

PART IX OF THE ICRC “DIRECT PARTICIPATION IN
HOSTILITIES” STUDY: NO MANDATE, NO
EXPERTISE, AND LEGALLY INCORRECT

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I. INTRODUCTION

On June 8, 1977, following two years of preparatory meetings and four years of negotiations, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict concluded.¹ It produced two law of war treaties: Protocol I Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"),² and Protocol II Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II").³ The title of each identifies its scope of application.

Additional Protocol I was unique. In addition to updating or expanding certain provisions contained in the four 1949

1. For a concise summary of the proceedings of the Diplomatic Conference, see Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Introductory Note, *reprinted in* THE LAWS OF ARMED CONFLICTS 699 (Dietrich Schindler & Jiri Toman eds., 2004) [hereinafter THE LAWS OF ARMED CONFLICTS].

2. Protocol I Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 711.

3. Protocol II Additional to the Geneva Conventions of August 12, 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 775.

Geneva Conventions,⁴ often referred to as “Geneva law,” it also updated provisions of that portion of the law of war known as “Hague law,” in particular the Hague Convention (IV) Respecting the Laws and Customs of War on Land of October 18, 1907.⁵ While Geneva law is concerned with protection of war victims, identified by the titles of the four 1949 Geneva Conventions, Hague law deals in large measure with the conduct of hostilities. Additional Protocol I’s provisions merged portions of Hague and Geneva law.

Article 51, paragraph 1 of Additional Protocol I states, “The civilian population and individual civilians shall enjoy general protection against dangers from military operations.” Article 51, paragraph 2 states in part, “The civilian population as such, as well as individual civilians, shall not be the object of attack.” These treaty provisions re-codified the principle of *discrimination*, also referred to as *distinction*, a cornerstone in the foundation of the law of war.⁶ Article 51, paragraph 3 takes the principle one step further: “Civilians shall enjoy the protection afforded . . . unless and for such time as they take a direct part in hostilities.” Similar language was incorporated

4. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 459; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 485; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 507; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 575.

5. Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 55.

6. *See, e.g.*, U.S. Army General Orders No. 100 art. 22, April 24, 1863 (also referred to as the “Lieber Code” in recognition of its author, Francis Lieber) [hereinafter Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 6 (“[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.”).

in Additional Protocol II.⁷ This issue of the *NYU Journal of International Law and Politics* features critical analyses by several of the participating experts of a five-year effort by the T.M.C. Asser Institute and the International Committee of the Red Cross (“ICRC”), with the assistance of military law of war experts, academics, and representatives of other non-government organizations, to define the phrase “direct part in hostilities.”⁸

Experts’ discussions resurrected the historic tension between Hague and Geneva law, that is, balancing the ability of a military force lawfully to accomplish its wartime missions while protecting individual civilians and civilian populations as a whole. As its title indicates, this article concentrates on, and is a critical history and analysis of, Section IX of the ICRC’s *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.⁹

II. THE LAW OF WAR PRINCIPLE OF DISCRIMINATION IN HISTORY

A. *The Principle of Discrimination in History*

As is the case with many aspects of the law of war, the principle of *discrimination* is based upon mutual responsibilities. Article 51, paragraphs 2 and 3 of Additional Protocol I obligate military forces to refrain from direct attack of the civilian population as such and individual civilians. In turn, there is a concomitant obligation on the part of an individual

7. Additional Protocol II, *supra* note 3, art. 13, para. 3 (“Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities”). Article 3 common to the four 1949 Geneva Conventions uses the phrase “active part in the hostilities.” The experts who participated in the Asser Institute/ICRC meetings to define “direct part in hostilities,” discussed *infra*, agreed that “active” and “direct” are synonymous.

8. 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); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010).

9. Int’l Comm. of the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 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).

civilian not to use his or her protected status to engage in hostile acts—the “equal application” principle in the law of war.¹⁰ Failing to do so may jeopardize the delicate relationship between military forces and civilians, endangering individual innocent civilians and the civilian population as a whole.

The relationship has not been easily defined. Nations struggled for centuries over the degree to which a civilian may act independently or in support of military forces and gain entitlement to prisoner of war status if captured.¹¹ The issue came to a head during the American Civil War (1861-1865) as each side in that conflict employed irregular forces, prompting the Union leadership to seek legal guidance as to when an individual not a member of the regular forces of a government may be entitled to protection if captured. At the request of General-in-Chief of Union Armies Henry Wager Halleck, Dr. Francis Lieber prepared two documents regarding the law of war status of private and public armed groups, the second of which was the well-known U.S. Army General Orders No. 100, the first official summary of the modern law of war.¹² The is-

10. See, e.g., Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. OF THE RED CROSS 931 (2008); Paul Kennedy & George J. Andreopoulos, *The Laws of War: Some Concluding Reflections*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 214, 214-15 (Sir Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994) (discussing the civilian obligation to refrain from hostile acts).

11. See Robert C. Stacey, *The Age of Chivalry*, in THE LAWS OF WAR, *supra* note 10, at 27 (discussing the concept of ‘direct participation in hostilities’ as it evolved through the Middle Ages). For the century preceding the American Civil War, see WILLIAM M. FOWLER, JR., *EMPIRES AT WAR: THE FRENCH AND INDIAN WAR AND THE STRUGGLE FOR NORTH AMERICA, 1754-1763* (2005), which includes descriptions of civilians taking a direct part in hostilities during the French and Indian War; MARK V. KWASNY, *WASHINGTON’S PARTISAN WAR* (1996) (describing General George Washington’s employment of partisan units during the American Revolution (1775-1783)). For discussions of Napoleon’s battles against Spanish guerrilla forces during the Peninsular War (1808-1813), see DON W. ALEXANDER, *ROD OF IRON: FRENCH COUNTERINSURGENCY POLICY IN ARAGON DURING THE PENINSULAR WAR* (1985); DAVID GATES, *THE SPANISH ULCER: A HISTORY OF THE PENINSULAR WAR* (1986); CHARLES J. ESDAILE, *FIGHTING NAPOLEON: GUERRILLAS, BANDITS, AND ADVENTURES IN SPAIN 1808-1814* (2004).

12. Lieber Code, *supra* note 6. Dr. Lieber’s work in reply to General Halleck’s request is described in FRANK FREIDEL, *FRANCIS LIEBER: NINETEENTH-CENTURY LIBERAL* 317 (1947) and RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (1983). The circumstances precipitating General Halleck’s request to Professor Lieber are provided in MICHAEL FELLMAN,

sue arose again in the Franco-Prussian War (1870-1871),¹³ at the 1874 Brussels Conference,¹⁴ at the First Hague Peace Conference (1899),¹⁵ in the Anglo-Boer War (1899-1902),¹⁶ and again at the 1949 Diplomatic Conference that produced the four Geneva Conventions of August 12, 1949 for the Protection of War Victims.¹⁷ One of these conventions, the Conven-

INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE CIVIL WAR 82 (1989); ROBERT R. MACKEY, *THE UNCIVIL WAR: IRREGULAR WARFARE IN THE UPPER SOUTH, 1861-1865* (2004); DANIEL E. SUTHERLAND, *A SAVAGE CONFLICT: THE DECISIVE ROLE OF GUERRILLAS IN THE AMERICAN CIVIL WAR* (2009); and CLAY MOUNTCASTLE, *PUNITIVE WAR: CONFEDERATE GUERRILLAS AND UNION REPRISALS* (2009), each describing Union and Confederate employment of guerrilla units in the American Civil War and, in particular, Union responses to Confederate tactics.

13. See SIR MICHAEL HOWARD, *THE FRANCO-PRUSSIAN WAR* 245, 249-56, 374-75, 377-81, 407, 409, 412 (1961). The issue of *Francs-tireurs* in the Franco-Prussian War is also discussed in JAMES M. SPAIGHT, *WAR RIGHTS ON LAND* 41-46 (1911).

14. See Brussels Conference of 1874: Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War, *reprinted in THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 21; SPAIGHT, *supra* note 13, 47-52.

15. See ARTHUR EYFFINGER, *THE 1899 HAGUE PEACE CONFERENCE* 271-72 (1999). The First Hague Peace Conference took on the issue squarely, denying private civilians engaged in hostile acts entitlement to prisoner of war status. Convention (II) with Respect to the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land art. 1, July 29, 1899, 11 G.B.T.S. 800, 22 Stat. 1803 [hereinafter 1899 Hague Convention], *reprinted in THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 66. This prompted one international lawyer to observe, "The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable. . . . But if populations have a war right as against armies, armies have a strict right against them. They must not meddle with fighting. The citizen must be a citizen and not a soldier." SPAIGHT, *supra* note 13, at 37.

16. See BYRON FARWELL, *THE GREAT ANGLO-BOER WAR* 399-450, 467-83 (1976).

17. This history, too lengthy for this article, is provided in the author's *Combatants in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, NAVAL WAR COLLEGE INT'L L. STUD. NO. 85 247, 261-70 (2009), available at <http://www.usnwc.edu/Research—Gaming/International-Law/RightsideLinks/Studies-Series/documents/Vol-85-Web1.aspx>. See also Emily Camins, *The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity*, 90 INT'L REV. RED CROSS 853 (2008) (tracing the historical factors and trends which influenced the development of the "direct participation" exception in its current form).

tion (III) Relative to the Treatment of Prisoners of War,¹⁸ in acknowledgement of the role in World War II of the British Special Operations Executive (SOE) and U.S. Office of Strategic Services (OSS)¹⁹ in training, supplying, supporting, and employing State-sanctioned resistance forces in opposition to Axis occupation and in employing civilians in support of military forces, broadened the degree to which captured civilians were entitled to prisoner of war status if captured.²⁰ Private citizens engaged in a non-international armed conflict against the government in power gained basic humanitarian protections in Article 3 common to the four 1949 Geneva Conventions, but did not gain the combatants' privilege, discussed *infra*, or prisoner of war status.

The 1949 Geneva Conventions, while comprehensive in the areas they addressed, nonetheless are limited in range, focusing on protection for military personnel *hors de combat* (wounded, sick, or shipwrecked), military medical personnel, facilities, and transport, and military and civilian personnel in

18. Convention III, *supra* note 4.

19. Representative histories are HENRI MICHEL, *THE SHADOW WAR: EUROPEAN RESISTANCE, 1939-1945* (R. Barry trans., 1972); MICHAEL R.D. FOOT, *SOE IN FRANCE* (1966); FOOT, *RESISTANCE: EUROPEAN RESISTANCE TO NAZISM, 1940-1945* (1977); FOOT, *SOE: AN OUTLINE HISTORY OF THE SPECIAL OPERATIONS EXECUTIVE 1940-1946* (1984); FOOT, *SOE IN THE LOW COUNTRIES* (2001); JERGEN HÆSTRUP, *EUROPE ABLAZE* (1978); DAVID STAFFORD, *BRITAIN AND EUROPEAN RESISTANCE, 1940-1945* (1980); CHARLES CRUICKSHANK, *S.O.E. IN THE FAR EAST* (1983); WILLIAM MACKENZIE, *THE SECRET HISTORY OF SOE: THE SPECIAL OPERATIONS EXECUTIVE, 1940-1945* (2000); FRANCIS B. MILLS, ROBERT MILLS, & JOHN W. BRUNNER, *OSS OPERATIONS IN CHINA* (2002). The present author has identified organized resistance movements authorized by exiled governments and provided SOE and OSS missions in Albania, Belgium, Burma, China, Czechoslovakia, Denmark, Finland, France, Indo-China, Greece, Italy, Malaya, Norway, Poland, Romania, Serbia, Singapore, Sumatra, Thailand, and Yugoslavia during Axis occupation.

20. In recognition of the World War II resistance experience, Article 4A(2) extended prisoner of war entitlement to "organized resistance movements belonging to a Party to the conflict . . . provided that . . . such resistance movements fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; and (d) that of conducting their operations in accordance with the laws and customs of war." Thus, Article 4A(4) and (5) broadened the scope of civilians accompanying or supporting the armed forces entitled to prisoner of war status. ICRC, *COMMENTARY ON GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* 52-61 (Jean S. Pictet ed., 1960).

enemy hands, whether as a result of detention of the latter during enemy occupation or battlefield capture. Given the degree to which individual civilians and the civilian population as such fell victim to military operations in World War II, particularly in the bombing campaigns of each side's war industries, the issue of *who* was a civilian and under what circumstances he or she forfeited protection from direct attack remained unaddressed (much less resolved) in treaty law. The issue was not ignored entirely in State practice, as individual nations (such as the United States) developed rules of engagement in order to implement the law of war principle of *discrimination*.

The premise set forth in Mao Tse-tung's primer on revolutionary warfare that the general civilian population is the water in which the fish—that is, the guerrilla—survives²¹ challenged the law of war principle of *discrimination* in post-World War II wars for independence and other conflicts in which guerrilla warfare occurred. Draft rules prepared by the ICRC²² to protect the civilian population, limited in their detail and silent on the issue of civilians engaging in hostile acts in armed conflicts, gained little international interest at the height of the Cold War and in the midst of armed conflicts in the Philippines (1946-1954),²³ Indochina (1946-1954),²⁴ Malaya (1948-1960),²⁵ Kenya (1952-1960),²⁶ Algeria (1954-1962),²⁷ Aden (1962-1967),²⁸ and Oman (1958-1959, 1970-1974),²⁹ among

21. MAO TSE-TUNG ON GUERRILLA WARFARE 93 (Brigadier General Samuel B. Griffith, trans., 1961).

22. ICRC, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR (1956), *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 339-43.

23. *See generally* COLONEL NAPOLEON D. VALERIANO & LIEUTENANT COLONEL T. R. BOHANNON, COUNTERGUERRILLA OPERATIONS: THE PHILIPPINE EXPERIENCE (1962).

24. *See generally* BERNARD FALL, STREET WITHOUT JOY (1961).

25. *See generally* ANTHONY SHORT, THE COMMUNIST INSURRECTION IN MALAYA, 1948-1960 (1975); RICHARD L. CLUTTERBUCK, THE LONG LONG WAR: COUNTERINSURGENCY IN MALAYA AND VIETNAM (1966); NOEL BARBER, THE WAR OF THE RUNNING DOGS: THE MALAYAN EMERGENCY: 1948-1960 (1971).

26. *See generally* FRANK KITSON, GANGS AND COUNTER-GANGS (1960); KITSON, BUNCH OF FIVE (1977); DAVID ANDERSON, HISTORIES OF THE HANGED: THE DIRTY WAR IN KENYA AND THE END OF EMPIRE (2005).

27. *See generally* ALISTAIR HORNE, A SAVAGE WAR OF PEACE (1977); JOHN TALBOTT, THE WAR WITHOUT A NAME: FRANCE IN ALGERIA, 1954-1962 (1980).

28. *See generally* JONATHAN WALKER, ADEN INSURGENCY: THE SAVAGE WAR IN SOUTH ARABIA, 1962-1967 (2005).

others.³⁰ The issue of when a civilian loses protection remained unresolved through the U.S. war in the Republic of Viet Nam (1961-1975), where guerrilla and counter-guerrilla operations were prevalent though, as previously noted, military units worked under rules of engagement designed to protect innocent individual civilians and the civilian population as a whole.³¹ The question in that context was not entitlement to prisoner of war status for captured guerrillas, but rather attack of civilians engaged in hostile acts or identified as providing material support within the insurgent infrastructure.³²

29. See generally COLONEL TONY JEAPES, SAS OPERATION OMAN (1980).

30. Works typical of the era are MODERN GUERRILLA WARFARE (Franklin Mark Osanka ed., 1962); PETER PARET & JOHN W. SHY, GUERRILLAS IN THE 1960's (rev. ed. 1962); ROBERT TABER, THE WAR OF THE FLEA (1965), as well as HAROLD JAMES & DENIS SHEIL-SMALL, THE UNDECLARED WAR: THE STORY OF THE INDONESIAN CONFRONTATION, 1962-1966 (1971); PETER DICKENS, SAS: THE JUNGLE FRONTIER (1983); PETER DENIS & JEFFREY GRAY, EMERGENCY AND CONFRONTATION: AUSTRALIAN MILITARY OPERATIONS IN MALAYA AND BORNEO, 1950-1966 167-316 (1996); CHRISTOPHER PUGSLEY, FROM EMERGENCY TO CONFRONTATION: THE NEW ZEALAND FORCES IN MALAYA AND BORNEO, 1949-1966 195-335 (2003). Each of the authors in the latter group describe the clandestine armed conflict in Borneo between Malaya and Indonesia, in which the defense of the former from attacks by the latter was provided in the main by British, Australian, and New Zealand military forces.

