while so employed*,”²¹⁸ and that “[u]nlawful combatants *who are not members of forces or parties declared hostile* but who are taking a direct part in hostilities may be attacked *while they are taking a direct part in hostilities*.”²¹⁹ In sum, Boothby’s doubt as to the customary nature of the phrase “unless and for such time” remains unsubstantiated.

2. *Temporal Scope of the Term “Participation”*

Boothby further contends that the Interpretive Guidance wrongly interprets the word “participation” as referring to involvement in *specific hostile acts or operations* which, in conjunction with the phrase “unless and for such time,” excludes the possibility of continuous loss of protection for civilians repeatedly taking a direct part in hostilities without becoming members of an organized armed force or group.²²⁰ According to Boothby, the ordinary meaning of the word “participate” could also refer to individual involvement in “groups or sequences of activity spread over a period,”²²¹ 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. While the dictionary meaning of the word “participate” may not exclude such an interpretation, it should be recalled that not all theoretically possible interpretations of a treaty provision are equally valid. Instead, what is decisive is “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²²²

218. COMMANDER’S HANDBOOK, *supra* note 144, § 8.10.2. (emphasis added).

219. *Id.* § 8.2.2 (emphasis added).

220. See Boothby, *supra* note 180, at 763 (“The notion of participation is not, however, necessarily limited to the duration of individual acts. Its dictionary definition of ‘be involved in, take part’ is equally applicable, in my view, either to individual acts or to groups or sequences of activity spread over a period.”), at 766 (“[T]he ICRC interpretation of the word ‘participates’ in the treaty rule excessively narrows the notion of DPH by inappropriately excluding the notion of continuous participation.”)

221. *Id.*

222. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

The primary purpose of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. The more specific purpose of the rule on direct participation in hostilities, which is part of a treaty provision entitled “protection of the civilian population,”²²³ is to define criteria according to which civilians can, exceptionally, lose the protection against direct attack they would normally be entitled to. As Boothby concedes, “[i]nterpreting the language in a way that increases the risks to the innocent, uninvolved civilian, must conflict with the object of the treaty.”²²⁴

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. Also, loss of protection against direct attack is not a sanction *following a previous activity*, but a corollary *applying during a current activity*. The treaty text further clarifies that activities during which civilian protection is suspended must not only amount to “participation” in hostilities, but that such participation must also be “direct,” which suggests a restrictive, rather than broad, interpretation of the word “participation.” Contrary to what Boothby suggests, an interpretation of the term “participation” as referring to individual involvement in specific hostile acts or operations is also supported by the Commentaries.²²⁵ Indeed, any extension of the concept of direct participation in hostilities beyond specific acts or operations would blur the distinction made in IHL 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

223. Additional Protocol I, *supra* note 12, art. 51; Additional Protocol II, *supra* note 13, art. 13.

224. Boothby, *supra* note 180, at 767.

225. In interpreting the notion of direct participation in hostilities, the Commentary consistently refers to notions such as “acts of war,” *Additional Protocol Commentary*, *supra* note 96, §§ 1679, 4788; “hostile acts,” *id.* §§ 1942-43; and “act of participation,” *id.* § 4787.

or function) and, thereby, confuse fundamentally different concepts underlying and informing the entire body of IHL governing the conduct of hostilities.

In this context, it may also be instructive to refer to the United States' understanding, declared in the context of an Optional Protocol to the Convention on the Rights of the Child, that "the phrase 'direct part in hostilities': (i) means *immediate and actual action on the battlefield* likely to cause harm to the enemy because there is a *direct causal relationship between the activity engaged in and the harm done to the enemy*; and (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment."²²⁶

3. *Revolving Door vs. Continuous Loss of Protection*

In trying to provide a legal basis for continuous loss of protection in case of civilians repeatedly taking a direct part in hostilities, Boothby makes a rather misguided reference to the Lieber Code.²²⁷ According to of Article 82 of that instrument:

Men, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, *if captured*, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.²²⁸

Contrary to Boothby's claim, this provision does not suggest that, in case of repeated direct participation in hostilities, "the

226. United Nations Treaty Collection, Status of Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (as of Dec. 20, 2009), *available at* <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11-b.en.pdf> (emphasis added).

227. Boothby, *supra* note 180, at 744.

228. Adjutant Gen.'s Office, U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field, art. 82, Gen. Ord. No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], *available at* <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (emphasis added).

preceding hostile activities deprived these individuals of protection on a continuous basis.”²²⁹ In fact, as the text makes plainly clear, this provision does not regulate loss of protection against direct attack, but the entirely distinct question of entitlement to prisoner of war status “if captured.” Needless to say, since the time of the Lieber Code, the previous practice of summary execution of “highway robbers or pirates” has been universally prohibited and replaced by an entitlement to a fair trial for all those deprived of their liberty for reasons related to the armed conflict.²³⁰

As far as protection against direct attack is concerned, however, it has been shown that civilians benefit from such protection “unless and for such time” as they are engaged in a specific act or operation amounting to direct participation in hostilities, including preparatory measures, deployment, and return. Thus, contrary to members of armed forces or organized armed groups, civilians regain their protection against direct attack in the interval between specific engagements in direct participation in hostilities. While it is true that the so-called “revolving door” of protection may make it more difficult for opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it is a fundamental misconception to claim that this mechanism creates “legal inequality between the opposing parties, thus eroding the international law assumption that the law applies equally to each party to the conflict.”²³¹

The law does, of course, apply equally to each party to the conflict. As far as loss of protection is concerned, it simply treats civilians differently than organized armed forces or

229. Boothby, *supra* note 180, at 744.

230. See, most notably, the prohibition of “executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” expressed in Article 3(1)(d) of Geneva Convention I, *supra* note 13, Geneva Convention II, *supra* note 13, Geneva Convention III, *supra* note 12, Geneva Convention IV, *supra* note 13, and recognized as customary in both international and non-international armed conflict. See also the clarification in Geneva Convention IV, *supra* note 13, art. 5(3) stating that even to the (limited) extent that derogation from the Convention’s protections may be permitted, the concerned “persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.”

231. Boothby, *supra* note 180, at 757.

groups—on both sides. The decisive difference is that civilians directly participating in hostilities remain unorganized armed actors who are not members of the organized fighting forces of the opposing parties and should not be treated as such, regardless of which party to the conflict they belong to. As pointed out in the Guidance, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate.²³² While Boothby rightly notes that certain civilians may provide regular and consistent support to a party to the conflict, whereas some members of organized armed groups may have functions subject to change, he overlooks that the Guidance's criterion of "continuous combat function" is an objective and pragmatic one, which does not impose a rigid and inflexible formula, but requires a contextualized interpretation on a case-by-case basis. Thus, according to the Interpretive Guidance, continuous combat function "may also be identified based on conclusive behavior, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation."²³³ Whatever criteria are applied in implementing the principle of distinction in a particular context, they must allow to reliably distinguish members of the armed forces of a belligerent party from civilians who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis.