31. See, e.g., GUENTER LEWY, AMERICA IN VIETNAM 236, 238-39, 241 (1978) (discussing rules of engagement as they were implemented in Vietnam). Professor Lewy correctly notes that rules of engagement implementation and enforcement are a command responsibility.

32. As a matter of policy, the United States provided prisoner of war *protection*, but not status *per se* to captured members of the National Liberation Front (commonly known as the Viet Cong), the guerrilla forces operating in South Viet Nam that were trained, equipped, organized, and controlled by the North Vietnamese. See generally DOUGLAS PIKE, VIET CONG (1966); MICHAEL MOYAR, TRIUMPH FORSAKEN: THE VIETNAM WAR, 1954-1965 92-98 (2006). In practice, there was virtually no distinction between *status* and *protection*. GEORGE S. PRUGH, LAW AT WAR: VIET NAM, 1964-1973 61-63 (1975).

B. *A Fundamental Distinction: Combatants and Civilians*

Fundamental to the law of war is the combatant's privilege. The law of war recognizes certain rights of belligerents.³³ A combatant:³⁴

- (1) Is entitled to carry out attacks on enemy military personnel and objectives, subject to specific law of war prohibitions (such as perfidy and denial of quarter) and limitations on the risk to civilians that may be incident to an attack.³⁵
- (2) May be the object of lawful attack by enemy military personnel at any time, wherever located, regardless of the duties in which he or she is engaged.
- (3) Enjoys combatant immunity, that is, bears no criminal responsibility (a) for killing or injuring (i) enemy military personnel or (ii) civilians taking a direct part in hostilities, or (b) for causing damage or destruction to property in connection with military operations, provided his or her acts, including the means

33. The present author agrees with Sir Adam Roberts that the "law recognizes certain rights of belligerents, or even that it suffers them to take certain actions. It is not the source of such rights. . . . Seen in this light, it is hard to see how the laws of war could be a basis for a set of ad hoc variations expanding or withdrawing something so intrinsic as the right to attack the armed forces of an adversary," to include civilians taking a direct part in hostilities. Roberts, *supra* note 10, at 935. This critical element is not contained in Section IX of the *Interpretive Guidance*.

34. The term "combatant" does not include uniformed members of the armed forces who are chaplains or who are entitled to status as medical personnel as that term is defined in Article 24 of the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field. Convention I, *supra* note 4, art. 24.

35. "Perfidy" is defined in Article 37, paragraph 1 of Additional Protocol I, as "[a]cts inviting the confidence of an adversary to lead it to believe it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence." Additional Protocol I, *supra* note 2, art. 37. Examples included therein are feigning an intent to surrender, and feigning civilian or non-combatant status. See Hague Convention (1899), *supra* note 15, art. 23. The prohibition was repeated in Article 23(b) of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land of October 18, 1907. Hague Convention (1907), *supra* note 5, art. 23(b). *Denial of quarter* includes refusal of an offer to surrender or an order to take no prisoners. For denial of quarter, see *id.* at paras. (c)-(d).

employed to commit those acts, have been in compliance with the law of war.

- (4) If captured is entitled to prisoner of war status.
- (5) If captured must be treated humanely.
- (6) May be tried for breaches of the law of war.
- (7) May only be punished for breaches of the law of war as a result of a fair and regular trial.³⁶

If authorized, a civilian may accompany military forces in the field in time of war. If captured, he or she is entitled to prisoner of war status, but does not enjoy combatant status.³⁷ If the civilian's activities are determined by the enemy to constitute taking a "direct part in hostilities," the civilian relinquishes his or her immunity from direct attack. In meetings to define "direct part in hostilities," experts in the T.M.C. Asser Institute and ICRC agreed that the issue of status upon capture was separate and apart from the issue of when a civilian may be regarded as taking a direct part in hostilities.³⁸

In contrast, a civilian in a peacetime law enforcement situation is a civilian. Law enforcement officers may resort to deadly force only (a) to protect themselves and others from immediate danger of death or serious bodily harm,³⁹ or (b) to prevent the escape of a dangerous suspect.⁴⁰

36. U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 4.005(a) (forthcoming) (citations omitted).

37. Convention III, *supra* note 4, art. 4, para. A(4).

38. See *Interpretive Guidance*, *supra* note 9, at 11 ("[This report's] conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty.").

39. *Monroe v. City of Phoenix*, 248 F.3d 851, 862 (9th Cir. 2001); *Wood v. City of Lakeland*, 2003 F.3d 1288, 1291 (11th Cir. 2000); *Pena v. Leombruni*, 200 F.3d 1031, 1035 (7th Cir. 1999); *Mettler v. Whitedge*, 165 F.3d 1197, 1203 (8th Cir. 1999); *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786-87 (4th Cir. 1998); *Colston v. Barnhart*, 130 F.3d 96, 99-100 (5th Cir. 1997); *Montoute v. Carr*, 114 F.3d 181, 185 (11th Cir. 1997); *Elliott v. Leavitt*, 99 F.3d 640, 644 (4th Cir. 1996); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996); *Wilson v. Meeks*, 52 F.3d 1547, 1554-55 (10th Cir. 1995); *Roy v. Lewiston*, 42 F.3d 691, 695-96 (1st Cir. 1994).

40. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); *Smith v. Freeland*, 954 F.2d 343, 346 (6th Cir. 1992); *Forrett v. Richardson*, 112 F.3d 416, 420 (9th Cir. 1997).

In armed conflict, the self-defense issue is addressed by national authorities and military commanders through rules of engagement issued to the individual soldier, sailor, airman, or Marine. Once authorized to commence combat operations and following rules of engagement and the law of war, and thus subject to law of war prohibitions or restrictions previously noted, soldiers are not constrained by the law of war from applying the full range of lawful weapons against enemy combatants and civilians taking a direct part in hostilities.

C. *The 1974-1977 Diplomatic Conference*

The history of the road to the 1974-1977 Diplomatic Conference is told elsewhere,⁴¹ and need not be repeated here. The circumstances leading to definition of the phrase "direct part in hostilities" do, however, necessitate some elaboration. In addition to the language in Article 51, paragraph 3 Additional Protocol I contained other language that raised questions with regard to the breadth and depth of conduct to which the phrase "direct participation in hostilities" was applicable.

Article 43, paragraphs 1 and 2 extended the combatant's privilege to certain private armed groups,⁴² ending the centuries-old monopoly that only nations and their authorized armed forces (including organized resistance movements of a State Party to an international armed conflict, as set forth in Article 4A(2), 1949 Geneva Convention Relative to the Treatment of Prisoners of War)⁴³ may engage in war, while providing new rules for the manner in which private armed groups may engage in hostilities.⁴⁴ Article 44, paragraph 1 provided

41. See, e.g., MICHAEL BOTHE, KARL JOSEF PARTSCH, & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 1-4 (1982); ICRC, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* xxxii-xxxv (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter *ICRC COMMENTARY*].

42. See *infra* note 44.

43. See Introductory Note to Convention III, *supra* note 4 (explaining the break between Additional Protocol I and previous laws of war), *reprinted in THE LAWS OF ARMED CONFLICTS*, *supra* note 1, at 507.

44. See Additional Protocol I, *supra* note 2, art. 43 ("The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to a Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to

prisoner of war status to any member of an armed group as defined in Article 43, then continued with the following in paragraph 3:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement; and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.⁴⁵

These provisions were criticized in the run-up to and during the Diplomatic Conference.⁴⁶ They were a principal reason for the United States' decision against ratification of Additional Protocol I⁴⁷ and the entry of qualifying statements of

an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law in armed conflict. . . . Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.”).

45. *Id.* art. 44(3).

46. See Gerald I. A. D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, BRIT. Y.B. INT'L L. 173, 176-78 (1971) (discussing the rationales for restricting belligerent status to States' armed forces); REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G. I. A. D. DRAPER, OBE 195 (Michael A. Meyer & Hilaire McCoubrey eds., 1998) (noting the controversy about whether Article 44 “legitimized” terrorism). The political aspect of negotiation of Additional Protocol I is described in KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING (1984).

47. The author participated in the legal, military, and policy review of Additional Protocols I and II. The claim regarding the United States' reasons for not ratifying the Additional Protocol I are based on this experience. See also Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, June 10, 1977, S. TREATY DOC. NO. 100-2 (1987) (containing a statement from President Reagan urging Congress to adopt Additional Protocol II, but

understanding with respect to these provisions by a number of governments that ratified Additional Protocol I.⁴⁸ A leading commentary, prepared by three members of government delegations to the Diplomatic Conference, concluded: “As the interpretation of these terms may affect matters of life or death, it is indeed regrettable that the ambiguities are left for resolution to the practice of States in future conflicts.”⁴⁹

While the uncertain interpretation of these provisions was relevant with respect to members of a *levee en masse* and other private armed groups, particularly with respect to the point at which its members are considered to be taking a direct part in hostilities, it also related to civilians who accompany the armed forces in the field. Statements such as that made by the United Kingdom referring to “a military deployment preceding the launching of an attack” were relevant to the determination of what constitutes taking a “direct part in hostilities.” These statements prompted the T.M.C. Asser Institute and the ICRC to co-organize and convene a series of meetings of experts beginning in 2003 as an effort to place some flesh on the bare bones of the phrase.

Before proceeding, it is important to understand what the intentions of the Asser Institute/ICRC expert meetings were and were not:

- As discussed in the preceding pages, the issue was not entitlement to prisoner-of-war status. That issue was resolved by the treaty provisions previously discussed, although not entirely to the satisfaction of all.

describing Additional Protocol I as “fundamentally and irreconcilably flawed”).

48. A representative statement is that which was issued by the United Kingdom: “It is the understanding of the United Kingdom that: the situation in the second sentence of paragraph 3 [of Article 44] can only exist in occupied territory or in armed conflicts covered by paragraph 4 of Article 1; [and] ‘deployment’ in paragraph 3(b) means any movement towards a place from which an attack is to be launched.” Similar statements were made by the governments of Argentina, Australia, Belgium, Canada, France, Germany, Ireland, Italy, Japan, Republic of Korea, and Netherlands. All statements are contained in an online ICRC database, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

49. BOTHE, PARTSCH & SOLF, *supra* note 41, at 302.

- By the same token, the discussion was not intended to address lack of entitlement to combatant status, that is, unprivileged belligerency, were a civilian to take a direct part in hostilities.
- The meetings focused instead on the meaning of the language in Article 51, paragraph 3 of Additional Protocol I. The question addressed was: Under what circumstances may a civilian be regarded as taking a direct part in hostilities, whether as a civilian lawfully accompanying the armed forces in the field in time of war or a private civilian engaged in guerrilla or terrorist operations, therefore relinquishing his or her immunity from direct attack?

III. SECTION IX OF THE ICRC INTERPRETIVE GUIDANCE

A. *Proposal of the Section and its Content*

A complete history and a detailed analysis of the experts' meetings are beyond the scope of this article. In large measure they have been provided in the contributions in this issue by fellow participants in the experts' meetings.⁵⁰ The fourth, and what was to have been the final, experts' meeting was held in Geneva November 27-28, 2006. A number of points, such as those identified by the aforementioned colleagues in their respective articles, remained unresolved after this meeting.

On July 6, 2007, the ICRC sent to participating experts its revised draft interpretive guidance based upon the fourth experts' meeting.⁵¹ Included as part of the revised draft was an entirely new draft Section IX, "General Restraints on the Use of Force in Direct Attack." Without consultation with participating experts or its co-sponsor, T.M.C. Asser Institute, the ICRC had added a section containing a statement of legal constraints on use of force when a civilian is determined to be taking a direct part in hostilities.

Experts' reactions to Section IX, both as to its addition to the Interpretive Guidance and its substance, were instantane-

50. See Boothby, *supra* note 8; Schmitt, *supra* note 8; Watkin, *supra* note 8.

51. ICRC, *Revised Draft: Interpretive Guidance on the Notion of "Direct Participation in Hostilities"* (2007) (*prepared by Nils Melzer*) [hereinafter *Revised Draft Interpretive Guidance*].

ous and vigorous.⁵² The issue came to a head at the annual Roundtable of the International Institute of Humanitarian Law in Sanremo, Italy, on September 5, 2007, with an impromptu meeting between ICRC officials and thirteen experts involved in the “direct participation” process.⁵³ Conceding slightly, the ICRC officials agreed to host an additional meeting of experts to discuss Section IX.

The meeting took place on February 5-6, 2008, in Geneva. Two of the seven working sessions were devoted to Section IX. Most experts’ comments, and particularly those of the military experts, were strongly critical for reasons ranging from questions as to the study’s remit to doubts about the ICRC’s “one size fits all” use-of-force formula that would apply to combatants in international armed conflict and across the conflict spectrum to civilians taking a direct part in hostilities. Two experts saw a limited basis for Section IX in the context of belligerent occupation and non-international armed conflict. Three of the participating experts, all academicians, argued for retention of Section IX.⁵⁴

The ICRC gave little deference to the advice of its military experts, declining to correct, much less delete, Section IX. Its final action consisted of forwarding the final text to participants shortly before its public release in late May 2009.⁵⁵ Experts were informed by the ICRC that anyone who continued to disagree with the product could ask that his or her name be removed from the list of participants. When many did so,⁵⁶

52. The author participated in numerous online discussions in response to Section IX. This characterization is based on these experiences.

53. See discussion of criticisms *infra* Parts 4A-B.

54. NILS MELZER, ICRC, DISCUSSION NOTES, FIFTH INFORMAL EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER IHL 3-6 (2008). The author’s notes indicate that no fewer than fifteen experts spoke out against Section IX.

55. The text was forwarded more to inform than to seek comment, as the Interpretive Guidance had been adopted by the Assembly of the ICRC on February 26, 2009, more than two months before it was forwarded to participating experts. *Interpretive Guidance*, *supra* note 9, at 9.

56. The number of participants who requested deletion of their name was at least one-third, including the author. One individual (not a participant) was informed by a senior ICRC official that the ICRC was “rocked back on its heels” by the number of participants who requested removal of their names.

the ICRC decided against publication of the names of any participating experts.⁵⁷

B. *Bases for ICRC Section IX*

1. *Pictet's use-of-force continuum*

There were at least three bases for the ICRC's addition of Section IX. The first, referred to by ICRC participants during the experts' meetings and in Title IX itself, was an argument made by Jean S. Pictet more than three decades earlier regarding the law of war principle of *humanity*:

War is in fact, a means, the ultimate means, whereby a State can bend another to its will. It consists of employing the necessary constraint to obtain that result. All violence which is not indispensable for achieving that object is therefore without purpose. It then becomes merely cruel or stupid.

To achieve its purpose, which is conquest, a State engaged in a conflict will seek to destroy or weaken, at the least loss to itself, the enemy's war potential, which consists of two factors: human resources and material resources.

The human potential, by which we mean individuals directly contributing to the war effort, may be reduced in three ways: death, wound or capture. These three methods are equivalent as regards military results. To be cynical, all three are equally capable of eliminating the enemy's strength. Humanitarian reasoning is different. Humanity demands capture rather than wounds, and wounds rather than death; that non-combatants shall be spared as much as possible; that wounds shall be inflicted as lightly as circumstances permit, in order that the wounded may be healed as painlessly as possible; and that captivity shall be made as bearable as possible.⁵⁸

57. The author was informed by the ICRC of its decision by e-mail. E-mail from dc_jur_them.gva@icrc.org (May 26, 2009. 09:38:46 EST) (Subject: List of Experts / Interpretive Guidance on "Direct Participation in Hostilities") (on file with author).

58. JEAN S. PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 32 (1975). The Interpretive Guidance also cites Pictet's famous statement that "[i]f we can put a soldier out of action by capturing him, we

Pictet offered similar arguments in the experts' meetings on the law of war related to conventional weapons hosted by the ICRC during the 1974-1977 Diplomatic Conference. First, "if [a combatant] can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action, grave injury should be avoided."⁵⁹ Second, "if two or more weapons would be available which would offer equal capacity to overcome (rather than 'disable') an adversary, the weapon which could be expected to employ the least injury ought to be employed."⁶⁰ His second point was challenged by another expert, who argued that while

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." *Interpretive Guidance*, *supra* note 9, at 82 n.221 (citing PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75 (1985)).

Although this author is among those who was privileged to have been a contributor to a *Festschrift* to honor Jean Pictet, Pictet's expertise was recognized by *Festschrift* authors as residing in Geneva law (protection of war victims) rather than Hague law (conduct of hostilities). See W. Hays Parks, *Pictet's Commentaries*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 495-98 (Christophe Swinarski ed., 1984). Pictet's personal view—never given serious consideration by governments in development of Additional Protocols I or II or during the 1980 Convention on Certain Conventional Weapons—was resurrected by the ICRC as justification for Section IX as if it were an internationally-accepted legal standard, but without supporting authority.

By way of minor clarification to benefit the reader unfamiliar with the full history of the Asser Institute/ICRC project on "direct participation in hostilities," the study was made public in late May 2009, and published in the INTERNATIONAL REVIEW OF THE RED CROSS, December 2008 edition. The latter did not precede the former. As sometimes happens with periodicals, the actual publication date was later than that indicated for the issue.

59. ICRC, WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS: REPORT ON THE WORK OF EXPERTS 13 (1973). While the ICRC's *Interpretive Guidance* refers to "Pictet's famous statement," the highly-detailed, 126-page U.S. Delegation report on the Lucerne conference mentioned neither of Pictet's points, suggesting the lack of serious regard given them by the participants. Compare *Interpretive Guidance*, *supra* note 9, at 82 n. 221 with U.S. DEP'T OF STATE, REPORT OF THE UNITED STATES' DELEGATION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON WEAPONS THAT MAY CAUSE UNNECESSARY SUFFERING OR HAVE INDISCRIMINATE EFFECTS (1974).

60. ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE USE OF CERTAIN CONVENTIONAL WEAPONS ¶ 25 (1975) [hereinafter CONFERENCE ON CONVENTIONAL WEAPONS]. It is standard procedure for the ICRC to avoid attribu-

the ideal solution might perhaps be that the soldier be equipped with a range of weapons from which he could select the one that would, in the concrete situation, put his enemy out of action with the least possible injury, this solution was impracticable and that, hence, even much graver injury than the minimum strictly required in a given situation could not always be avoided.⁶¹

Another expert responded with a point that goes to each of Pictet's arguments as well as Section IX of the ICRC's "direct participation" study: "Even if the first [Pictet's] interpretation [. . .] were accepted, this would leave open how much injury is required to disable an enemy soldier. According to some experts, it might be necessary, particularly at short range, to inflict a severe wound for this purpose, as a comparatively minor injury might enable him to continue fighting."⁶²

Neither of Pictet's arguments received serious consideration, much less support, from government delegations in the preparatory or formal conference sessions of the 1978-1980 United Nations Conference on Prohibitions and Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects that produced the 1980 treaty of the same title.⁶³

tion of comments to an expert by name. However, the quote is attributed to Pictet by another participating expert. See Frits Kalshoven, *The Soldier and His Golf Clubs*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 369, 380 (Christophe Swinarski ed., 1984).

61. CONFERENCE ON CONVENTIONAL WEAPONS, *supra* note 60, ¶ 27. Pictet's argument and the quoted response prompted Professor Kalshoven's *The Soldier and His Golf Clubs*, *supra* note 60, which facetiously suggested that to comply with Pictet's interpretation each soldier would be legally obligated to go into combat with a bag of weapons and to select the weapon that enabled compliance under the circumstances, much as a golfer selects a golf club for each individual stroke.

62. CONFERENCE ON CONVENTIONAL WEAPONS, *supra* note 60, ¶ 26. This comment is borne out by the tragic example discussed below relating to the 1986 murder of two Federal Bureau of Investigation agents and wounding of five others by a single gunman after he received what medical examiners described as a fatal wound. See *infra* p. 42 and note 127.

63. The author was a member of the United States delegation. The characterization given of the participants' responses to Pictet's arguments is based on this experience. See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342

2. The Public Committee against Torture in Israel v. The Government of Israel

The second and third reasons for the ICRC's decision to add Section IX overlapped. It became apparent during the experts' meetings from the timing of the ICRC's addition of Section IX and the subsequent discussion that the ICRC's decision to add Section IX was driven in large measure by the decision of the Supreme Court of Israel in *The Public Committee against Torture in Israel v. The Government of Israel*.⁶⁴ This deci-

U.N.T.S. 137, 19 I.L.M. 1523, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 181 [hereinafter 1980 Convention on Certain Conventional Weapons]. For an overall history of the conference, the Convention, and its protocols, see WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT (2009); Parks, *Conventional Weapons and Weapons Reviews*, 8 Y.B. INT'L HUMANITARIAN L. 55 (2005).

64. HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2005] IsrSC 57(6) 285. That this decision, wholly unique to Israel's situation, became the trigger for Section IX is apparent in the "direct participation" final report. Acknowledging that Section IX's constraints on use of force were unlikely to be applicable in "classic large-scale confrontations between well-equipped and organized armed forces," the ICRC stated: "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 conflict." *Interpretive Guidance*, *supra* note 9, at 80-81. The footnote supporting this argument cites language from the Israeli targeted killing case as its authority: "[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can 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 soldiers, that it is not required. . . . 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. . . . Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used." *Id.* at 81 n.220.

In attempting to apply the practice across the conflict spectrum, eventually reduced to occupation and non-international armed conflict, the Interpretive Guidance offers an over-simplification of each. Nils Melzer, the Section IX author, would have done well to have researched and borne in mind the intensity of battle that can occur in belligerent occupation rather than depend solely on a single case in a situation unique to a single nation or downplay the intensity of combat that can occur in a non-international armed conflict. *See infra* note 65. For examples of such intense conflicts, see DAN KURZMAN, THE BRAVEST BATTLE (1976) (describing the Warsaw Ghetto

sion upheld Israel's practice of so-called "targeted killings." The ICRC's focus on the case was prompted by Nils Melzer, an ICRC employee who joined the Asser Institute/ICRC-hosted meetings in 2004 following completion of his graduate work.⁶⁵

Uprising against Nazi occupation, April 9 to May 16, 1943); ISRAEL GUTMAN, *RESISTANCE: THE WARSAW GHETTO UPRISING* (1994); BERNARD B. FALL, *HELL IN A VERY SMALL PLACE: THE SIEGE OF DIEN BIEN PHU* (1966) (providing an example of intense fighting in non-international armed conflict, as experienced by French forces in their 1954 battle with the Viet Minh at Dien Bien Phu); DON OBERDORFER, *TET!* (1971) (detailing the experience of U.S., Australian, and Republic of Korea forces with the Viet Cong in the Republic of Viet Nam during the latter's two-month Tet offensive, January 29 to March 31, 1968); BING WEST, *NO TRUE GLORY: A FRONTLINE ACCOUNT OF THE BATTLE FOR FALLUJAH* (2006) (describing battles in Iraq in November 2004); MARK BOWDEN, *BLACK HAWK DOWN: A STORY OF MODERN WAR* (1999) (examining peacekeeping operations, such as U.S. forces experienced in Mogadishu on October 3, 1993 against the tribal forces of Somali warlord Mohammed Farrah Aidid).

65. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2009). Dr. Melzer's treatise, which attempts to force a peacetime law enforcement/human rights law paradigm on military use of force across the armed conflict spectrum, was the basis for Section IX of the Interpretive Guidance. What is undetermined is whether Dr. Melzer brought his theory into the process or whether Dr. Melzer was brought into the meetings of experts by the ICRC because of his theory—that is, whether the ICRC embraced his argument as a way to use the T.M.C. Asser/ICRC process to legislate what it wished the law to be. Nor is it known whether Dr. Melzer's thesis topic was selected by him or by the ICRC with this purpose in mind.

TARGETED KILLING must be read with caution, as it contains errors of facts and law. For example, Melzer alleges that the United States carried out "air raids against the Tripoli residence of Libyan leader, Muammar Qadhafi." *Id.* at 37. The present author was a legal adviser for the April 14-15, 1986 air strike against terrorist-related targets in Libya. A residence of Qadhafi was located within the heavily-fortified Tarabulus (Aziziyah) Barracks in Tripoli, a principal command and control center for Qadhafi's worldwide terrorist network, but neither Qadhafi (whose whereabouts were unknown) nor his residence were targeted. *See* Hays Parks, *Lessons from the Libya Airstrike*, 36 *NEW ENG. L. REV.* 755, 762 (2002) (describing which target nominations were endorsed by the Joint Chiefs of Staff and the Secretary of Defense, and which were ultimately approved by President Reagan); Hays Parks, *Crossing the Line*, 112 *USNI PROCEEDINGS* 40, 47 (1986). Similarly, Melzer alleges U.S. law enforcement instituted "'shoot to kill' rules of engagement" following the September 11, 2001, terrorist attacks on New York and Washington. Melzer, *supra*, at 38. Domestic law enforcement authorities do not use "rules of engagement," but rules for use of deadly force based upon the U.S. Constitution and federal court cases, discussed *infra*. Post-September 11, 2001 rules for use of force remained the same and within Constitutional requirements and case law. Dr. Melzer acknowledged and quoted

While Dr. Melzer's educational experience and his service as one of the ICRC co-chairmen was useful to the overall process, the situation of Israel in contending for more than four decades with daily threats posed by the Palestine Liberation Organization (Fatah), Hamas, Hezbollah,⁶⁶ and other terrorist groups within its own territory, in the territory it captured during its 1967 six-day war with Egypt, Jordan, Lebanon, and Syria,⁶⁷ and its subsequent administration of those territories,

from one U.S. Supreme Court case but, as will be shown, U.S. case law is far more substantial.

66. One source provides a summary of the events and casualty statistics for each of the main actors on the Palestinian side of the Israel-Palestine conflict:

Group name	Suicide Casualties	Suicide Casualties	Suicide Casualties	Suicide Casualties
Fatah	180	1,596	22	640
Popular Front for the Liberation of Palestine	63	505	7	161
Hamas	543	3,474	50	2,485
Palestine Islamic Jihad	150	1,165	29	787
Unknown/other	1,798	2,754	38	485
Subtotal (5 groups)	2,734	9,494	146	4,558
Percent of total (48 groups)	90.6%	81.9%	94.2%	94.8%

AARON CLAUSET, LINDSAY HEGER, MAXWELL YOUNG & KRISTIAN SKREDE GLEDITSCH, STRATEGIC SUBSTITUTION AND COMPLEMENTARITY IN THE ISRAEL-PALESTINE CONFLICT 7 (2008), available at http://sbs-xnet.sbs.ox.ac.uk/complexity/complexity_PDFs/CABDyN%20Seminar%202007_2008/substitution_Gleditsch.pdf. The history of terrorist threats against Israel is both lengthy and extensive. See generally WILLIAM V. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO (1991); AMIR TAHERI, HOLY TERROR: INSIDE THE WORLD OF ISLAMIC TERRORISM (1987); RASHID KHALADI, UNDER SIEGE: PLO DECISIONMAKING DURING THE 1982 WAR (1986); PLO IN LEBANON: SELECTED DOCUMENTS (Raphael Israeli ed., 1983); EDGAR O'BALLANCE, ARAB GUERRILLA POWER (1973).

67. See generally CHAIM HERZOG, THE ARAB-ISRAELI WARS 145-91 (1982). During this conflict Israel captured territory previously belonging to Egypt (Sinai, including the Gaza Strip), Syria (Golan Heights) and Jordan (West Bank, including Jerusalem), and the southern part of Lebanon. Although never acknowledging that it was an occupying power or the direct application of the provisions relevant to occupied territory of the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War,

is unique but of limited value outside that context. Carefully read, the court's decision was narrow in its scope of application in its consideration of the Israeli Defense Forces' [IDF] practice of (as termed by the Government of Israel) "the policy of targeted frustration of terrorism"⁶⁸ and (as termed by President (Emeritus) Aharon Barak in the court's opinion) "preventative strike" against terrorist threats *in the area* in immediate proximity to Israel, and within the borders of Israel,⁶⁹ from which terrorist attacks against Israeli civilians were planned, prepared, and launched.⁷⁰ While holding that IDF

supra note 4, Israel administered the territories under its control through reference to the law of war. See, e.g., 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL: THE LEGAL ASPECTS (Meir Shamgar ed., 1982).

68. Legal criteria developed by the IDF for practice of its policy were specific: "that arrest is impossible; that targets are combatants; that senior cabinet members approve each attack; that civilian casualties are minimized; that operations are limited to areas not under Israeli control; and that targets are identified as a future threat. Unlike prison sentences, targeted killing cannot be meted out as a punishment for past behavior . . . [or] for revenge, but only for deterrence." Laura Blumenfeld, *In Israel, a Divisive Struggle over Targeted Killing*, WASH. POST, Aug. 27, 2006, at A12. In *The Public Committee against Torture in Israel v. The Government of Israel*, the court disagreed only with reference to the terrorists as "combatants." While acknowledging that "combatants . . . are legitimate targets for military attack [and] their lives and bodies are endangered by the combat [and that therefore] they can be killed and wounded," HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov't of Israel [2005] IsrSC 57(6) ¶ 23, the court determined that as an unprivileged belligerent, a terrorist is a civilian "who is [not] entitled to the same protection to which civilians who are not unlawful combatants are entitled. . . . [H]e is a civilian who is not protected from attack so long as he is taking a direct part in hostilities. Indeed, a person's status as unlawful combatant is not merely an issue of the internal state penal law. It is an issue for international law dealing with armed conflicts." *Id.* ¶ 26 (citing Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003)). Continuing, the court stated: "A civilian who violates [the law of war] and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted a prisoner of war." *Pub. Comm. Against Torture* ¶ 31.

69. "The terrorist attacks take place both in the territory of Judea, Samaria, and the Gaza Strip, and within the borders of the State of Israel. . . . Over the last five years, thousands of acts of terrorism have been committed against Israel. In the attacks, more than one thousand Israeli civilians have been killed." *Pub. Comm. Against Torture* ¶ 1.

70. *Pub. Comm. Against Torture* ¶¶ 2, 41, 60.

actions were not police activity but an armed conflict in which the law of war applied, the Court did not extend its ruling to international armed conflict, belligerent occupation, or non-international armed conflict, but rather, limiting its holding to its military operations in specified areas within or adjacent to its territory against a continuous terrorist threat greater than that faced by any other nation.⁷¹ In acknowledging that “when there is a gap (*lacuna*) in [the law of war], it can be supplemented by human rights law,”⁷² the court did not conclude such a gap existed in the law of war with respect to use of deadly force by individual soldiers against enemy combatants or civilians taking a direct part in hostilities in international armed conflict (including belligerent occupation), non-international armed conflict, or in the circumstances faced by Israel.⁷³

Of greatest importance to the subject of this article, the court, in agreeing with IDF practice, declared:

[A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. *In our domestic law*, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed. Trial is preferable to use of force. . . . Arrest, investigation, and trial are not

71. *See id.* ¶ 16 (“The general, principled starting point is that between Israel and the various terrorist organizations active in Judea, Samaria, and the Gaza strip (hereinafter ‘the area’) a continuous situation of armed conflict has existed since the first *intifada* [in December 1987].”) (citing numerous prior decisions to this effect).