In practice, a civilian who regularly and consistently directly participates in hostilities in support of a belligerent party will almost always be affiliated with an organized armed force or group and, thus, may be regarded as a *de facto* member assuming a continuous combat function for that force or group. As such, he is no longer considered to be a civilian and loses protection against direct attack for as long as he continues to assume such combat function. This includes not only the armed full-time fighter, but also private contractors hired to defend military objectives, as well as the notorious "farmer by day and fighter by night" who, in parallel to his seemingly

232. *Interpretive Guidance*, *supra* note 1, at 70.

233. *Id.* at 35.

peaceful everyday life, assumes a continuous function involving acts such as placing IEDs, mines, or booby-traps, or providing tactical intelligence or logistic support as part of specific attacks or combat operations. Persistently recurrent direct participation in hostilities without such affiliation to an organized force or group, on the other hand, is very unlikely to be a major problem in practice. Where it exceptionally does occur, such as in the case of 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, the threat posed by these civilians in the interval between hostile acts is more adequately addressed through means and methods of law enforcement. On the other hand, a member of an organized armed group who changes his function within that group will remain a legitimate military target for as long as the current function at least partially involves his direct participation in hostilities. However, once a member has affirmatively disengaged from a particular group, or has permanently changed from its military to its political wing, he can no longer be regarded as assuming a continuous combat function and must be considered a civilian protected against attack unless and for such time as he directly participates in hostilities.

The Guidance argues that the mechanism of the “revolving door” of protection is derived directly from the treaty text, and is not only necessary for the protection of the civilian population from erroneous or arbitrary attack, but also reasonably acceptable for the operating armed forces or groups as long as the relevant hostile acts occur on a merely spontaneous, unorganized or sporadic basis. In Boothby’s view, however, “the correct approach is to distinguish between, first, isolated and sporadic acts by civilians and, second, repeated or persistent acts of [direct participation in hostilities]. Only the former would involve resumption of protected status after the act of [direct participation in hostilities], while the latter would involve continuous loss of protected status while such persistent or repeated involvement in hostilities continues.”²³⁴ Nevertheless, he concedes that, “once there has been a sufficient act of disengagement or a sufficient period of non-participation

234. *Id.* at 20-21 (citations omitted).

since the last act of [direct participation in hostilities] . . . his protected status is properly re-established.”²³⁵ The problem is not only that Boothby fails to provide a legal basis for his proposal, but also that he leaves operational forces without any reliable guidance as to how the proposed distinction between “sporadic” and “repeated” hostile acts should be made in practice. Would the second hostile act already entail continuous loss of protection? If not, where should the line be drawn? What exactly would be a “sufficient” period of non-participation? Leaving questions such as these without satisfactory answers hardly contributes to making Boothby’s interpretation of the law “more workable” for the practitioner.

V. HOW MUCH FORCE IS PERMISSIBLE AGAINST LEGITIMATE TARGETS?: A RESPONSE TO COLONEL (RET.)
W. HAYS PARKS

Colonel (ret.) W. Hays Parks’ critique²³⁶ of the Interpretive Guidance focuses on its Section IX, which outlines the restraints imposed by IHL on the kind and degree of force used against legitimate military targets. Parks’ critique has a procedural, a substantive, and a practical aspect. In procedural terms, he argues that, in drafting Section IX of the Interpretive Guidance, the ICRC exceeded both the mandate bestowed upon it by the international community and the agreed scope of the clarification process on the notion of direct participation in hostilities. In substantive terms, Parks holds that the Guidance’s Section IX lacks a valid basis in international law and that it contradicts State practice as well as domestic and international case law on the use of force. Parks also argues that the propositions made in Section IX of the Interpretive Guidance are not practicable in operational reality. As will be shown, none of these arguments withstand closer scrutiny.

235. *Id.* at 19.

236. W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010).

A. *ICRC Mandate and Scope of the Clarification Process*

1. *ICRC Mandate regarding Section IX*

As Parks rightly notes, the ICRC's mandate has two principal sources, namely the Geneva Conventions and the Statutes of the International Red Cross and Red Crescent Movement, which have been approved by the States party to the Geneva Conventions.²³⁷ He is also right to observe that the ICRC, as an independent humanitarian organization, has no legislative authority.²³⁸ Parks is mistaken, however, when he contends that "[t]he ICRC mandate is thus limited to assisting war victims in armed conflict" and "does not extend to determining *when* much less *how much* force may be applied by military forces against [legitimate military targets]."²³⁹ According to the Statutes of the Movement, the ICRC's role is, *inter alia*, to work for the understanding, dissemination, and faithful application of IHL, to prepare any development thereof, and to take cognizance of any complaints based on alleged breaches of IHL.²⁴⁰ Further, the ICRC "may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution."²⁴¹ In other words, the international community of States has provided the ICRC with a broad mandate to act as a promoter and guardian of IHL. That body of law regulates not only the protection of war victims, such as wounded, sick, or captured military personnel or civilians finding themselves in the hands of a party to an armed conflict, but also the conduct of hostilities between the involved belligerents, i.e. their resort to means and methods of "injuring the enemy."²⁴² Accordingly, in exercising its mandate, the ICRC has repeatedly addressed questions relating to the conduct of hostilities, whether in confidential reports, notes, and interventions submitted to the bel-

237. *Id.* at 794.

238. *Id.* at 796.

239. *Id.* at 794-95.

240. Statutes of the International Red Cross and Red Crescent Movement art. 5(2)(c), (g), Oct. 23-31, 1986, *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/\\$File/Statutes-EN-A5.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/statutes-movement-220506/$File/Statutes-EN-A5.pdf).

241. *Id.* art. 5(3).

242. *See* Hague IV Regulations, *supra* note 18, art. 22.

ligerent parties in ongoing armed conflicts, in elaborating draft treaty texts in preparation for the Diplomatic Conference of 1974-77, or in the framework of expert meetings or legal studies aiming to clarify IHL.²⁴³ Contrary to what Parks seems to suggest, therefore, there is no basis for interpreting the ICRC's mandate as formally excluding the examination of legal questions arising under IHL in relation to the use of force against legitimate military targets.