72. *Id.* ¶ 18 (citing the International Court of Justice’s *Advisory Opinion on the Legality of Nuclear Weapons*, 1996 I.C.J. 226, 240).

73. *Id.* ¶ 19 (“[T]he ‘geometric location’ of our issue is in customary international law dealing with armed conflict It is from that law that additional law which may be relevant will be derived according to our domestic law. International treaty law which has no customary force is not part of our internal law.”) In contrast, Dr. Melzer’s TARGETED KILLING, *supra* note 65, argues that “any targeted killing not directed against a legitimate military target remains subject to the law enforcement paradigm, which imposes extensive restraints on the practice.”

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.⁷⁴

As the court stated, the Israeli requirement for capture or apprehension of a civilian taking a direct part in hostilities is based on Israeli internal law rather than a law of war obligation. Moreover, it was an obligation of the State and the military commander in mission planning, considering factors such as risk to friendly forces, not upon the individual soldier charged with execution of the mission facing a threat, much less in a combat operation against an enemy combatant in an international armed conflict. Therefore the Israeli Supreme Court decision in *Public Committee* neither acknowledges nor endorses the Pictet use-of-force continuum as a law of war obligation and is not supportive of the arguments offered in Dr. Melzer's treatise or Section IX of the ICRC *Interpretive Guidance*.

Reliance in Section IX of the ICRC *Interpretive Guidance* on the high court's decision upholding Israel's "preventative strike" policy is not supported by State practice, the law of war, or domestic or international court cases. The circumstances at issue in the Israeli case are unique to that nation's geography, history, circumstances, and threats. The *Public Committee* case thus does not support the proposition that, as a matter of international law, combatants or civilians involved in "direct participation in hostilities" are protected from direct attack across the conflict spectrum unless and until the opposing force or individual soldiers work their way through the Pictet use-of-force continuum. The ICRC's reliance on the Israeli case to the exclusion of the substantial body of case law to the contrary⁷⁵ is thus misrepresentative of existing law.

IV. PROBLEMS WITH DRAFT SECTION IX

A. *Procedural Problems with Draft Section IX*

When Section IX was introduced to participating experts in 2007, experts voiced several fundamental objections to its

74. *Pub. Comm. Against Torture* ¶ 40 (emphasis provided).

75. See, e.g., *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), and other cases cited in footnote 130, *infra*.

addition. First, experts sensed a breach of trust by the ICRC. The ICRC had assembled a group of experts to assist it and the T.M.C. Asser Institute in providing definition for the phrase “taking a direct part in hostilities.” The time and effort invested in this project by individual experts was substantial. Many have demanding careers in government, the military, or academia. Participation in this project in most cases meant taking time away from other official or professional duties of equal, and in some cases greater, priority. The experts chose to participate for the purpose stated—to determine *when* a civilian is taking a direct part in hostilities. Adding the additional and rather substantial use of force issue without consultation violated the trust experts expect in such circumstances.

Second, Section IX was beyond the mandate of the ICRC. As the ICRC acknowledges, “The ICRC has a legal mandate from the international community.” That mandate has two sources: first, “the 1949 Geneva Conventions, which task the ICRC with visiting prisoners, organizing relief operations, reuniting separated families and similar humanitarian activities *during armed conflicts*”; and second, “the Statutes of the International Red Cross and Red Crescent Movement, which encourage it to undertake similar work in *situations of internal violence*, where the Geneva Conventions do not apply.”⁷⁶ The ICRC mandate is thus limited to assisting war victims in armed conflict, subject to the express consent of the parties to the conflict.⁷⁷ In Geneva Convention terms, these are military wounded, sick, and shipwrecked; prisoners of war and retained personnel; and civilians detained in international or non-international armed conflict or in occupied territory in the case of the former. As a history of the ICRC notes,

The International Committee of the Red Cross . . . monitors the laws of war; visits prisoners of war and

76. ICRC, The ICRC’s Mandate and Mission, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_mandate?OpenDocument.

77. For example, Article 10 of Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War states: “The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, *subject to the consent of the parties to the conflict*, undertake for the protection of civilian persons and for their relief.” Convention IV, *supra* note 4, art. 10 (emphasis added). The language is similar to that in each of the 1949 Geneva Conventions.

political detainees; acts as a go-between and negotiator during hijackings and hostage takings; campaigns to control weapons; takes relief and medical help to the victims of conflicts; traces the “disappeared”; puts families separated by war in touch with each other and acts as custodian of the Geneva Conventions; and it does all these things silently, often in secret and without publicity.⁷⁸

The ICRC mandate does not extend to determining *when*, much less *how much*, force may be applied by military forces against opposing military forces, individual military personnel, or civilians taking a direct part in hostilities in an international or non-international armed conflict.

Third, the ICRC identifies itself as the “Guardian of the Geneva Conventions”—not the law of war as a whole—and, as such, possesses substantial expertise for that mission. It depends upon outside expertise in matters related to use of force in armed conflict.⁷⁹

Fourth, the T.M.C. Asser Institute and the ICRC do not have expertise or experience in modern combat. As a Swiss organization, governing members of the ICRC are citizens of a neutral nation. While the Swiss military enjoys a reputation for its protection of Swiss neutrality in World Wars I and II,⁸⁰ the Swiss military has no modern combat experience. Indeed, over the last 500 years its wars have been almost exclusively between its cantons rather than international armed conflicts. Lacking military experience, the T.M.C. Asser Institute and the ICRC requested senior military lawyers from Canada,

78. CAROLINE MOORHEAD, *DUNANT'S DREAM: WAR, SWITZERLAND, AND THE HISTORY OF THE RED CROSS* xxi (1998).

79. For example, in his career, in addition to participation in the experts' meetings to define “direct participation in hostilities,” the author has been called upon by the ICRC to participate as a military and law of war expert in meetings it hosted on anti-personnel mines, so-called “blinding laser weapons,” its unsuccessful SIFUS Project (an attempt to establish precise standards based on effects-based criteria for determining the legality of weapons), its unsuccessful challenge to the legality of the Raufoss 12.7mm Multi-purpose projectile, and the topic of legal reviews of new weapons and munitions, most of which are discussed in the author's *Conventional Weapons and Weapons Reviews*, *supra* note 63.

80. *See, e.g.*, STEPHEN P. HALBROOK, *TARGET SWITZERLAND: SWISS ARMED NEUTRALITY IN WORLD WAR II* (1998), and *SWISS AND THE NAZIS: HOW THE ALPINE REPUBLIC SURVIVED IN THE SHADOW OF THE THIRD REICH* (2006).

Israel, United Kingdom, and the United States to serve as participating experts, because they have a high level of knowledge of and experience in application of the law of war in armed conflict and other operational situations. Regrettably, the ICRC ignored the expert advice when the expert advice was not consistent with the ICRC's objectives in adding Section IX to the *Interpretive Guidance*.

Fifth, the ICRC's role as agreed by States Parties, which financially support the ICRC, is strictly advisory. The ICRC enjoys no legislative authority. In conferences of governments to draft law of war treaties, hosted by a government or the United Nations,⁸¹ the ICRC's role is strictly one of an observer; only governments possess the authority to negotiate and agree to treaties. The reason for this is straightforward: ultimately the responsibility for implementing the law of war rests with governments, entrusted in large measure to their respective battlefield commanders.

B. *Substantive Practical and Legal Problems with Draft Section IX*

As drafted by Dr. Melzer, Section IX of the draft and final *Interpretive Guidance* contains five major errors of law:

First, it resurrects and offers Pictet's unaccepted use-of-force continuum theory as if it were an internationally accepted, binding legal formula. It is neither.

Second, as Dr. Melzer did in his book, Section IX dismisses *opinio juris* and the ICRC's own understanding of Article 52, paragraph 2 of Additional Protocol I, as applicable only to *objects* and not to the targeting of *combatants* or civilians taking a direct part in hostilities.

Third, it melds each of the above into Dr. Melzer's flawed two-part test for targeting combatants in international armed

81. For example, the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict that produced the 1977 Additional Protocols I and II was sponsored and hosted by the Government of Switzerland. The 1978-1980 Conference on Prohibitions and Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects that produced the 1980 convention of the same name was hosted by the United Nations through financial assessments of member nations.

conflict and civilians taking a direct part in hostilities across the conflict spectrum, asserting:

[I]t therefore appears reasonable to argue that, in order for the requirement of military necessity to be fulfilled, an individual attack against a specific target must be likely to contribute effectively to the achievement of a concrete and direct military advantage. Additionally, the restrictive aspect of the principle of military necessity requires that there be no reasonable alternative which would entail a comparable military advantage while interfering significantly less with humanitarian and other values, which IHL aims to protect from the effects of the hostilities.⁸²

Fourth, it attempts to impose a law enforcement paradigm with respect to targeting civilians taking a direct part in hostilities throughout the conflict spectrum in order to apply a human rights “right to life” standard. In the process, it disregards the substantial body of case law that recognizes that the law of war is *lex specialis* in armed conflict.⁸³

1. *The law of war is lex specialis*

The subject of draft Section IX is an area in which the law of war is *lex specialis*. The maxim *lex specialis derogat legi generali*, also known as the principle of speciality, holds that “[a]s a rule

82. MELZER, *supra* note 65, at 293-94. Section IX of the *Interpretive Guidance* deals only with civilians taking a direct part in hostilities. But as a civilian forfeits his or her immunity from direct attack for such time as he or she takes a direct part in hostilities, it renders the individual susceptible to attack the same as a combatant. Therefore, if one accepts Dr. Melzer’s two-part test for engagement of a civilian taking a direct part in hostilities, the argument follows that the same test would be applicable to combatants, as Dr. Melzer argues in his book. This test is even more restrictive than Pictet’s use-of-force continuum. It also is inconsistent with the ICRC’s legislative history of Article 52, paragraph 2, of Additional Protocol I. See footnotes 96 and 107, *infra*, comparing Melzer’s work with the ICRC COMMENTARY, *supra* note 41.

83. See MELZER, *supra* note 65, at 176 (“Where the *lex specialis* of [international humanitarian law] does not regulate the resort to lethal force with sufficient precision, the relevant criteria must be derived from the *lex generalis* of human rights law.”). But as demonstrated *infra*, domestic and international case law does not support his argument that it requires either part of his two-part test, either at the national or individual soldier level, for attacking enemy combatants or a civilian taking a direct part in hostilities.

the special rule overrides the general law,” that is, if an action is regulated by both a general provision and a specific one, the latter prevails as most appropriate because it is more specifically directed towards that action.⁸⁴ The law of war is the *lex specialis* of armed conflict and, as such, is the controlling body of law with regard to the conduct of hostilities and for the protection of war victims.⁸⁵ This position is supported by decisions of international courts and tribunals, opinions of international organizations, and the writings of leading scholars.⁸⁶

84. *Colleanu v. German State*, German-Rumanian Mixed Arbitral Tribunal, January 12, 1929, *reprinted in* 5 I.L.R. 438 (1929). The author is indebted to Karl Chang, an office colleague, for the research contained in footnotes 84 through 86.

85. U.S. courts, for example, repeatedly have affirmed this principle within their rulings. See WINTHROP, *MILITARY LAW AND PRECEDENTS* 773-74 (1920) (explaining that the Constitution contemplates that the law of war can supersede “the ordinary laws of the land”). U.S. courts have “recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations, as well as of enemy individuals.” *Ex Parte Quirin*, 371 U.S. 1 (1942); *see, e.g., Talbot v. Seeman*, 5 U.S. 1 (1801) (applying the law of capture in an undeclared war between France and the United States); *Brown v. United States*, 12 U.S. 110 (1814) (applying the law of capture in the War of 1812); *The Prize Cases*, 67 U.S. 635 (1863) (applying the law of capture in the Civil War); *The Paquete Habana*, 175 U.S. 677 (1900) (applying the law of capture in the Spanish-American war); *Juragua Iron Co. v. United States*, 212 U.S. 297 (1909) (applying the law of war to the destruction of property in the Spanish-American War); *Ex parte Toscano*, 208 F. 938 (S.D. Cal. 1913) (applying Hague V to justify the detention by the United States of persons party to a civil war in Mexico); *Ex parte Quirin*, 317 U.S. 1 (1942) (applying the law of war to the trial of unprivileged belligerents by military commission in WWII); *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (applying the law of war to justify the detention of an Italian Army draftee in WWII); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (applying Common Article 3 of the Geneva Conventions of 1949 to the trial of an unprivileged belligerent by military commission in the war against Al Qaeda).

86. International tribunals also have treated the law of war as *lex specialis*. *See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 ¶ 106 (July 9) (“In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”); *Coard et al. v. U.S.*, Case 10.951, Inter-Am. C.H.R., Report No. 109/99, ¶ 42 (1999) (“[I]n a situation of armed conflict, the test for assessing the observance of a particular right, such as the right to liberty, may, under given circumstances, be distinct from that applicable in a time of peace. For that reason, the standard to be applied must be deduced by reference to the applicable *lex*

The ICRC chose to disregard substantial case law, as cited herein, and advice by its designated experts against injecting human rights arguments as a substitute for law that courts consistently have ruled is *lex specialis*.

2. *Pictet's theoretical use-of-force continuum*

Application of Pictet's theoretical use-of-force continuum to civilians taking a direct part in hostilities ignored a fundamental rationale for the law of war: to protect innocent civilians, that is, to protect the endangered from the dangerous. Contrary to Pictet's original argument, no government has employed a use-of-force continuum with respect to the conduct of its soldiers in engaging enemy combatants or civilians taking a direct part in hostilities. Governments have accepted the treaty prohibitions against perfidy and on denial of quarter, but for very sound reasons have not seen the need for a use-of-force continuum in armed conflict. As will be shown, domestic and international courts also have declined to require employment of a use-of-force continuum in law enforcement situations from individual armed threats up to and including hostage rescue, each at a stage on a violence spectrum substantially lower in threat intensity than armed conflict.

When introduced to the experts in 2007, the draft Section IX offered several arguments quickly challenged by experts, such as the following:

specialis.”); *Abella et al. v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, ¶ 161 (1997) (“[T]he Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations.”); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 2 ¶ 25 (July 8) (“In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”).

In regards to the writings of leading jurists, see 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES*, bk. II, ch. XVI, sec. XXIX, at 428 (Francis W. Kelsey trans., Clarendon Press 1925) (“Among agreements which are equal in respect to the qualities mentioned, that should be given preference which is most specific and approaches most nearly to the subject at hand; for special provisions are ordinarily more effective than those that are general.”).

Civilians lose their protection against direct attack for such time as they directly participate in hostilities or, alternatively, for such time as they cease to be civilians due to their continuous assumption of a combat function within an organized armed group. Such loss of protection does not mean that the concerned persons fall outside the law. It only entails that the lawfulness of the use of force against the concerned persons is no longer exclusively governed by the standards of law enforcement and individual self-defense, but that operations may now be based on the standards of the conduct of hostilities.⁸⁷

These statements were acceptable. It was the footnote accompanying the text that drew attention, stating: “This observation does not exclude *the continued applicability during the conduct of hostilities of normative frameworks other than IHL, such as human rights law, which depends on circumstances that cannot be discussed within the scope of this Interpretative Guidance.*”⁸⁸

This was quickly recognized by participating experts as an ICRC challenge to the *lex specialis* stature of the law of war through insertion of human rights law across the conflict spectrum, not only with respect to protection of civilians taking a direct part in hostilities but also in applying combat power against uniformed (regular) enemy forces.⁸⁹ Notwithstanding strong expert advice to the contrary, the argument remained in the *Interpretive Guidance*.⁹⁰

Continuing, the draft stated: “*The experts also distinguished direct attacks against civilians directly participating in hostilities from the preventive use of lethal force in situations of self-defense.*”⁹¹ This

87. *Revised Draft Interpretive Guidance*, *supra* note 51, at 60.

88. *Id.* at 60 n.188 (emphasis added).

89. For example, see the language quoted from Dr. Melzer’s book in the main text referenced at footnote 82.

90. *Interpretive Guidance*, *supra* note 9, at 82 (“[A]lthough 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 . . .”).

91. *Revised Draft Interpretive Guidance*, *supra* note 51, at 60 n.189 (emphasis added). A statement by a single expert to the effect that the law related to use of force differs from the law of war does not constitute a basis to assert expert agreement.

footnote implies that there had been extensive discussion and deliberation by the experts of the issue of use of deadly force in domestic law enforcement situations as well as expert agreement with introduction of human rights law onto the battlefield. Each is incorrect. The author would have recalled discussion of this point, as this is a topic with which the author has substantial experience, and which was also the crux of experts' objections to Section IX. Other than expression of objections to Section IX, expert discussion related only to defining the phrase "direct participation in hostilities" *in armed conflict*.

The draft also stated, "Moreover, it should be recognized that, in regulating the use of force against legitimate military targets, IHL does neither impose an obligation to 'capture rather than kill', as would be the case under law enforcement standards, nor does it provide an express 'license to kill.'"⁹² This statement confuses military capture-or-kill operations with domestic law enforcement operations,⁹³ indicating a mis-

92. *Id.* at 61.

93. "Capture or kill" operations are military operations initiated to capture unidentified enemy combatants (usually for the purposes of gaining intelligence) or designated enemy combatants, the latter often due to their "high value." Examples include a successful mission conducted by then-Captain (later Brigadier) Fitzroy MacLean in September 1942 with two other British Special Air Service soldiers and a company of Seaforth Highlanders to capture or kill Persian General Fakhollah Zahidi, believed to be a covert German collaborator. See FITZROY MACLEAN, *EASTERN APPROACHES* 266-75 (1949). Another example includes a mission on Crete on April 26, 1944 by two British SOE officers to capture or kill Major General Karl Kreipe, Commander, 22nd Panzer Division. See STANLEY MOSS, *ILL MET BY MOONLIGHT* 93-107 (1950). In the frequently misunderstood and much maligned Phoenix program during the U.S. war in Viet Nam, capture of members of the Viet Cong was emphasized over killing. MARK MOYAR, *PHOENIX AND THE BIRDS OF PREY* 227 (1997). In 1970, in that same conflict, U.S. Army Special Forces executed OPERATIONS ASHTRAY and ASHTRAY II, missions into southern Laos to capture a North Vietnamese military truck driver to determine what North Vietnamese military convoys were carrying, how they reached South Viet Nam, and their precise destination(s). See JOHN L. PLASTER, *S.O.G.: THE SECRET WARS OF AMERICA'S COMMANDOS IN VIET NAM* 165-73 (1997). On such missions, capture is preferred for military mission purposes but not required by the law of war. The mission ends in death of the targeted person only if he or she resists or if capture becomes impossible. It is highly situational and entrusted to the on-scene commander's decision based upon the circumstances ruling at the time. The capture element is the military purpose for the operation. In each circumstance a decision to

understanding by its author(s) of a type of mission usually performed against uniformed enemy combatants in armed conflict. Domestic deadly force laws apply to law enforcement officers when confronted with a civilian posing an imminent threat of death or serious bodily harm in a domestic peacetime environment. These laws impose no legal or policy authority, much less “obligation,” to “capture or kill.” To the contrary, under those circumstances, law enforcement officers are authorized to employ deadly force not to kill but to *stop the threat*. Death often is a natural consequence of use of deadly force (hence the term “deadly force”), but death is not *per se* a legal “obligation,” as the ICRC draft text incorrectly asserted.

Employment of the pejorative pulp fiction phrase “license to kill” in the ICRC draft text ignored and demeaned the centuries-old combatant’s privilege. The draft text cited no treaty provision or other legal reference for the implied assertion that subjecting a civilian taking a direct part in hostilities to attack was contrary to the law of war.

The next problematic section of the draft was the following:

IHL [international humanitarian law] simply does not provide certain categories of person[s], including civilians directly participating in hostilities, with protection against direct attack. While the use of force against such persons clearly is not governed by law enforcement standards, considerations of humanity require that no more death, injury or destruction be caused than is reasonably necessary to achieve a lawful objective. In other words, persons who constitute legitimate military targets may be directly attacked for the purpose of rendering them hors de combat and may be lawfully killed to the extent that this is reasonably required to achieve that purpose in the concrete circumstances.⁹⁴

use lethal force is equally valid. These are classic examples of state practice specifically not accompanied by *opinio juris*. The flexibility entrusted to the mission commander is inconsistent with a philosophy of rigidity of rules such as the ICRC put forward in Section IX, but still subject to the law of war prohibition on denial of quarter.

94. *Revised Draft Interpretive Guidance*, *supra* note 51, at 61.

This argument was based upon some military manual definitions of the law of war principle of *military necessity*,⁹⁵ but misapplied the general definition in such a way as to suggest that manual definitions were intended to apply to the individual soldier in his or her engagement of enemy combatants rather than as a general obligation of nations or military commanders at relatively senior levels. Moreover, as the ICRC Commentary on Additional Protocol I confirms, and as discussed *infra*, Article 52, paragraph 2 deals only with objects.⁹⁶

95. *Id.* at 62. In Section IX of the Interpretive Guidance, one source cited was a 1976 manual prepared by one U.S. military service but withdrawn from use almost two decades ago. *Interpretive Guidance, supra* note 9, at 79 n.216 (citing United States: Department of the Air Force, Air Force Pamphlet, AFP 110-31 (1976), § 1-3 (2), p. 1-6). During the 2008 experts' meeting, the ICRC was informed by the author that the definition contained therein was no longer in use or regarded as correct. Acknowledging the manual was no longer in force, the ICRC nevertheless persisted in citing it as authoritative.

96. This argument is a carry-over from MELZER, *supra* note 65, at 288-96, in which Melzer argues that each individual soldier is a military objective whose attack must be assessed against the criteria contained in Article 52, para. 2 of Additional Protocol I—that is, by determining whether that particular soldier, “by their nature, location, purpose or use make an effective contribution to military action and whose total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Melzer’s argument on these pages was a basis for the addition of Section IX to the *Interpretive Guidance*. Melzer acknowledges that his argument is contrary to the position of many authors, including leading experts such as Brigadier General Kenneth Watkin, presently Judge Advocate General, Canadian Forces, and a participant in the “Direct Participation” experts meetings at ICRC request, and “powerful States” (the latter an attack on the United States in particular), but also other NATO states—Australia, New Zealand, and other of the thirty-three nations whose military forces have experienced combat operations sanctioned by the United Nations Security Council against al Qaeda and the Taliban in Afghanistan since 2001. *Id.* at 288. It is also contrary to the Israeli Supreme Court decision in *The Public Committee against Torture in Israel v. The Government of Israel*, which (as previously noted in note 68) states, “A civilian who violates [the law of war] and commits acts of combat does not lose his status as a civilian, but as long as he is taking a direct part in hostilities he does not enjoy—during that time—the protection granted to a civilian. He is subject to the risks of attack like those to which a combatant is subject, without enjoying the rights of a combatant, e.g. those granted a prisoner of war.” HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov’t of Israel [2005] IsrSC 57(6) 285 ¶ 31.

Dr. Melzer’s argument is contrary to the two most authoritative resources on the 1977 Additional Protocols: Bothe, Partsch & Solf, *supra* note 41, at 323-25 (prepared by three individuals who participated as members of

There is no “military necessity” determination requirement for an individual soldier to engage an enemy combatant or a civilian determined to be taking a direct part in hostilities, any more than there is for a soldier to attack an enemy tank.

national delegations and who were recognized law of war scholars in their own right, one of whom, Professor Michael Bothe, was a participant in the “Direct Participation” meetings as well); and the ICRC’s own COMMENTARY, *supra* note 41, § 2017 (discussed *infra*). Melzer’s argument also conflicts with the Israeli Supreme Court decision, *Pub. Comm. Against Torture*, and other authoritative sources. *See, e.g.*, FEDERAL MINISTRY OF DEFENSE, HUMANITARIAN LAW IN ARMED CONFLICTS, ZDV 15/2, 1992, para. 442 (the official German law of war manual); A.P.V. ROGERS, LAW ON THE BATTLEFIELD 35 (1st ed., 1996); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 85 (2004) (stating perhaps as unequivocally and clearly as can be said: “Human beings can categorically come within the ambit of military objectives. Indeed, all combatants may be targeted.”). The pre-conditions asserted by Pictet, Melzer, and Section IX of the *Interpretive Guidance* do not exist for attack of persons.

An experience of the author illustrates the fallacy of Dr. Melzer’s argument. On February 22, 1969, I was serving as a Marine Corps captain in the headquarters of the First Marine Division outside Da Nang, Republic of Viet Nam. I was in combat uniform, carrying a weapon issued to me, as was the requirement for all Marines. During the day I was serving as a lawyer. Had an enemy sniper observed me, according to Dr. Melzer’s thesis, he would have been legally required, before attacking me, to assess whether, at that moment, by my nature, location, purpose, or use, I was making an effective contribution to military action, and whether my total destruction, capture, or neutralization, in the circumstances ruling at the time, offered a definite military advantage to my enemy. Naturally, the sniper would know nothing about me other than that I was an armed, uniformed member of his enemy. I was, by all law of war definitions, an enemy combatant. Further, however, under the Pictet use-of-force theory, the sniper would have been required to employ the least injurious means to “neutralize” me.

Later that night, at 2:00 A.M., I was called upon in my collateral duty as the Executive Officer of one of the Division’s two reaction companies—composed of Marines who were cooks, clerks, bakers, military police, and the First Marine Division band—to assume command of these Marines, who put down their pencils, typewriters, spatulas, and musical instruments, picked up their weapons, and engaged and successfully defeated a concentrated enemy attack on the division headquarters and adjacent Marine units. The author continued to lead his unit over the next seventy-two hours as it engaged and defeated the remaining enemy forces. *See* GARY D. SOLIS, MARINES AND MILITARY LAW IN VIET NAM: TRIAL BY FIRE 143 (1989). Applying Melzer’s theory, I, while a combatant at all times, could be engaged by the enemy sniper only when I assumed my collateral infantry assignment; and even then, I could be killed only “to the extent that this is reasonably required to achieve that purpose in the concrete circumstances.”

While the text cites and quotes the general definition of military necessity contained in Article 14 of the 1863 Lieber Code⁹⁷ to support its argument that it imposes a limit on military application of force against enemy combatants, it neglected to cite Article 15, which states in part that “[m]ilitary necessity admits of *all* destruction of life or limb of armed enemies.”⁹⁸ Further, it is the word “reasonably” that offends, implying a law of war requirement for deliberation that would be potentially fatal to a police officer in a domestic situation, especially a soldier in an armed conflict. The ICRC errs in its attempt to apply an inaccurate law enforcement paradigm in armed conflict.⁹⁹ As will be shown in the discussion of case law, *infra*, domestic and international judicial bodies have

97. Lieber Code, *supra* note 6, art. 14 (“Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of war, and which are lawful to the modern law and usages of war.”).

98. *Id.* art. 15. It also neglected the last sentence of Article 16, which states, “military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult,” and the final sentence of Article 29, which states, “The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief”—referencing a 19th century argument that a short but violent war was more humane as it likely would result in fewer friendly and enemy casualties than a prolonged conflict. *Id.* arts. 16, 29. One need not necessarily agree with the last point. These additional articles from the Lieber Code are cited in order to suggest that the draft and its references engaged in a degree of selective research to support an argument rather than offer a thorough and objective analysis.

99. Article 1 (“Material field of application”) from the 1977 Additional Protocol II, relating to non-international armed conflict, illustrates the error of the ICRC’s effort to apply a relatively benign peacetime domestic law enforcement paradigm to armed conflict: “This Protocol . . . shall apply to all armed conflicts which are not covered by Article 1 of [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out *sustained and concerted military operations* and to implement this Protocol. [In addition,] [t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Additional Protocol II, *supra* note 3, art. 1, paras. 1-2 (emphasis added). As these treaty provisions illustrate, governments made a clear distinction between the substantially higher threshold for non-international armed conflicts and the law enforcement paradigm attempted in Melzer’s TARGETED KILLING, *supra* note 65, and the ICRC’s *Interpretive Guidance*, *supra* note 9.

made clear distinctions between national legal obligations and the degree to which they have been imposed on individual law enforcement officers in peacetime, much less soldiers in combat.

Article 60 of the Lieber Code and subsequent law of war treaties codified the prohibition of denial of quarter, that is, refusal to accept an enemy's surrender.¹⁰⁰ Other than general or specific limitations on conventional weapons, such as those contained in the protocols to the 1980 Convention on Certain Conventional Weapons,¹⁰¹ nations otherwise have written law of war treaties to protect war victims while prudently declining to impose treaty restrictions on decisions by battlefield commanders or individual soldiers with respect to application of force against enemy combatants or civilians taking a direct part in hostilities.¹⁰² The ICRC's effort to the contrary with reference to general principles such as *humanity*, *military necessity*, and *proportionality* is devoid of any reference to treaty provisions, case law, or State practice, instead attempting an approach governments have assiduously avoided.¹⁰³

100. Lieber Code, *supra* note 6, art. 60; Hague Convention (1899), *supra* note 15, art. 23(d); Hague Convention (1907), *supra* note 5, art. 23(d); Additional Protocol I, *supra* note 2, art. 40; Additional Protocol II, *supra* note 3, art. 4.

101. 1980 Convention on Certain Conventional Weapons, *supra* note 63. The 1980 Convention on Certain Conventional Weapons contains five protocols: Protocol I prohibits fragments not detectable by x-ray; Protocol II regulates use of mines, booby-traps, and other devices; Protocol III regulates incendiary weapon use; Protocol IV prohibits "blinding laser" weapons; and Protocol V addresses remnants of war, that is, post-conflict battlefield clean-up to protect civilians.

102. The ICRC acknowledged this in Section IX of its published report, stating, "Apart from the prohibition or restriction of certain means and methods of warfare, however, the specific provisions of IHL [international humanitarian law] do not expressly regulate the kind and degree of force permissible against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct 'attacks', that is to say, from 'acts of violence against the adversary, whether in offense or defense'." *Interpretive Guidance*, *supra* note 9, at 78.