2. *The ICRC's Clarification Process regarding Section IX*

It must be emphasized that Parks' account of how and when Section IX was introduced into the process openly contradicts the proceedings of the expert process as reviewed and approved by the participating experts.²⁴⁴ As the ICRC's reports on the second and third expert meetings of 2004 and 2005 make unambiguously clear, Section IX of the Guidance was not, as Parks claims, introduced late in the process and without consulting the participating experts.²⁴⁵ On the contrary, the importance of clarifying the question addressed in Section IX (i.e. the legal restraints imposed on the use of force against legitimate military targets) was recognized early on in the expert process. Accordingly, this question was discussed repeatedly and from various perspectives throughout the clarification process,²⁴⁶ and Section IX was already included in the ICRC's first draft of the Interpretive Guidance submitted to the participating experts in preparation for the fourth expert meeting held in Geneva in November 2006.²⁴⁷ Section IX was subsequently discussed in detail during the 2006 and 2008 expert meetings and went through several revisions before reaching its final form in June 2009.²⁴⁸ Hence, the inclusion of Sec-

243. See, e.g., *Customary International Law Rules*, *supra* note 12 (including many customary provisions of IHL governing the conduct of hostilities).

244. For precise reference see ICRC Proceedings, *supra* note 2.

245. Parks, *supra* note 236, at 783, 793-95.

246. SUMMARY REPORT 2004, *supra* note 103, at 17-19; SUMMARY REPORT 2005, *supra* note 169, at 45-46, 51-53. All materials available on the ICRC's website. ICRC Proceedings, *supra* note 2.

247. See ICRC, Draft, *Interpretive Guidance on the Notion of "Direct Participation in Hostilities"* 45-48 (Fourth Expert Meeting, Nov. 27-28, 2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2006-02-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2006-02-background-doc-icrc.pdf).

248. See SUMMARY REPORT 2006, *supra* note 95, at 74-79; ICRC, Revised Draft, *Interpretive Guidance on the Notion of "Direct Participation in Hostilities"* 60-

tion IX in the ICRC's Interpretive Guidance could not possibly be perceived as a surprise—much less a “breach of trust”²⁴⁹—by any participating expert.

Counterfactual is also Parks' claim that the questions to be examined during the expert process had been restricted to the meaning of the notion of “direct participation in hostilities.” Rather, as amply illustrated by the wide range of issues addressed in the background documents preparatory to each expert meeting, as well as during the expert discussions themselves, the aim of the process had always been to clarify, for the purposes of the conduct of hostilities, IHL as far as it relates to civilian participation in hostilities.²⁵⁰ It had been clear from very early on that this would require examining at least three questions under IHL governing both international and non-international armed conflict: 1) who qualifies as a civilian for the purposes of the principle of distinction?; 2) what conduct amounts to direct participation in hostilities?; and, most importantly for Section IX, 3) what modalities govern the ensuing loss of protection against direct attack?²⁵¹

While Parks rightly points out that, during the expert discussions, several participating experts were extremely critical of Section IX, he fails to note that just as many experts strongly supported its inclusion in the Interpretive Guidance, and sev-

65 (Fourth Expert Meeting, Nov. 27-28, 2006), *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2008-02-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2008-02-background-doc-icrc.pdf); ICRC, EXPERT COMMENTS & ELEMENTS OF RESPONSE CONCERNING THE REVISED DRAFT OF THE INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 39-44 (2008) [hereinafter EXPERT COMMENTS 2008], *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2008-03-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2008-03-background-doc-icrc.pdf); ICRC, DISCUSSION NOTES (WORKING SESSION I-VII) 8-12 (2008) [hereinafter DISCUSSION NOTES 2008], *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2008-04-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2008-04-background-doc-icrc.pdf); ICRC, SUMMARY REPORT: FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 7-32 (2008) [hereinafter SUMMARY REPORT 2008], *available at* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/2008-05-report-dph-2008-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/2008-05-report-dph-2008-icrc.pdf); *see also Interpretive Guidance, supra* note 1, at 77-82.

249. Parks, *supra* note 236, at 793.

250. The background documents and reports drafted for all five expert meetings held from 2003 to 2008 are published on the ICRC's website. ICRC Proceedings, *supra* note 2.

251. *Interpretive Guidance, supra* note 1, at 12-13.

eral others even argued that Section IX was not sufficiently restrictive, but should be complemented by human rights standards on the use of force.²⁵² It is probably fair to say that, at the end of the expert process, Section IX remained highly controversial and that, therefore, the position expressed in the Interpretive Guidance does not reflect the unanimous view or majority opinion of the participating experts. Instead, the final version of Section IX endeavors to propose a balanced and practical solution that takes into account the wide variety of concerns expressed and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL.

B. *Substantive Critique of Section IX*

Parks' substantive discussion of Section IX consists of multiple strands of legal and practical argument intertwined with elaborate procedural accounts and rather speculative assertions as to the personal and institutional motivations of the present author and the ICRC, all of which are difficult to disentangle. In fact, most of Parks' critique does not address the final text of the Interpretive Guidance as adopted by the ICRC, but refers to preliminary formulations included in background documents and previous drafts of Section IX, or discusses third sources which he presumes to have influenced the ICRC in reaching its position, most notably the writings of Jean Pictet,²⁵³ the book "Targeted Killing in International Law" by the present author,²⁵⁴ and the Israeli High Court judgment on the Israeli policy of targeted killing.²⁵⁵ Given that the present article is not the place to respond to argu-

252. See SUMMARY REPORT 2006, *supra* note 95, at 74-79; EXPERT COMMENTS 2008, *supra* note 248, at 39-44; DISCUSSION NOTES 2008, *supra* note 95, at 8-12; SUMMARY REPORT 2008, *supra* note 95, at 7-32.

253. See Parks, *supra* note 236, most notably at 785-87, 799, 812-20 (citing Jean S. Pictet, *Humanitarian Law and the Protection of War Victims* 32 (1975); Pictet, *Development and Principles of International Humanitarian Law* 75 (1985) and ICRC, *Weapons that may Cause Unnecessary Suffering or have Indiscriminate effects: Report on the work of experts* 13 (1973)). .

254. See *id.*, most notably at 789 n.65, 792 n.73, 797 nn.82-83, 803 n.96, 814-15 nn.125, 820, 826 n.166 (citing NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2009)).

255. See *id.*, most notably at 788-93 (discussing HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005]).

ments and allegations unrelated to the final text of the Interpretive Guidance, it may suffice to note that both the Israeli High Court judgment (December 14, 2006) and the relevant book by the present author (May 29, 2008) were published at a time when Section IX had already been drafted and discussed at the fourth expert meeting of November 27-28, 2006. Therefore, these sources may provide additional support for the final position taken by the ICRC but, contrary to what Parks seems to suggest,²⁵⁶ can hardly have served as its original basis. Further, while the writings of Pictet, one of the ICRC's leading jurists and commentators of the 20th century, may well have inspired the positions expressed in the Interpretive Guidance, they cannot, of course, constitute their legal basis. Therefore, Parks' critique of third sources, as well as of preliminary drafts of Section IX, shall in the following be responded to only to the extent necessary to illustrate the legal basis and substantive accuracy of the final version of the Interpretive Guidance's Section IX as published in June 2009. For the record, the final text of the interpretive recommendation of Section IX reads:

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.²⁵⁷

In Parks' view, the ICRC's interpretation of IHL expressed in Section IX contains several "major errors of law." Most notably, according to Parks, Section IX attempts to impose a human rights based law enforcement paradigm during the conduct of hostilities and, thereby, disregards the *lex specialis* principle.²⁵⁸ Moreover, he finds that Section IX is based on a flawed interpretation of treaty IHL, of the principles of military necessity and humanity, and of the practice and legal opinion of States with regard to the use of force in law enforcement and the conduct of hostilities.

256. *Id.* at 788-89 nn.65-66.

257. *Interpretive Guidance*, *supra* note 1, at 17, 77 (Recommendation IX).

258. Parks, *supra* note 236, at 797-99.

1. *The Interpretive Guidance and the lex specialis Principle*

The final text of Section IX contains a clause clarifying that “although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of interstate force (*jus ad bellum*)”.²⁵⁹ In a rather surprising misreading of the Guidance, Parks interprets this “without prejudice” clause, which was included upon request of the majority of participating experts,²⁶⁰ as “an ICRC challenge to the *lex specialis* stature of the law of war through insertion of human rights law across the conflict spectrum.”²⁶¹ Needless to say, this critique is misplaced. The clause in question makes no statement whatsoever as to which legal framework is to prevail in case of a conflict of norms, which is the sole purpose of the *lex specialis* principle in international law. The clause merely recognizes that, in a situation of armed conflict, the international lawfulness of a particular operation involving the use of force may not always depend exclusively on IHL but, depending on the circumstances, may potentially be influenced by other applicable legal frameworks, such as human rights law and the *jus ad bellum*. The clause further clarifies that questions pertaining to the interrelation between the various applicable bodies of law with regard to regulating the use of force in a particular situation are beyond the scope of the Interpretive Guidance and, therefore, are not prejudiced by its conclusions and recommendations.²⁶² In fact, quite to the contrary of what Parks seems to suggest, the Interpretive Guidance clearly states that its interpretation of the standards governing the use of force

259. *Interpretive Guidance*, *supra* note 1, at 82.

260. *See sources infra* note 262.

261. Parks, *supra* note 236, at 800.

262. During the expert meetings, some experts suggested that the arguments made in Section IX should be based on the human right to life. The prevailing view was, however, that the Interpretive Guidance should not examine the impact of human rights law on the kind and degree of force permissible under IHL. Instead, a general savings clause should clarify that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law. SUMMARY REPORT 2006, *supra* note 95, at 78-79; SUMMARY REPORT 2008, *supra* note 95, at 21-22.

in the conduct of hostilities is based exclusively on IHL.²⁶³ Thus, it cannot possibly be interpreted as giving preference to a general norm of human rights law over a more specific norm of IHL. Consequently, the question to be examined is not whether the Interpretive Guidance contradicts the *lex specialis* principle, but whether its interpretation of the *lex specialis* of IHL is substantively accurate.

2. *Distinguishing Section IX from the Law Enforcement Paradigm*

The most fundamental problem with Parks' substantive critique of Section IX is that it is based on a serious misreading of what the Interpretive Guidance actually says. According to Parks, Section IX attempts to "impose a law enforcement paradigm" during the conduct of hostilities, which would require soldiers to subject their operations against legitimate military targets to an unrealistic use-of-force continuum "beginning with the least-injurious action before resorting to 'grave injury' in attack of an enemy combatant or a civilian taking a direct part in hostilities."²⁶⁴ He even misinterprets the Guidance to imply that "if a soldier can be rendered *hors de combat* by a single wound, a second wound would be superfluous injury and, presumed, a war crime."²⁶⁵ While it is clear that a soldier *hors de combat* can no longer be attacked, the kind and degree of force required to render him *hors de combat* will strongly depend on the prevailing circumstances and must always be determined by reference to realistic and reasonable standards. Parks further provides an elaborate discussion of selected judicial cases to prove that the strict use-of-force continuum allegedly advocated by the Interpretive Guidance had been rejected even for peace-time law enforcement operations and thus, *a fortiori*, cannot be authoritative for combat operations in armed conflict.²⁶⁶

Section IX does not, of course, interpret IHL to impose a use-of-force continuum or, more generally, a law enforcement paradigm on attacks against legitimate military targets. Nor does it, as suggested by Parks, interpret IHL as prohibiting the multiple shooting or wounding of an enemy who is not *hors de*

263. *Interpretive Guidance*, *supra* note 1, at 11, 82.

264. Parks, *supra* note 236, at 815; *see generally id.* at 810-12, 815-20.

265. *Id.* at 818.

266. *Id.* at 816-20.

combat, or the direct application of deadly force without prior attempt to resort to non-lethal means. Instead, in addition to the various provisions regulating specific means and methods of warfare, Section IX simply interprets IHL governing the conduct of hostilities as restricting the kind and degree of force that can lawfully be used against legitimate military targets to “what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.”²⁶⁷ As will be shown by reference to Parks’ own analysis of domestic and international case law, the Guidance’s interpretation of IHL implies neither a use-of-force continuum, nor a law enforcement paradigm.

In his analysis focusing on four leading US domestic cases, one UK domestic case and the famous *McCann* case of the European Court of Human Rights (all of which involve the use of force in response to an actual or perceived threat to life or limb), Parks seems to draw the following conclusions with regard to the legal standards governing the use of lethal force in peace-time law enforcement operations: First, the permissibility of force used in the prevention of a crime essentially depends on two factors, namely on whether it is (a) necessary to achieve the pursued purpose in the prevailing circumstances, and (b) proportionate to the harm to be prevented.²⁶⁸ Second, these standards “must embody allowance for the fact that police officers often are forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²⁶⁹ Given that “[d]etached reflection cannot be demanded in the presence of an uplifted knife,” it cannot be required that officers facing a threat of death or serious physical injury “should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than kill him.”²⁷⁰ Thus, in a high-stress sit-

267. *Interpretive Guidance*, *supra* note 1, at 17, 77 (Recommendation IX).

268. See Parks, *supra* note 236, at 821-22 (discussing the Iranian Embassy Siege, London, 1980).

269. *Graham v. Connor*, 490 U.S. 386, 397 (1989), cited in Parks, *supra* note 236, at 813 n.121. The words “in circumstances that are tense, uncertain, and rapidly evolving,” an instructive part of the judgment, seem to have been omitted in Parks’ citation.