103. The ICRC argument reflects a serious misunderstanding of basic and lawful combat application of force, among other things. For example, for practical purposes and as will be shown in discussion of case law, *infra*, there is no such thing as "proportionate deadly force" in domestic or international law. The only reference to the principle of proportionality is contained in Articles 51, paragraph 5(b), and 57, paragraph 2(a)(ii), each relating to

As noted in footnote 98, the draft *Interpretive Guidance* carried forward an argument proffered by Dr. Melzer in his book. Openly acknowledging he was speaking contrary to *opinio juris*, he argued that the law of war prohibits the attack of enemy combatants “where there manifestly is no military necessity to do so,” citing language from the ICRC’s *Commentary on the 1977 Additional Protocols*.¹⁰⁴ Thereafter he proceeded to advance an argument that targeting an enemy combatant (or a civilian taking a direct part in hostilities) requires a soldier to proceed through the multiple-part test or evaluation for attack of a military objective contained in Article 52, paragraph 2 of Additional Protocol I. A soldier may employ deadly force against the enemy combatant or civilians taking a direct part in hostilities only after proceeding through the Pictet use-of-force continuum, and only if a concrete and direct military advantage and (in his words) “*qualitative, quantitative, and temporal* necessity” has been established.¹⁰⁵

Dr. Melzer’s analysis is flawed on several counts. First, it errs in its reference to the ICRC *Commentary* in two respects. Dr. Melzer stated, “[T]he ICRC *Commentary* holds that unarmed combatants only *indirectly* participating in military operations ‘should be taken under fire only when there is no other way of neutralizing them.’”¹⁰⁶ The ICRC *Commentary* provision cited does not refer to regular force combatants in an international armed conflict, but to members of a guerrilla movement, that is, private armed groups, and then only to those who are indirectly participating in hostilities. It is necessary to read the ICRC *Commentary* statement in conjunction with Article 51, paragraph 3 regarding civilians taking a *direct* part in hostilities. By its terms, it addresses civilians *directly* participating in hostilities, as opposed to the civilians “*indirectly* partici-

“loss of *civilian* life, injury to *civilians*, damage to *civilian* objects, or a combination thereof” (emphasis added), relating to attack of enemy military units or personnel or other military objectives where the civilian population would be at risk. There is no treaty language regarding “proportionate force” applied against military units or other military objectives, and State practice historically has emphasized application of “overwhelming force” against enemy forces.

104. Melzer, *supra* note 65, at 288 (referring to the ICRC COMMENTARY, *supra* note 41, § 1694).

105. *Id.* at 288-98 (emphasis in original).

106. *Id.* at 288 (emphasis in original).

pating in military operations” referred to in the *Commentary* text Dr. Melzer relied upon. This distinction was the basis for the five years of experts’ meetings.

Second, in arguing for application of the military objective test contained in Article 52, paragraph 2, Dr. Melzer overlooked the ICRC Commentary’s discussion of this provision:

It should be noted that the definition [in Article 52, paragraph 2] is limited to objects but it is clear that members of the armed forces are military objectives, for, as the Preamble of the [1868] Declaration of St. Petersburg Declaration states: “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; [. . .] for this purpose it is sufficient to disable the greatest possible number of men.” Article 43 (Armed forces) defines armed forces and provides that members of such forces are combatants, that is to say, they have the right to participate directly in hostilities; the corollary is that they may be the object of hostile acts.¹⁰⁷

In particular, the ICRC ignored the above discussion in the *Commentary* when it included the following in the *Interpretive Guidance*.

More concretely, while the operating forces can hardly be required to take additional risks in order to

107. ICRC COMMENTARY, *supra* note 41, § 2017 (citing Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, November 29, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS, Schindler & Toman, *supra* note 1, at 92). This includes “resident” members of a private armed group involved in indirect intelligence collection, as discussed in Article 46, para. 3, of Additional Protocol I, which states:

[I]f the guerrilla is a member of an organized armed group . . . he does not lose his combatant status by continuing his civilian occupation while “off duty”, provided that he properly distinguishes himself as soon as he begins to participate in a military operation preparatory to an attack. The “resident” combatant described in para. 3 of Art. 46 illustrates the significance of the first sentence [of Article 44, para. 3]. He remains a combatant and is entitled to prisoner of war status if apprehended, but prior to capture he is free to mingle as an apparent civilian among the civilian population. . . . But subject to the presumption in Article 50, para. 1, he remains a legitimate object of attack.

BOTHE, PARTSCH & SOLF, *supra* note 41, at 252.

capture rather than kill an armed adversary, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity to surrender where the circumstances are such that there manifestly is no necessity for the immediate application of lethal force.¹⁰⁸

Whether and to what extent considerations of humanity require an adaptation of the quality and degree of force used against persons not entitled to protection against direct attack must be determined separately for each specific case in light of the concrete circumstances. Clearly, circumstances which would require an attempt at capture or the issuing of a warning prior to the use of lethal force are more likely to exist in territory over which the operating forces exercise effective control.¹⁰⁹

There have been, and no doubt in future armed conflicts will be, situations such as those described in the first paragraph of the ICRC text. There have been, and no doubt will be, tactical and other reasons why a military commander or an individual soldier will choose to capture an enemy combatant or a civilian taking a direct part in hostilities rather than apply deadly force. That said, other than the law of war prohibitions on perfidy and denial of quarter, governments and courts have

108. *Revised Draft Interpretive Guidance*, *supra* note 51, at 61.

109. *Id.* The final Interpretive Guidance offers an overly simplistic and highly improbable example of an unarmed civilian taking a direct part in hostilities “sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force” to suggest the ease with which this individual could be captured rather than killed, offering this as the rationale for a legal obligation for a use-of-force continuum across the conflict spectrum. *Interpretive Guidance*, *supra* note 9, at 81. The hypothetical is unrealistic in that directing an airstrike requires close visual observation of the target and in most cases the inbound strike aircraft, something someone sitting in a restaurant is unlikely to have (not to mention the rather obvious security problem of conversation using military terminology between the individual in question and the strike aircraft being overheard by restaurant staff or other customers). Taking the simplest example to make a point ignores additional factors, such as the fact that security forces must consider the possibility that the individual in question may be armed and/or wearing a suicide vest, placing arresting officials and innocent civilians at risk, or that his death may result in termination of the air attack for lack of the information he is transmitting.

seen the prudence in declining to draw such a line owing to the many vagaries that exist not only in domestic law enforcement situations but also, and in particular, on the battlefield. This is the case in combat in recognition of the obligation imposed by many nations on their military forces not to surrender and, indeed, to resist surrender either by force or through escape and evasion.¹¹⁰

3. *Practical difficulties: hesitation and wound ballistics*

As has been explained at several points, there are practical problems with a use-of-force continuum. As one experienced law enforcement officer has written and as is illustrated by Pictet's theory:

The typical force continuum begins with the presence of the officer or with verbal commands and then lists use-of-force options in order of increasing intrusiveness, ending with deadly force. . . . While virtually every force continuum provides that such progressing through force may not be appropriate in all use-of-force situations, the seed of hesitation is inescapably planted. The word *continuum* implies a sequential approach. . . . The goal of force continua—using the least intrusive means to respond to a threat—simply is not constitutionally required.¹¹¹

Nor is the use-of-force continuum required by the law of war. A second practical mistake in the Pictet use-of-force continuum theory adopted in the ICRC *Interpretive Guidance* naturally follows from the “limited violence” or “least intrusive” argument, *viz.*, limiting the number of shots fired at an enemy combatant or a civilian taking a direct part in hostilities or requiring a “one-shot-and-stop” step in the use-of-force continuum.

Movies and television have provided a serious misimpression as to the effectiveness of bullet wounds, e.g., one shot and

110. For example, Article II of the U.S. Code of Conduct for its uniformed men and women states, “I will never surrender of my own free will. If in command I will never surrender the members of my command while they still have the means to resist.” Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (1988).

111. Thomas D. Petrowski, *Use-of-Force Policies and Training: A Reasoned Approach*, 71(10) F.B.I. L. ENFORCEMENT BULL. 25, 29 (Oct. 2002).

the targeted person (always hit) is thrown thirty feet across the room or perhaps through a barroom window and immediately rendered *hors de combat*. The former defies one of Sir Isaac Newton's laws of motion regarding reciprocal actions ("for every action there is an opposite reaction") in that the force from a bullet necessary to throw the targeted man thirty feet would have the same action with regard to the shooter through the force of the weapon's recoil.¹¹² With respect to a single shot (and hit) rendering a targeted person *hors de combat*, this may happen, more often through a psychological reaction to being shot, however slight or severe, rather than as the result of physiological damage to the target. As a surgeon experienced in gunshot wounds stated, "One shot will not necessarily stop an individual from carrying out voluntary activities,"¹¹³ such as firing a weapon or setting off a bomb, improvised explosive device, or suicide vest. Another surgeon highly experienced in treating gunshot wounds, including combat wounds, has observed, "The most common reaction to being struck in the torso by a bullet is to show no immediate sign of being hit."¹¹⁴ A conference of pathologists, medical examiners, and surgeons experienced in treating gunshot wounds in combat and in domestic situations reached the following conclusions:

With the exception of hits to the brain or upper spinal cord, the concept of reliable and reproducible immediate incapacitation of the human target by gunshot wounds to the torso is a myth. The human target is a complex and durable one. A wide variety of psychological, physical, and physiological factors exist, all of them pertinent to the probability of incapacitation. . . . Physiologically, a determined adversary can be stopped reliably and immediately only by a shot that disrupts the brain or upper spinal cord.

112. SIR ISAAC NEWTON, *PHILOSOPHIÆ NATURALIS PRINCIPIA MATHEMATICA* (1687). Newton's rule was stated as: "Whenever a first body exerts a force F on a second body, the second body exerts a force -F on the first body. F and -F are equal in magnitude and opposite in direction."

113. Statement of Dr. Ed Lane, MD, to the Wound Ballistics Seminar, Federal Bureau of Investigation Academy, Quantico, Virginia (January 19-22, 1993), at 3. The author was an official participant in the seminar.

114. Martin L. Fackler, *Civilian Gunshot Wounds and Ballistics: Dispelling the Myths*, 16, 1 *EMERGENCY MEDICINE CLINICS OF AMERICA* 17 (1998).

Failing a hit to the central nervous system, massive bleeding from holes in the heart or major blood vessels of the torso causing circulatory collapse is the only other way to force incapacitation upon an adversary, and this takes time. For example, there is sufficient oxygen within the brain to support full, voluntary action for 10-15 seconds after the heart has been destroyed.¹¹⁵

These practical factors should have been, but were not, given consideration by Jean Pictet in his original use-of-force continuum argument or by Dr. Melzer or ICRC officials in resuscitating and incorrectly asserting Pictet's theory in the *Interpretive Guidance* as a legal obligation.

C. *Use-of-Deadly-Force Cases in Domestic and International Courts*

As has been noted, throughout Melzer's treatise and in Section IX of the *Interpretive Guidance*, not-so-subtle efforts were made to remove thoughts of armed conflict and substitute a law enforcement paradigm in order to argue for application of human rights law. But domestic and international court cases dealing with criteria for law enforcement use of deadly force, not only as to *when* but *how much*, consistently have declined to impose a use-of-force continuum on police officers such as the Pictet theory and the ICRC, in its *Interpretive Guidance*, advocated. Case law does not support the Pictet theory or the *Interpretive Guidance* argument for law enforcement officers facing a threat in a domestic situation. The detailed case analysis that follows is provided to show that if courts have declined—indeed, refused—to assert a use-of-force continuum and detailed steps that must be taken in such situations, any attempt to assert such a continuum on individual soldiers in an armed conflict is doubtful in its authoritative-ness, particularly as Section IX of the *Interpretive Guidance* offers no case law to support its statements (other than Israel's *The Public Committee v. The Government of Israel* case, which, as previously noted, did not actually support these statements in the manner indicated).

115. FEDERAL BUREAU OF INVESTIGATION, HANDGUN WOUNDING FACTORS AND EFFECTIVENESS 8 (1989), available at <http://www.firearmstactical.com/hwfe.htm>.

1. *United States case law*

Although the United States is a relatively young nation, its laws protecting individual citizens against government action, including law enforcement use of force, are far older than those of many nations. The U.S. Constitution was written in 1781 and adopted in 1788; its Bill of Rights containing the first ten amendments was adopted in 1791. Hence protection for its citizens precedes human rights law by 150 years, such as the Universal Declaration of Human Rights (1948) or the European Convention on Human Rights (1950, entered into force on September 3, 1953). Germane to this discussion is the Fourth Amendment of the Bill of Rights, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹¹⁶

“Seizure” is defined as a “governmental termination of freedom of movement *through means intentionally applied*.”¹¹⁷ In applying the Fourth Amendment to law enforcement use of force, including but not limited to deadly force, U.S. federal courts including the Supreme Court consistently and firmly have rejected standards such as those set forth by Jean Pictet and the ICRC in Section IX.¹¹⁸ The U.S. Supreme Court has made a careful distinction between the “dangerous and the endangered.”¹¹⁹ That is, “[i]n determining the reasonableness of the manner in which a seizure is effected, ‘[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of

116. U.S. CONST. amend. IV.

117. *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis in original).

118. Federal courts have jurisdiction by way of an excessive force claim brought under 42 U.S.C. § 1983 in which the plaintiff brings action under the Fourth Amendment’s “unreasonable seizure” standard or the Eighth Amendment’s prohibition on cruel and unusual punishment.

119. Petrowski, *supra* note 111, at 26.

the governmental interests alleged to justify the intrusion.’”¹²⁰ The test as enunciated in the principal Supreme Court case, *Graham v. Connor*, 490 U.S. 386 (1989), is one of reasonableness, that is, a “careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.”¹²¹ The test of reasonableness is “is a commonsense evaluation of what an objectively reasonable officer might have done in the same circumstances. . . . Put another way, an unreasonable use of force is one that no objectively reasonable law enforcement agent would have used.”¹²²

U.S. courts have grasped the challenges law enforcement officers face daily. As the Supreme Court has stated, “The calculus of reasonableness must embody allowance for the fact that police officers often are forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation.”¹²³ “Detached reflection cannot be demanded in the presence of an uplifted knife. . . . [I]t is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him.”¹²⁴ Thus U.S. federal court decisions do not support Pictet’s argument even in peacetime law enforcement situations.

The “reasonableness” issue and the critical factor of a split-second decision is not considered in Section IX of the

120. *Scott v. Harris*, 550 U.S. 372, 384 (2007) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

121. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). *Graham v. Connor* is but one of the many U.S. cases germane to the issue. In contrast, it was the only U.S. case cited by Dr. Melzer in his 468-page TARGETED KILLING IN INTERNATIONAL LAW, *supra* n. 65, at 38. As shown in this article, his research would have benefited from a more thorough study and analysis of U.S. case law, particularly with respect to Dr. Melzer’s embrace of Pictet’s use-of-force continuum theory. *See, e.g.*, *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994), and other cases cited in note 130, *infra*.

122. Petrowski, *supra* note 111, at 26. Thus, in *Graham v. Connor*, the Supreme Court stated: “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” 490 U.S. at 396.

123. *Graham*, 490 U.S. at 396-97.

124. *Brown v. United States*, 256 U.S. 335, 343 (1921).

ICRC *Interpretive Guidance*. Central to Section IX was Pictet's 1974 argument:

If a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action, grave injury should be avoided.¹²⁵

Pictet's statement and Section IX of the *Interpretive Guidance* suggests the existence of a law of war obligation to rigidly follow a use-of-force continuum across the conflict spectrum, 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. Some U.S. law enforcement agencies employ a use-of-force continuum, but for training purposes only.¹²⁶ Contrary to Pictet's argument, there is no legal requirement in the law of war to "shoot to wound." For operational purposes and the safety of law enforcement officers and innocent civilians, "shoot to wound" is a step discouraged and in most cases prohibited in the use-of-force continuum.¹²⁷

125. See *Interpretive Guidance*, *supra* note 9, at 82 n. 221, which reasserts "Pictet's famous statement." Given that Pictet's statement was made in the period of the 1974-1977 Diplomatic Conference, but lay moribund for almost four decades amid the numerous law of war conferences held during that time until rediscovered by Dr. Melzer in his dissertation (*supra* note 65, at 289) and then incorporated into the draft *Interpretive Guidance* by the ICRC in 2007, the validity of it as an accurate statement of law, much less one that can be characterized as "famous," is dubious. ICRC abandonment of the application of Pictet's statement with respect to "classic large-scale confrontations between well-equipped and organized armed forces" (*Interpretive Guidance*, *supra* note 9, at 80) confirms the present author's view that Pictet's argument is not law. Otherwise it would apply in all situations in which the law of war applies.