270. *Brown v. United States*, 12 U.S. 110 (1814), cited in Parks, *supra* note 236, at 814 & n.124. The words “threat of death or serious physical injury,”

uation, where the level of threat and the time pressure are such that “deadly force is otherwise justified . . . , there is no . . . duty to use non-deadly alternatives first,”²⁷¹ nor would the number of shots fired or the number of wounds inflicted necessarily be decisive for the excessiveness (or not) of the force used.²⁷² Third, under international human rights law, the responsibility for unjustified use of force falls on the State and not on the individual officers conducting the operation.²⁷³

While it should be recalled that the international responsibility of States for human rights violations does not exclude a parallel individual responsibility of the operating officers under domestic law or international criminal law, the other standards identified by Parks essentially correspond to those of strict necessity, proportionality, and precaution developed in universal and regional human rights jurisprudence for the *reactive use of force* in response to a relatively imminent (actual or perceived) threat to life or limb of the police officers or third persons.²⁷⁴ Of course, the requirements of necessity and precaution are likely to be interpreted more restrictively in case of

which constitute the classic criterion justifying the resort to deadly force in U.S. case law, are taken from the U.S. Supreme Court’s decision in *Tennessee v. Garner*, 471 U.S. 1 (1985).

271. *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), cited in Parks, *supra* note 236, at 816 n.130; *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) §§ 13-121 (1995), discussed and cited in Parks, *supra* note 236, at 822-27. In the same context, Parks also refers to Department of Defense Directive 3000.3 (July 9, 2005), Policy for Non-Lethal Weapons, according to which “[t]he availability of non-lethal weapons shall not limit a commander’s inherent authority and obligation to use all necessary means available and to take all appropriate action in self defense.” Parks, *supra* note 236, at 817 n.130.

272. Parks, *supra* note 236, at 818 (citing *Amato v. United States*, 549 F. Supp. 863 (N.J. 1982)).

273. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) §§ 13-121 (1995) (discussed and cited in Parks, *supra* note 236, at 820-25).

274. Today, the use of force standards developed for law enforcement operations by the UN Human Rights Committee and the European, Inter-American and African Human Rights Commissions and Courts are most comprehensively reflected in two soft law instruments of the United Nations, namely the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, U.N. Doc. A/ CONF.144/28/Rev.1 (1990), *available* at <http://www2.ohchr.org/english/law/firearms.htm>; and the Code of Conduct for Law Enforcement Officials, adopted by UNGA Resolution 34/

proactive use of force against individuals not posing an immediate threat and finding themselves in environments largely under the control of the operating officers. Be this as it may, for the present purposes it is sufficient to note that Parks is absolutely right when he points out that, even in peace-time law enforcement, “shooting to wound” or other escalatory use-of-force approaches may not always be practicable options, particularly in extreme situations of hostage taking or when officers are confronted with suicide bombers.²⁷⁵

A fortiori, armed forces operating in situations of armed conflict may not always have the means or opportunity to capture rather than kill, even if equipped with sophisticated weaponry and means of observation.²⁷⁶ As the Interpretive Guidance acknowledges,

*In classic large-scale confrontations between well equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.*²⁷⁷

The reference in this passage to “situations comparable to peacetime policing” does not suggest the application of law enforcement standards during open combat, but simply illustrates that the requirements of military necessity and humanity may have to be interpreted differently in different circum-

169 of 17 December 1979, G.A. res. 34/169, annex, 34 U.N. GAOR Supp. (No. 46) at 186, U.N. Doc. A/34/46 (1979).

275. Parks, *supra* note 236, at 816 n.130, 821.

276. As acknowledged in the *Interpretive Guidance*, *supra* note 1, at 82 n.221, this was generally recognized during the expert meetings. See SUMMARY REPORT 2006, *supra* note 95, at 62-63.

277. *Interpretive Guidance*, *supra* note 1, at 80-81.

stances. Even if generously interpreted, however, the law enforcement paradigm remains significantly more restrictive than the standard based on military necessity proposed in Section IX. Most notably, while the law enforcement paradigm permits the resort to lethal force only for the purpose of defending a person against an imminent threat of death or serious injury or to apprehend a person presenting such a threat, Section IX refers to “a legitimate military purpose.” This includes not only reaction to imminent threats to life and limb, but essentially any other purpose not prohibited by IHL, such as the capture or putting *hors de combat* of enemy combatants or civilians directly participating in hostilities, the impediment of military deployments, the occupation of territory, or the destruction of military objectives. Also, the Interpretive Guidance’s standard of “military necessity” is far more adapted to the conduct of hostilities than the law enforcement standard of “strict necessity.” As Section IX expressly acknowledges,

*What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards, but is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.*²⁷⁸

Further, while the difficult role of law enforcement officers regularly requires them to take a certain amount of risk in trying to avoid the use of lethal force and harm to uninvolved bystanders, Section IX of the Interpretive Guidance clarifies

278. *Id.* at 80. It has long been recognized that matters not expressly regulated in treaty IHL should not, “for want of a written provision, be left to the arbitrary judgment of the military commanders. Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land pmb., July 29, 1899, 11 G.B.T.S. 800, 22 Stat. 1803. Virtually synonymous: Hague IV Regulations, *supra* note 18, pmb.

that, in the conduct of hostilities, “operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive.”²⁷⁹

In sum, contrary to what Parks suggests, Section IX of the Interpretive Guidance does not subject the use of force against legitimate military targets to a use-of-force continuum or, more generally, a law enforcement paradigm. It thus remains to be examined to what extent Park’s critique disproves the legal basis and substantive accuracy of the interpretive recommendation made in the Guidance’s Section IX.

3. *Legal Basis and Substantive Accuracy of Section IX*

In essence, Section IX of the Interpretive Guidance states that, within the parameters set by the more specific provisions of IHL governing the conduct of hostilities, considerations of military necessity and humanity should serve as guiding principles in determining the kind and degree of force which is permissible against legitimate military targets.²⁸⁰ While Section IX does not suggest that an unconditional obligation to “capture rather than kill” should apply in all circumstances, it insists that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”²⁸¹ The ICRC’s legal argument supporting Section IX has been presented in detail in the Interpretive Guidance and shall not be repeated here except to the extent necessary to respond to Parks’ critique, namely that the legal interpretation proposed in Section IX has no basis in treaty law, State practice, or domestic or international case law,²⁸² and that the principle of military necessity as defined in national military manuals is addressed to governments and senior military commanders and

279. *Interpretive Guidance*, *supra* note 1, at 82.

280. See Recommendation IX and accompanying commentary in *id.* at 77-82.

281. *Id.* at 82 (emphasis added). It is in this sense that Pictet’s famous statement should be understood that: “If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.” JEAN S. PICTET, *HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS* 75-76 (1975).

282. Parks, *supra* note 236, at 827.

does not intend to restrict the individual soldier's use of force against the enemy.²⁸³

With regard to the legal basis of Section IX in existing treaty law the Interpretive Guidance acknowledges that, “[a]part from the prohibition or restriction of certain means and methods of warfare . . . the specific provisions of IHL do not expressly regulate the kind and degree of force permissible against legitimate military targets.”²⁸⁴ This does not mean, of course, that no conclusions can be drawn from the interpretation of existing treaty provisions. First, as a preliminary matter, it should be recalled that, according to customary and treaty IHL, the right of belligerents to adopt means and methods of injuring the enemy is not unlimited.²⁸⁵ Second, while treaty IHL does not expressly regulate the use of lethal force in combat, it excludes certain categories of persons, most notably combatants and civilians directly participating in hostilities, from protection against the dangers arising from military operations, thus exposing them to direct attack.²⁸⁶ As such, the absence of protection against attack (i.e. offensive or defensive acts of violence)²⁸⁷ neither implies an unrestrained “right to kill,” nor an unconditional obligation to “capture rather than kill.”²⁸⁸ Third, according to the International Court of Justice, the existing treaty prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering

283. *Id.* at 794-95.

284. *Interpretive Guidance*, *supra* note 1, at 78 (emphasis added).

285. *See* Hague IV Regulations, *supra* note 18, art. 22 (“The right of belligerents to adopt means of injuring the enemy is not unlimited”); *see also* Additional Protocol I, *supra* note 12, art. 35 (“In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.”).

286. *See* Additional Protocol I, *supra* note 12, art. 48 (“[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”); *id.* art. 51(3) (“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”); Additional Protocol II, *supra* note 13, art. 13(3) (employing the same language as Additional Protocol I, art. 51(3)).

287. Additional Protocol I defines attacks as “acts of violence against the adversary, whether in offence or in defence.” Additional Protocol I, *supra* note 12, art. 49(1).

288. *Interpretive Guidance*, *supra* note 1, at 78.

(*maux superflus*)²⁸⁹ constitutes an intransgressible principle of international customary law and a cardinal principle of IHL, which outlaws the infliction on combatants of “harm greater than that unavoidable to achieve legitimate military objectives.”²⁹⁰ Although the prohibition of *maux superflus* has traditionally been discussed almost exclusively in connection with the permissibility of specific “means” (i.e., arms, projectiles, or material) of warfare, the subsequent inclusion of “methods” of warfare in Article 35(2) of Additional Protocol I demonstrates that the drafters of the Protocol intended to give the prohibition a wider scope. Systematically, the prohibition of *maux superflus* is today positioned and formulated as a basic rule underlying and informing the entire body of IHL governing the conduct of hostilities.²⁹¹ Even though, for the time being, neither State practice nor international jurisprudence provide clear standards as to when harm caused to combatants could be regarded as “greater than that unavoidable to achieve legitimate military objectives,” the interpretation of the prohibition of *maux superflus* adopted by the International Court of Justice comes close to a generalized statement of principle from which a positive obligation corresponding to Section IX of the Interpretive Guidance could arguably be derived. In this context it should also be emphasized that, contrary to what Parks suggests, Section IX does not, of course, extend the targeting criteria developed exclusively for objects in Article 52(2) of Additional Protocol I to the targeting of persons.²⁹²

289. See Additional Protocol I, *supra* note 12, art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”). In treaty law, the prohibition of *maux superflus* first appeared in the St. Petersburg Declaration (1868), which banned the use of certain explosive projectiles because they were deemed to “uselessly aggravate the sufferings of disabled men, or render their death inevitable,” and was subsequently expanded to include other “arms, projectiles, or material calculated to cause superfluous suffering” or “unnecessary suffering” in Article 23(e) of the Hague IV Regulations (1907), *supra* note 18.

290. ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (Jul. 8) [hereinafter Nuclear Weapons Opinion].

291. According to its title, Article 35 of AP I comprises the “basic rules” governing Section I on “methods and means of warfare.” Additional Protocol I, *supra* note 12, art. 35.

292. Parks’ erroneous claim to the contrary seems to be rooted in a misunderstanding of a passage in the present author’s book “Targeted Killing in

Relevant for the present discussion is also the famous Martens Clause which provides that, in cases not regulated by treaty law, “civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”²⁹³ According to the International Criminal Tribunal for the former Yugoslavia (ICTY), “this Clause enjoins, as a minimum, reference to those principles and dictates [i.e. of humanity and public conscience] any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.”²⁹⁴ It appears justified, therefore, to regard considerations of military necessity and of humanity, which are generally recognized as underlying and informing the entire normative framework of IHL, as guiding

International Law.” See Parks, *supra* note 236, at 796, 803 n.96, 807-08. This misunderstanding is surprising given that the passage in question clearly states that the “argument here submitted is not that Article 52(2) Additional Protocol I should be directly extended also to persons, but that the core criteria for the assessment of military necessity, namely that military action must be reasonably expected to lead to a ‘definite military advantage’, can be generalized and applied also to action against persons.” NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 292 (2009).

293. Additional Protocol I, *supra* note 12, art. 1(2). Since its first formulation in the Preamble of the Hague Convention II in 1899, the Martens Clause has been reformulated and adopted in numerous international instruments. See, e.g., Hague IV Regulations, *supra* note 18, pmbl.; Geneva Convention I, *supra* note 13, art. 63; Geneva Convention II, *supra* note 13, art. 62; Geneva Convention III, *supra* note 12, art. 142; Geneva Convention IV, *supra* note 13, art. 158; Additional Protocol I, *supra* note 12, art. 1(2); Additional Protocol II, *supra* note 13, pmbl.; Convention on Conventional Weapons, pmbl., Dec. 21, 2001. It is now recognized by the International Court of Justice as an operative part of IHL “which has proved to be an effective means of addressing the rapid evolution of military technology.” Nuclear Weapons Opinion, *supra* note 290, at 257. See also *supra* note 278 and accompanying text.

294. Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Trial Judgment, § 525 (Jan. 14, 2000) (referring to Nuclear Weapons Opinion, *supra* note 290, at § 78). See also the statement of Lauterpacht that “the law on these subjects [i.e. on the conduct of hostilities] must be shaped—so far as it can be shaped at all—by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being.” Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT’L L. 360, 379 (1952).

principles for the interpretation of the rights and duties of belligerents within the parameters set by the more specific provisions of IHL governing the conduct of hostilities.