126. See, e.g., Dep't of the Treasury, Federal Law Enforcement Training Center, SH-5046A, Rev. 0/700, Use of Force Model (n.d.) ("The [Use of Force] Model is designed to assist you in developing the necessary skills when directed toward situational circumstances, the action(s) of the subject(s), and the reasonableness of your selected response."); Federal Law Enforcement Training Center "Use of Force Model" card (clearly marked as "Training Principles").

127. "Shooting to wound," as Pictet suggested, is the antithesis of importance of shot placement. It requires greater accuracy at a time of great stress, resulting in physical, sensory/perceptual, and cognitive/behavioral changes. See generally ALEXIS ARTWOHL AND LOREN W. CHRISTENSEN, DEADLY

Pictet's use-of-force continuum theory is the antithesis of the Supreme Court's decision to decline to draw a line or lines or endorse a continuum approach that suggests a legal requirement for a sequential approach to use of force, with deadly force legally permissible only as a last resort. Employment of a use-of-force continuum in encountering a threat situation is contrary to the Supreme Court's decision in *Graham v. Connor*.¹²⁸ Instead, "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."¹²⁹ The U.S. federal courts trust individual police officers to use their discretion in applying broad rules to particular circumstances.¹³⁰

FORCE ENCOUNTERS: WHAT COPS NEED TO KNOW TO MENTALLY AND PHYSICALLY PREPARE FOR AND SURVIVE A GUNFIGHT 38 (1997); Alexis Artwohl, *Perpetual and Memory Distortion during Officer-Involved Shootings*, 71 (10) FBI L. ENFORCEMENT BULL. 18, 19 (2002). In a high-stress situation, the U.S. Supreme Court in the provision previously quoted from *Graham v. Connor* (text cited at footnote 121) entrusted the police officer making the decision with broad rules and discretionary authority based upon the circumstances faced. Shooting to wound increases the chance of missing the target and the risks to friendly forces or innocent civilians; it also diminishes projectile capability to stop the threat. For example, were a person posing a threat to point a firearm at a police officer, a "shot to wound" to the leg would not prevent the person from operating his firearm; nor would it prevent an individual wearing a homicide bomb vest from discharging it. Historical examples of the failure of a "shoot to wound" policy abound. On April 11, 1986, agents of the Federal Bureau of Investigation (FBI) confronted two heavily armed men suspected of bank robbery and murder. In the opening seconds of the confrontation, one of the two suspects, Michael Platt, received what subsequently was described by medical examiners as a "fatal wound" (meaning it was likely the individual would have succumbed from loss of blood even had he departed for the nearest hospital immediately). In the ensuing four-and-one-half minute gun battle, Platt fired forty-two rounds from his rifle, three rounds from one revolver and three rounds from another revolver, murdering two FBI agents and wounding another five before succumbing to multiple gunshot wounds. W. FRENCH ANDERSON, MD, FORENSIC ANALYSIS OF THE APRIL 11, 1986, FBI FIREFIGHT 3, 13 (1996).

128. Petrowski, *supra* note 111, at 28-29.

129. *Graham v. Connor*, 490 U.S. at 396 (citing *Bell v. Wolfish*, 441 U.S. 320, 559 (1979)). See also *Scott v. Harris*, 550 U.S. 372, 382 ("Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'").

130. See *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994) ("There is no precedent in this circuit (or any other) which says that the constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases

which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.”). See also *U.S. v. Sokolow*, 490 U.S. 1 (1989) (stating that the reasonableness of an agent’s decision to make an investigative stop did not depend on whether there was a less intrusive investigatory technique available); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (holding that even if a less intrusive means existed for protecting particular types of property, it would be unreasonable to expect police officers to employ such means and make subtle distinctions in conducting a search of an arrestee); *Roy v. Lewiston*, 42 F.3d 691 (1st Cir. 1994) (holding that the standard of objectively reasonable behavior is comparatively generous to police in cases where potential danger, emergency conditions, or other exigent circumstances are present); *Salim v. Proulx*, 93 F.3d 86 (2d Cir. 1996) (stating the reasonableness test is met if officers of reasonable competence could disagree, and that the test does not employ 20/20 hindsight to evaluate officer decisions); *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996) (recognizing a reviewing court must make allowance for the tense, uncertain, and rapidly evolving circumstances under which officers make decisions when evaluating whether excessive force was used); *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1989) (finding the officer’s actions to be reasonable through balancing the extent of intrusion against the need for it); *Tauke v. Stine*, 120 F.3d 1363 (8th Cir. 1997) (conceding that while other actions were available to the officer, he nevertheless acted reasonably in responding to a threat); *Schulz v. Long*, 44 F.3d 643 (8th Cir. 1995) (reiterating that an inquiry into excessive force does not focus on the most prudent course of action, but rather whether the action taken falls within the land of reasonableness); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994) (holding officers do not need to avail themselves of the least intrusive means of responding to a situation, but instead only need to act within the range of conduct a court would identify as reasonable, and stating that to require otherwise would inevitably induce tentativeness by officers, deter police protecting the public and themselves, and entangle courts in constant second-guessing of police decisions); *Warren v. Las Vegas*, 111 F.3d 139 (9th Cir. 1997) (reiterating that courts determine reasonableness from the perspective of the officer at the scene, rather than with 20/20 hindsight); *Wilson v. Meeks*, 52 F.3d 1547 (10th Cir. 1995) (holding that the inquiry for excessive force is confined to the danger at the moment of the threat, not whether the officer may have contributed to the threat arising); *Manuel v. Atlanta*, 25 F.3d 990 (11th Cir. 1994) (stating that courts have uniformly refused to second-guess officers because reconsideration nearly always reveals something different could have been done to avoid the use of force, making recognition of the context under which an officer made a decision invaluable); *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001) (analyzing an excessive force claim by assessing whether the officer’s conduct was reasonable from the perspective of a reasonable officer at the scene, recognizing that officers may be forced to make split-second judgments under stressful and dangerous conditions).

Following the October 3, 1993 battle between U.S. and other peacekeeping forces against those of Somali warlord Mohamed Farrah Aidid, see BOWDEN, *supra* note 64, the U.S. Department of Defense began a

This approach runs counter to the argument in the ICRC's *Interpretive Guidance* that "[i]t has long been recognized that matters not expressly regulated in IHL should not 'for want of a written provision, be left to the arbitrary judgment of the military commanders.'"¹³¹ Were one to follow the logic of the argument offered by Pictet, Melzer, and in Section IX of the *Interpretive Guidance*, 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. This argument has not been pursued by governments, as multiple wounds in battle are common due to the integrated weapon systems employed in a military unit's fire support plan in military operations on a linear or non-linear battlefield.¹³² In small-unit actions, such as in counterinsurgency operations, the same is true, as the unit, ranging in size from four to a dozen, masses its fire power to respond to the threat. Neither has the Melzer argument for individual responsibility in application of deadly force found sympathy in domestic law enforcement cases, as will be shown.

development and acquisition program for non-lethal (also referred to as "less-lethal") weapons. Department of Defense Directive 3000.3 (July 9, 2005), Policy for Non-Lethal Weapons, contains the following:

4.4 The 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.

4.5 Neither the presence nor the potential effect of non-lethal weapons shall constitute an obligation for their employment or a higher standard of force than provided by applicable law. In all cases, the United States retains the option to immediate use of lethal weapons, when appropriate, consistent with international law.

4.7 Non-lethal weapons may be used in conjunction with lethal weapon systems to enhance the latter's effectiveness and efficiency in military operations. This shall apply across the range of military operations to include those situations where overwhelming force is employed.

131. *Interpretive Guidance*, *supra* note 9, at 80 n.219.

132. See, e.g., WOUND BALLISTICS, HISTORY OF THE MEDICAL DEPARTMENT, U.S. ARMY, IN WORLD WAR II 255, 256, 258, 276, 315, 316, 317, 321, 326, 329, 339, 340, 343-344, 371, 375, 563, 564, 573, 574, 600, 722 (Major James C. Beyer ed., 1962). In the examination of one group of 369 battle casualties, the percentage of soldiers with multiple wounds was 37.7%. Of the number experiencing multiple wounds, 17.6% were killed in action and 13.1% died of their wounds. *Id.* at 258.

Civilian courts have declined to count the number of shots fired by law enforcement agents in response to a threat, or the number of wounds suffered by the individual or individuals who posed the threat. For example, in *Amato v. United States*, the plaintiff was one of three men—Vincent Amato, John Colarco, and Frank Vuono—who planned to rob a bank.¹³³ The Federal Bureau of Investigation (FBI) received advance warning of the robbery and set up at the site to apprehend the three.¹³⁴ As Amato and his partner in crime, Vuono, exited their car at the bank, Vuono detected a uniformed FBI Special Weapons and Tactics (SWAT) team, drew his weapon, and fired a single shot at them, prompting members of the FBI SWAT team to return fire.¹³⁵ This in turn resulted in FBI agents inside the bank opening fire, in the mistaken belief that the shots in their direction originated from the bank robbers.¹³⁶ In the next thirty-three seconds, eleven FBI agents fired 281 bullets and shotgun pellets as they engaged in an intramural firefight.¹³⁷ Vuono was killed and four FBI agents were wounded.¹³⁸ Amato suffered sixty-five separate gunshot wounds, but survived.¹³⁹ His claim alleging excessive force was rejected.¹⁴⁰

As previously noted, the phenomenon of multiple wounding has a number of rationales. Using the *Amato* case by way of example, the intensity of FBI gunfire was the result of each of the eleven agents unilaterally responding to an actual or perceived threat. The same would be true of soldiers in an armed conflict, who are trained to respond with individual and combined fire. There are additional reasons, including fundamental physiological attributes, such as one often referred to as *action beats reaction*.¹⁴¹ In *action beats reaction*, an individual who sees or hears something requires time for the information seen or heard to be transmitted to the brain, processed, a re-

133. 549 F. Supp. 863 (D.N.J. 1982).

134. *Id.* at 865.

135. *Id.* at 868.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 871.

141. See, e.g., Warren H. Teichner & Marjorie J. Krebs, *Laws of Visual Choice Reaction Time*, 1 PSYCHOL. REV. 75, 81 (1974).

sponse formed, and transmitted within the body to perform the response decided upon.¹⁴² Thus a soldier in an armed conflict or a law enforcement officer in a peacetime environment confronted with a threat will see what may be a threat, identify it as a threat, process that information, and respond according to his or her training, rules of engagement (in the case of the soldier) or rules for use of deadly force (in the case of the police officer). Similarly, when a soldier or police officer engages the threat with his weapon, the threat may suffer multiple gunshot wounds because (a) it may require multiple shots and more than one wound to incapacitate the threat; it will take a similar amount of time for the soldier or police officer to (b) see that the targeted threat has dropped his weapon and is falling, (c) transmit what he or she is seeing to the brain, (d) process that information, and (e) transmit the command within his or her body to cease the motor functions used to operate his or her weapon. Pictet never took his argument to the extreme of “counting shots,” but it is a logical step in his flawed argument, relied upon by the ICRC in Section IX. As will be shown, it is a step courts in addition to the judge in *Amato* prudently have declined to take. It also shows the fallacy of the Pictet argument and Dr. Melzer’s and the ICRC’s reliance on it in Section IX of the *Interpretive Guidance*.

Short of actual combat, whether international or non-international armed conflict, few situations highlight the distinction between the dangerous and the endangered as do hostage or other terrorist situations. Court decisions in such cases have added to the law related to the balance that must be struck by a government and its law enforcement or military forces between the dangerous and the endangered.¹⁴³

142. For example, in a test performed to determine the delaying effect of reaction/response time, twenty experienced police officers were instructed to shoot as many times as possible from their service pistols during the time between audible signals. 85% of the officers fired one or two shots after the stop signal. The final shot was fired 0.261 seconds (on average) after the stop signal. The conclusion was that the human body’s physiology prevents immediate stopping of a series of shots, even to a known signal. Ernest Tobin & Martin L. Fackler, *Officer Reaction-Response Time Delay at the End of Shot Series*, 2 WOUND BALLISTICS REV. 1, 11-12 (2001).

143. The cases that follow are representative and of value because of the judicial proceedings that followed and because they are available to the public. Other cases include the October 18, 1977, hostage rescue mission by the German Federal Border Guard Group 9 Special (GSG9) with SAS assistance

2. *United Kingdom case law: Princes' Gate, London, May 5, 1980*

On April 30, 1980, the Iranian Embassy, located at 16 Princes' Gate in London, was seized by five members of the Mohieddin al Nasser Martyr Group armed with handguns, machine pistols, and hand grenades.¹⁴⁴ Negotiations ensued between British civil authorities and the terrorists, during which time law enforcement resources were mobilized. As the crisis continued, the decision was made that military aid to the civil power would be necessary to rescue the hostages in the event the embassy had to be entered by force against armed opposition.¹⁴⁵ The Special Air Service (SAS), specifically trained for hostage rescue missions, was alerted to prepare and stage a unit for this eventuality. Although negotiations succeeded in the release of five hostages over the next five days, the murder of Abbas Lavasani, the Embassy's Press Officer, on May 5, and threats to begin executing other hostages, prompted the British government to order the SAS to assault the embassy to resolve the situation. In the ensuing operation, five of the six terrorists died, receiving the following number of gunshot

of the passengers and crew of the hijacked Lufthansa LH161 in Mogadishu from Baader-Meinhof terrorists, resulting in the deaths of four of five of the terrorists. See ROLF TOPHOVEN, *GSG9: GERMAN RESPONSE TO TERRORISM* (Bernard & Graef 1985); BARRY DAVIES, *FIRE MAGIC: HIJACK AT MOGADISHU* 142-45 (1994); STEFAN AUST, *BAADER-MEINHOF* 372, 407-8 (Anthea Bell trans., 2008). See also YAROSLAV TROFIMOV, *THE SIEGE OF MECCA* 224, 239 (2007) (describing the September 20, 1978, terrorist seizure of the Grand Mosque in Mecca and its eventual recovery, resulting in the deaths of seventy-five of the terrorists during the operation; sixty-three terrorists captured were executed one month later). See also LUIS GIAMPIETRI, *41 SECONDS TO FREEDOM* (2007) (describing the December 18, 1996, seizure of the Japanese Embassy in Lima, Peru, including six hundred hostages, by the terrorist group Tupac Amaru Revolutionary Movement, and the rescue of the hostages and recovery of the embassy four months later by specially-trained Peruvian military forces, resulting in the deaths of all of the terrorists).

144. Transcript of Iranian Embassy Siege at 2, Westminster Coroner's Court (Feb. 3-4, 1981) [hereinafter Coroner's Court] (on file with author). For other descriptions of the siege, see MICHAEL PAUL KENNEDY, *SOLDIER "I" S.A.S.* 175 (1989) and GENERAL SIR PETER DE LA BILLIERE, *LOOKING FOR TROUBLE* 319 (1994). The Mohieddin al Nasser Martyr Group sought autonomy for Arabistan in southwestern Iran. KENNEDY, *supra*, at 175.

145. Coroner's Court, *supra* note 144, at 3.

wounds: Salim, 15; Feisal, 39; Abass, 21; Makki, 11; Shai, 152.¹⁴⁶ A final terrorist, Neyjad, was captured.¹⁴⁷

The jury was informed it could arrive at one of four alternative verdicts: (a) justifiable homicide, that is, a person may use such force as is reasonable under the circumstances, in the prevention of a crime; (b) misadventure, that is, a lawful act which unexpectedly took a turn, due to misfortune or bad luck, and this unexpected turn of events led to the death of a person (such as a person caught in crossfire between terrorists and the SAS); (c) unlawful killing, that is, the conduct of the SAS showed they acted in an unreasonable manner; and (d) open verdict, that is, insufficient evidence to suggest any of the other suggested verdicts. In instructing the jury, the coroner informed them that two questions should be asked as to whether the "force is reasonable, in the circumstances, in the prevention of a crime . . . (a) was the force used necessary . . . [and] (b) was the force proportionate to the evil to be avoided."¹⁴⁸ By unanimous verdict, the jury ruled that the terrorists' deaths were justifiable homicide.¹⁴⁹ The actions of the soldiers and the number of times each terrorist had been shot were not factors in determining whether the government response was proportionate to the terrorists' seizure of the embassy.