As noted in the Interpretive Guidance, according to contemporary military manuals, the principle of military necessity permits “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources.”²⁹⁵ Complementing and implicit in the principle of military necessity is the principle of humanity, which “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”²⁹⁶ While it is clear that individual soldiers generally cannot be expected to second-guess their superiors’ strategic, operational, or tactical decisions based on considerations of military necessity and humanity, the above interpretation of treaty IHL suggests that they cannot absolve themselves from making such an assessment, always within the limits of feasibility and appropriateness in the circumstances, where the kind

295. *Interpretive Guidance*, *supra* note 1, at 79, citing UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 2.2 (2004). For similar definitions of military necessity see NATO, GLOSSARY OF TERMS AND DEFINITIONS (AAP-6V), at 2-M-5 (1998); U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10 ch. 1 § I(3)(a) (1956); U.S. DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 5.3.1 (2007); COLOMBIA: MANUAL DE DERECHO OPERACIONAL, *infra* note 300, at 37 (2009); FRANCE, MINISTRY OF DEFENCE, MANUEL DE DROIT DES CONFLITS ARMÉS 86 (2001); GERMANY, FEDERAL MINISTRY OF DEFENSE, TRISERVICE MANUAL ZDv 15/2: HUMANITARIAN LAW IN ARMED CONFLICTS § 130 (1992); SWITZERLAND, SWISS ARMY, REGULATIONS 51.007/IV, BASES LÉGALES DU COMPORTEMENT À L’ENGAGEMENT § 160 (2005); Lieber Code, *supra* note 228, art. 14.

296. *Id.* (citing UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT § 2.4 (2004). *See also* U.S. DEP’T OF THE AIR FORCE, AIR FORCE PAMPHLET, AFP 110-31, at § 1-3 (2) (1976)). *See also id.* n.216 (“Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of IHL.”).

and degree of force to be used is left to their personal judgment.

4. *Support for Section IX in recent State Practice and Case Law*

Although Parks contends that Section IX of the Interpretive Guidance is not supported by State practice and case law,²⁹⁷ he fails to provide any evidence of contrary practice or jurisprudence, which would imply the permissibility of manifestly excessive force in attack against combatants or civilians directly participating in hostilities.²⁹⁸ In fact, the absence of clear and consistent State practice with regard to some of the questions addressed in the Interpretive Guidance was precisely one of the reasons why the ICRC decided to initiate the clarification process on the notion of “direct participation in hostilities” and to provide its recommendations as to how IHL relating to that issue should be interpreted in contemporary armed conflicts.²⁹⁹ Nevertheless, it cannot be ignored that the recent governmental and judicial practice of several States currently involved in armed conflicts is supportive of the legal position proposed in Section IX. Two cases in point are the adoption by the General Command of the Colombian Armed Forces of the new “Manual de Derecho Operacional” of December 7, 2009³⁰⁰ and the Israeli High Court judgment of December 14, 2006 concerning the Israeli government policy of targeted killing.³⁰¹

The Colombian Manual of Operational Law repeatedly refers to the ICRC’s Interpretive Guidance, including its inter-

297. Parks, *supra* note 236, at 793, 806, 829.

298. Even Parks’ extensive discussion of international and domestic case law on the use of force in law enforcement operations does not question the unlawfulness of unnecessary force. It merely clarifies that the standards of precaution, necessity, and proportionality governing the use of force in law enforcement operations must not be interpreted in an overly strict and unrealistic manner but always with due regard to the concrete circumstances prevailing at the time and place in question. Parks, *supra* note 236, at 810-27. See also the discussion *supra* notes 268-273 and accompanying text.

299. *Interpretive Guidance*, *supra* note 1, at 9-11.

300. Colombia, Comando General Fuerzas Militares, Manual de Derecho Operacional, FF.MM 3-41 (2009) [hereinafter Manual de Derecho Operacional].

301. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] (determining the legality of targeted preventative attacks).

pretation of the principles of military necessity and humanity.³⁰² As the following excerpts illustrate, the Manual is supportive of the recommendation expressed in Section IX and has no difficulties translating it into guiding principles for operational practice:

Principle of necessity: Generally speaking, the principle of necessity implies that all combat activity must be justified by military purposes, wherefore activities that are not militarily necessary are prohibited.³⁰³

Inherent in the concept of military necessity is an important element of *restriction*: only that force will be used, which is necessary to achieve the military purposes; any use of force exceeding this purpose contravenes military necessity.³⁰⁴

The Manual provides that operational orders for the conduct of hostilities under IHL must always require the operating forces to determine whether, in the prevailing circumstances, the use of force is the only means permitting mission accomplishment without unnecessarily endangering the operating forces.³⁰⁵ The Manual clarifies this point as follows:

The fact that officers, non-commissioned officers and soldiers are required to adapt the principle of military necessity while planning and executing an operation does not mean that it is possible to adapt military necessity in this manner in all scenarios of hostilities. There are many combat situations where this is not possible without exposing one's own men to unacceptable risks and without losing operational effectiveness.³⁰⁶

Accordingly, the Manual's so-called "red card" summarizing the model rules of engagement for combat operations provides that, whenever circumstances permit, the demobilization or capture of enemies is to be preferred over their killing in combat.³⁰⁷ Without any doubt, the Colombian Manual of Operational Law is a striking example of recent State practice il-

302. MANUAL DE DERECHO OPERACIONAL, *supra* note 300, at 37, 88-92.

303. *Id.* at 37 (translated by the author).

304. *Id.* at 88 (emphasis in original) (translated by the author).

305. *Id.* at 100-01.

306. *Id.* at 92 (translated by the author).

307. *Id.* at 106.

lustrating not only the theoretical accuracy, but also the operational practicability and appropriateness of the Interpretive Guidance's Section IX.

On 14 December 2006, the Israeli High Court delivered its judgment in a case challenging the lawfulness of the policy of targeted killing which had been officially adopted by the Israeli government in the course of the second Palestinian uprising. In its judgment, the Court neither banned nor justified the State policy as a whole, but ruled that the lawfulness of targeted killings must be examined separately for each operation.³⁰⁸ Most relevant for the present discussion is that, according to the Court, the force used against civilians directly participating in hostilities must not exceed what is necessary in the circumstances. In the words of the Court:

The approach of *customary international law applying to armed conflicts of an international nature* is that civilians are protected from attacks by the army. However, that protection does not exist regarding those civilians "for such time as they take a direct part in hostilities" (§ 51 (3) of *The First Protocol*). Harming such civilians, even if the result is death, is permitted, *on the condition that there is no other less harmful means . . .*³⁰⁹ Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required However, it is a possibility which should always be considered. *It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities . . .*³¹⁰

308. See HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] § 60.

309. *Id.* § 60 (emphasis added).

310. *Id.* § 40 (emphasis added).