3. *European Court of Human Rights case law: McCann and Others v. United Kingdom*

In early 1988, the government of the United Kingdom learned of the probability of a likely attack by the Irish Republican Army (IRA) on British citizens or property outside the United Kingdom, in all likelihood in Gibraltar or southern Spain.¹⁵⁰ Eventually three IRA members—Daniel McCann,

146. *Id.* at 157-59. Short names were used throughout the Coroner's Court report, since it was established that the names used by the terrorists for entry into the United Kingdom were false. *Id.* at 20-21. Shai was shot in the head when the SAS soldier who confronted him had a malfunction of his submachinegun, drew his pistol and fired. *Id.* at 96-100, 158. A hand grenade was found next to Shai's body. *Id.*

147. *Id.* at 157-59.

148. *Id.* at 161.

149. *Id.* at 164.

150. The factual summary is based upon the majority opinion in *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶¶ 13-121 (1995).

Mairead Farrell, and Sean Savage, described as armed, highly dangerous, dedicated, and fanatical terrorists—were identified as members of an IRA “active service unit” that was likely to detonate a car bomb near Ince’s Hall on March 8, 1988, during the changing of the guard by the band and guard of the Royal Anglian Regiment.¹⁵¹ An SAS team was dispatched to provide military assistance to civil authorities in the prevention of the attack by and apprehension of the terrorists. Standard rules for use of force were issued by the Gibraltar Police Commissioner. They provided in part:

You and your men are not to use more force than is necessary in order to protect life. . . . You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this. . . . You and your men may fire without warning if the giving of a warning or any delay in firing could lead to death or injury to you or them or any other person, or if the giving of a warning is clearly impracticable.¹⁵²

The three suspected terrorists entered Gibraltar on Sunday, March 6, Savage in an automobile, McCann and Farrell on foot two hours later, each employing a false passport. SAS soldiers charged with apprehending the three IRA members attended briefings in which it was stated that the car bomb was likely to be detonated by remote control and, were the terrorists confronted, they were likely to detonate the bomb.¹⁵³

Once positive identification of the three IRA members had been established, the Commissioner of Police passed control to the four SAS for the arrest of the terrorists.¹⁵⁴ As four SAS members proceeded to make the arrest, Farrell and Mc-

151. *Id.* ¶¶ 17, 28, 29.

152. *Id.* ¶ 16. In subsequent discussions by the author with British Army Legal Services officers knowledgeable about the incident, it was determined that the phrase “and if there is no other way to prevent this” did not require resorting to the least intrusive option or any other deadly force continuum.

153. *Id.* ¶ 28. One of the five SAS members had no recollection of this last point. *Id.* ¶ 29.

154. *Id.* ¶¶ 47, 54.

Cann separated from Savage, who turned in the direction of the car as Farrell and McCann headed towards the border with Spain. In an unexpected turn of events, as SAS soldiers “A” and “B” were about to apprehend Farrell and McCann, a Gibraltar police car sounded its siren to get through traffic. The siren prompted McCann to turn. Spotting the two SAS soldiers and recognizing them for what they were,¹⁵⁵ McCann began to reach inside his coat. Farrell, alerted by McCann’s action, reached into her purse. At a distance of three feet to three yards, fearing McCann or Farrell would detonate the car bomb, Soldiers “A” and “B” drew their pistols and opened fire.¹⁵⁶

Soldiers “C” and “D” had closed to a distance of three meters from Savage to effect arrest when gunshots were heard. As soldier “C” shouted “Stop,” Savage “spun around and his arm went down towards his right hand hip area. [Soldier] D believed that Savage was going for a detonator. He used one hand to push a lady out of line and opened fire from about two to three meters away,” firing nine rounds into Savage’s body.¹⁵⁷ Soldier “C” testified that as Savage turned (as described by Soldier D), he [Savage] “moved his right arm down to the area of his jacket pocket and adopted a threatening and aggressive stance. [At a distance of five to six feet from Savage, Soldier] C opened fire since he feared Savage was about to detonate a bomb. . . . He fired six times as Savage spiralled down, aiming at the mass of his body.”¹⁵⁸

The inquiry established the following results:

Target	Wounds ¹⁵⁹	Range	Shooters (soldiers)
McCann	5	9 ft. or less	A, B
Farrell	8	9-12 ft.	A, B
Savage	16	5-6 ft.	C, D

155. As they were on a “military aid to civilian power” mission, the SAS were in civilian clothing.

156. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) ¶¶ 60-62 (1995).

157. *Id.* ¶ 78.

158. *Id.* ¶ 79.

159. A minor discrepancy exists in the record between number of shots fired by Soldiers A, B, C, and D, and the number of wounds. The European Court’s summary of the Coroner’s Inquiry indicates the soldiers testified that

A Coroner's Inquest convened in 1988 was informed that none of the three deceased were armed with a weapon or possessed a remote control device. The car Savage drove into Gibraltar contained no bomb, but apparently was a "blocking car" to secure the parking space. Car keys found in Farrell's purse were for a car found in La Linea rented by Farrell under her false name. Keys were found in it for another car located in Marbella, containing the bomb components lacking only final priming and connection.¹⁶⁰ After hearing testimony from seventy-nine witnesses, the Coroner's jury returned verdicts of lawful killing by a majority of nine to two.¹⁶¹

Subsequently relatives of McCann, Farrell, and Savage submitted a complaint to the European Commission of Human Rights, alleging violation of the right to life contained in Article 2, European Convention on Human Rights,¹⁶² of the three terrorists by the Government of the United Kingdom. Plaintiffs sought damages and attorney's fees. The European Commission of Human Rights by majority decision denied their claim.¹⁶³ One point considered by the Commission is germane to the issue of Dr. Melzer's and the ICRC's reliance in Section IX of *Interpretive Guidance* on Pictet's use-of-force continuum theory. Plaintiffs argued that the soldiers' firing of multiple rounds at close range into McCann, Farrell, and Savage before providing an intelligible warning or attempting to overpower them physically or disable them could not be re-

seven shots were fired at Farrell and fifteen at Savage (*id.* ¶¶ 61, 62, 78, 79), but the Court indicates the pathologist's report states the number of wounds (*id.* ¶ 199). Explanations for the discrepancy are beyond the scope of this article and in any event were not pursued by the Court.

160. *Id.* ¶¶ 96, 98, 99.

161. *Id.* ¶¶ 103, 106, 121.

162. Article 2 provides as follows: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law; 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." European Convention on Human Rights art. 2, Nov. 4, 1950, 213 U.N.T.S. 221.

163. *McCann, Farrell and Savage v. The United Kingdom*, Application No. 18984/91, Eur. Comm'n H.R. (Mar. 4, 1994).

garded as a strictly proportionate response.¹⁶⁴ In denying the argument, the Commission reasoned:

The soldiers made no attempt to overpower physically or disable the suspects since this was regarded as posing too much of a risk. It would have taken time even at a close distance to seize and immobilize a person. A person who was wounded also remained capable of the movement necessary to push a button device. On this reasoning, the soldiers considered that it was logical and necessary to continue firing until the suspects were rendered incapable of detonating a device. . . .

The Commission finds nonetheless that given the soldiers' perception of the risk to the lives of the people of Gibraltar—that a car bomb could be and was about to be detonated by the activation of a remote control device—the shooting of the three suspects can be considered as absolutely necessary for the legitimate aim of the defense of others from unlawful violence. The Commission has noted that if a bomb of the dimensions found in Marbella had been brought in and detonated on 6 March there could have been a devastating loss of life.¹⁶⁵

The Commission regarded the issue of proportionality to be applicable with respect to the actions of the United Kingdom government rather than the use of deadly force by the soldiers, stating, “[T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.”¹⁶⁶ By a vote of 11 to 6, the Commis-

164. *Id.* ¶ 218.

165. *Id.* ¶ 233.

166. *Id.* ¶ 235. As Melzer acknowledges (citing the court's language), the issue was “not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence [which the court found *was* the case] but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force [which the court found *was not* the case].” *Id.* at 107. The court's decision and the court's decision with regard to the soldier's actions acknowledged by Melzer contradict the Pictet and Melzer arguments of “proportionate deadly force.”

sion concluded that “the deprivation of life resulted from the use of force that was no more than ‘absolutely necessary’ for that purpose.”¹⁶⁷

The case was appealed to the European Court of Human Rights.¹⁶⁸ The Court unanimously agreed that the actions of the four SAS members did not give rise to a violation of article 2, paragraph 2,¹⁶⁹ but by a vote of 10 to 9 determined that actions by the Government of the United Kingdom in the control and organization of the mission was a breach of article 2, paragraph 2 of the Convention.¹⁷⁰ By unanimous vote it ordered the United Kingdom to pay the costs and expenses of the Strasbourg proceedings¹⁷¹ but dismissed applicants’ claim for damages “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb.”¹⁷² The primary points to be taken from the court’s decision are (a) no use of force continuum was considered as a prerequisite to use of deadly force, and (b) responsibility was borne by the government of the United Kingdom, not the individual soldiers. Each is squarely at odds with the Pictet, Melzer and *Interpretive Guidance* arguments.

V. THE PUBLICATION OF SECTION IX

Section IX of the *Interpretive Guidance* was published without substantive change, notwithstanding the advice of its military experts. The Section included the concession that “[i]n 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 already required by specific provisions of IHL,” thus supporting the challenge of the experts that no restriction as proposed by Pictet, Melzer, and the ICRC existed in law. Read another way, however, this passage could suggest that the ICRC was attempt-

167. *McCann, Farrell and Savage*, ¶ 250. The minority submitted three dissenting opinions.

168. *McCann v. United Kingdom*, 324 Eur. Ct. H.R. (ser. A) (1995).

169. *Id.* ¶ 200.

170. *Id.* ¶¶ 212, 213, 214, 222(1).

171. *Id.* ¶ 222(2).

172. *Id.* ¶¶ 219, 222(3).

ing to retain the ability to argue its point as a case of “emerging law.”

Customarily a critique should arrive at a point at which it suggests a way or ways in which the document reviewed may be improved through revision. Regrettably, this is not possible in this instance for reasons contained in the preceding pages. What became Section IX of the *Interpretive Guidance* was constructed from faulty sources against the strongest advice of experts from whom the ICRC had sought advice. The ICRC failed to heed this expert advice, constructing a theory not supported by treaty law, State practice, or court decisions. Its ill-constructed theory is flawed beyond repair.

VI. CONCLUSION

Combat is a brutal experience. The present author has declined to refer to the law of war as “international humanitarian law” for several reasons, the primary one being that anyone who has experienced combat at close range finds it challenging to find humanity in killing other humans. The experience with Section IX of the ICRC’s *Interpretive Guidance* was disappointing and frustrating for several reasons. A well-known law of war expert of a century ago, James Moloney Spaight, once wrote:

War law has never been presented to officers in an attractive form, as it might have been (I submit with diffidence) if the writers had insisted on the historical, human, and practical side rather than on the legal and theoretical one. But the difficulty of the subject, and the necessity for a careful study of it, have not been brought home to officers: they underestimate its importance and complexity.¹⁷³

Similarly, Sir Adam Roberts has stated:

The laws of war are strange not only in their subject matter, which to many people seems a contradiction in terms, but also in their methodology. There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. Lawyers, academics, and diplomats have often been better at interpreting the precise legal meaning of ex-

173. SPAIGHT, *supra* note 13, at 17.

isting accords . . . or at generalizing about the circumstances in which they can or cannot work. In short, the study of law needs to be integrated with the study of history: if not, it is inadequate.¹⁷⁴

As Caroline Moorhead states in her history of the ICRC, the ICRC “has its roots in precedence and institutional memory, yet thrives on action and sometimes seems curiously uninterested in history.”¹⁷⁵ Such was the case with respect to Section IX of the *Interpretive Guidance*. For the second time in five years, contrary to the admonitions of James Moloney Spaight and Sir Adam Roberts, the ICRC put forward with substantial but incomplete effort an argument lacking thorough grounding in State practice¹⁷⁶ or case law, in this instance against the advice of military and civilian legal experts it had solicited to assist it in an area of the law of war in which it lacked experience or expertise. Section IX offers arguments not based on treaty law, State practice, or domestic or international case law but which hinge on a single case by a national court operating in one of the most uncommon situations in the world. Other clear distinctions exist, not the least of which is that case law focuses on the responsibility of a government while declining to impose detailed, step-by-step pre-conditions for an individual soldier to resort to deadly force against an enemy combatant or a civilian taking a direct part in hostilities in armed conflict—that is, the exact opposite of the argument

174. Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in Howard and Andreopoulos, *supra* note 10, at 116, 117.

175. MOORHEAD, *supra* note 78, at xxi.

176. As was the case with respect to the ICRC’s customary law study, ICRC, *Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005), the ICRC’s *Interpretive Guidance* was less than discriminate in determining the value of the sources it cited, notwithstanding several highly credible critiques of the latter. See, e.g., Letter from John Bellinger III, Legal Adviser, U.S. Dept. of State, and William J. Haynes, General Counsel, U.S. Depart. of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), 46 I.L.M. 514, 515-16 (2007) (“We do not believe that this is an appropriate methodological approach.”); Daniel Bethlehem, *The Methodological Framework of the Study*, Ian Scobbie, *The Approach to Customary International Law in the Study*, and Michael N. Schmitt, *The Law of Targeting*, in BRITISH INST. OF INT’L & COMPARATIVE LAW, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3-14, 15-49, 131-68 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

put forward by the ICRC. As Spaight noted and as this article illustrates, the area is complex, not sympathetic to simple solutions. As the adage goes, "If you think the answer is easy, you don't understand the problem." The decision by the ICRC to press forward with Section IX against the knowledge, experience, and advice of its experts was not only unfortunate but wrong. As the article shows, it was not a matter of reasonable people disagreeing. It is that the ICRC in Section IX began with a faulty argument for which it failed to provide any, much less credible, supporting information.

Section IX and the critical review contained herein focus on the very narrow niche of applying force against a civilian taking a direct part in hostilities but through proposed rules that would apply equally to enemy combatants. Discussion of this topic was not intended to ignore the fact that soldiers also are captured in armed conflict, nor the value of capturing enemy soldiers. In North Africa in World War II, Allied forces accepted the surrender of 275,000 German and Italian prisoners of war in early May 1943, as Axis forces collapsed.¹⁷⁷ During the first Persian Gulf War (1991), in the process of liberating Kuwait from Iraqi occupation, Coalition forces captured 86,743 Iraqi soldiers.¹⁷⁸ Thus a military commander as well as the individual soldier will face options and make decisions consistent with a nation's law of war obligations, as their fathers and grandfathers did in wars past. That said, the historic consequence of combat is that combatants lawfully may kill their enemies and are at constant risk of being killed by them.¹⁷⁹ This article closes with a reminder of that important point.

177. GEORGE F. HOWE, *NORTHWEST AFRICA: SEIZING THE INITIATIVE IN THE WEST, THE MEDITERRANEAN THEATER OF OPERATIONS*, UNITED STATES ARMY IN WORLD WAR II 666 (1957).

178. DEPARTMENT OF DEFENSE, *FINAL REPORT TO CONGRESS: CONDUCT OF THE PERSIAN GULF WAR* 577 (1992).

179. As the Dutch international law scholar Hugo Grotius stated, "In general, killing is a right in war." *DE JURE BELLI AC PACIS* (1646 ed., trans. by Kelsey, 1925), Book iii, ch. iv. v. i.; and "according to the law of nations, anyone who is an enemy may be attacked anywhere" (*id.*, viii, I).