While Parks rightly observes that the Court applies its “least harmful means” requirement as part of Israeli domestic law,³¹¹ he overlooks that, in Israel, customary IHL constitutes an integral part of domestic law.³¹² Contrary to what Parks seems to suggest,³¹³ the High Court’s “least harmful means” argument was not tailor-made for the specificities of the Israeli-Palestinian context, but is conceived more generally as part of customary IHL applicable in international armed conflict, even though its practical relevance may increase in occupied territories or other situations involving territorial control by the operating forces.³¹⁴ As far as the relevance of considerations of military necessity for the use of force against legitimate military targets is concerned, the following statement of the Israeli Government to the UN Human Rights Committee appears to correspond to the position subsequently adopted by the Israeli High Court:

Even persons known to be terrorists were legitimate targets only if there was reliable evidence linking them directly to a hostile act. . . . It would, of course, be preferable to arrest such persons, but in areas like the Gaza Strip, over which Israel had no control, his Government did not have that option. Its security forces were instructed by the Attorney-General, however, to attack unlawful combatants only when there was an urgent military necessity and when no less harmful alternative was available to avert the danger posed by the terrorists.³¹⁵

In sum, the Israeli High Court judgment, in conjunction with the Israeli Government’s position, is another clear-cut example of domestic practice supportive of the legal accuracy and

311. Parks, *supra* note 236, at 792-93 (citing HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] § 40).

312. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] § 19.

313. See Parks *supra* note 236, at 788-93 (stating that “[t]he circumstances at issue in the Israeli case are unique to that nation’s geography, history, circumstances, and threats”).

314. See *supra* notes 309-310 and accompanying text.

315. *Second Periodic Report of Israel*, § 40, delivered to the Human Rights Committee, U.N. Doc. CCPR/C/SR.2118 (Aug. 6, 2003), available at <http://unispal.un.org/UNISPAL.NSF/0/9CD18444E77A0FE285256D80004D9676>.

operational practicability of the Interpretive Guidance's Section IX.

VI. CONCLUSION

Without any doubt, the critiques put forward by Watkin, Schmitt, Boothby, and Parks express understandable concerns over the ability of State armed forces to operate effectively against an elusive enemy who can hardly be distinguished from the civilian population and whose means and methods are often indiscriminate, perfidious, or otherwise contrary to IHL. All four authors attempt to remedy practical difficulties in identifying and engaging the enemy through the flexibilization and expansion of the legal criteria permitting direct attacks against individuals under IHL. Thus, in order to improve the safety of the operating forces, Schmitt proposes that, in case of doubt, a civilian should be presumed to directly participate in hostilities and, therefore, not to be entitled to protection against direct attack. Similarly, according to Watkin, the concept of "membership" in an organized armed group—and, therewith, continuous loss of protection against direct attack—should extend not only to fighting personnel of organized armed groups, but essentially to any person who could be regarded as performing a "combat," "combat support," or even "combat service support" function for such a group, including unarmed cooks and administrative personnel. In the same vein, Boothby argues that the treaty phrase "unless and for such time as they take a direct part in hostilities" should be interpreted to entail loss of protection not only during the current engagement of a civilian in a specific hostile act or operation (including preparation, deployment, execution, and return), but also in the interval between such acts. Finally, according to Parks, armed forces should not be legally required to "capture rather than kill" an enemy combatant or civilian directly participating in hostilities, even where the circumstances are such that he could easily be captured without additional risk to the operating forces or the surrounding civilian population. As has been shown, even when applied in good faith, these proposals result in an extremely permissive targeting regime prone to an unacceptable degree of error and arbitrariness.

As noted at the outset, IHL is based on a careful balance between considerations of military necessity and humanity. The most fundamental problem with the proposals put forward by Watkin, Schmitt, Boothby, and Parks is that they reflect an approach almost exclusively driven by military necessity which is not balanced by equally important considerations of humanity. During the expert meetings, other participants advocated an opposite, almost exclusively humanity-driven perspective, which sometimes tends to disregard legitimate concerns of military necessity. The Interpretive Guidance, faithful to the ICRC's role as a neutral and impartial intermediary, does not give either consideration preference over the other, but proposes a balanced approach, which takes all legitimate concerns into account, while at the same time aiming to ensure a clear and coherent interpretation of IHL consistent with its underlying purposes and principles.

Indeed, it is an important step towards accommodating considerations of military necessity when the ICRC's Interpretive Guidance acknowledges that organized armed groups belonging to a non-State belligerent are not civilians but, for as long as they assume a continuous combat function, constitute legitimate military targets according to the same principles as regular combatants (Section II). This approach is subsequently balanced by equally exacting considerations of humanity when the Guidance presumes entitlement to protection in case of doubt (Section VIII) and clarifies that, within the parameters set by more specific provisions of IHL, the use of force against legitimate military targets must not exceed what is actually necessary in the circumstances (Section IX). Similarly, while military necessity requires that members of armed forces and organized armed groups belonging to a belligerent lose protection for the entire duration of their formal or functional membership, considerations of humanity demand that civilians, who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis, regain their protection once their personal involvement in a hostile act or operation ends (Sections I, II, VII).

While the Interpretive Guidance is widely informed by the discussions held during the expert meetings, it also draws from the ICRC's institutional expertise and experience as a humanitarian organization having been operational for almost 150 years in countless armed conflicts all over the world. Although

it is legitimate for legal experts to scrutinize or challenge the ICRC's interpretation of IHL, accusing the organization of "a troubling ignorance of the realities of 21st century battlefield combat"³¹⁶ is completely out of place and does not add to the credibility of what they have to say.

The Interpretive Guidance does not propose mathematical formulas which could be mechanically applied to each tactical situation, nor does it provide a comprehensive framework of rules governing all use of force in situations of armed conflict. It examines IHL with a primary focus on offensive and defensive operations against legitimate military targets. It does not specifically address the rules governing the reactive use of force based on the right of individual self-defense, which does not depend on the categorization of the attacker or his activity under IHL, but on the immediacy and intensity of the threat to be repelled. Overall, therefore, the Interpretive Guidance can neither replace contextualized rules of engagement, which translate its recommendations into more concrete and comprehensive instructions for operational forces, nor the personal judgment of the responsible military commander or others charged with the use of force in situations of armed conflict. Rather, the Interpretive Guidance provides the legal practitioner with a coherent and consolidated framework of concepts and principles based on which operational decisions ought to be made and, in doing so, aims to contribute to the better understanding and faithful application of IHL.

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. Nor did the four authors provide a theoretically coherent and practically convincing alternative to the approach proposed in the Interpretive Guidance. In the final analysis, therefore, the ICRC remains convinced that its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" offers an accurate, balanced and operationally realistic interpretation of IHL relating to civilian participation in hostilities and contributes sig-

316. Schmitt, *supra* note 88, at 739.

nificantly to the clarification of key concepts of that law in light of the circumstances prevailing in contemporary armed conflict.