

DECONSTRUCTING DIRECT PARTICIPATION IN HOSTILITIES: THE CONSTITUTIVE ELEMENTS

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I. INTRODUCTION

In May 2009, the International Committee of the Red Cross released its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.¹ The product of five years of efforts by a group of nearly 50

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1. 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).

international experts convened by the organization, the Interpretive Guidance represents the ICRC's view on the meaning and application of the notion in both international and non-international armed conflict. Despite initial hopes, it does not reflect a consensus document. On the contrary, and notwithstanding certain laudatory aspects of the analysis, key features of the Guidance have proven highly controversial.²

As will be explained in greater depth below, civilians who “directly participate” in hostilities lose the protection from attack they otherwise enjoy under international humanitarian law. This article, written from the perspective of a participant in the ICRC process, critically analyzes one facet of the Interpretive Guidance—its criteria for activities that qualify as “direct participation,” which it labels “constitutive elements.”³

Following a general examination of the legal notion of direct participation, various approaches adopted by States, tribunals, academicians, and the ICRC prior to the launch of the project are reviewed. Of particular importance in situating the prevailing normative code is the fact that States have tended towards case-by-case assessments. The remainder of the article is devoted to a comprehensive deconstruction of the three constitutive elements—threshold of harm, direct causation, and belligerent nexus—and an examination of how to characterize conduct in grey area situations.

2. Note that the ICRC expressly limits the Interpretive Guidance to “conduct of hostilities” issues, that is, those relating to combat. It assiduously avoids any discussion of the consequences of direct participation vis-à-vis detention of individuals who so participate. *Id.* at 9. This was a sage decision, for direct participation lies at the heart of the debate over the existence of a category of “unlawful combatants” who qualify for neither the protection to which prisoners of war are entitled under the Third Geneva Convention, nor the full panoply of protections due to civilian detainees under the Fourth Geneva Convention. Geneva 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 Geneva Convention III]; Geneva Convention 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 Geneva Convention IV]. This disclaimer aside, the approach adopted in the Interpretive Guidance does provide some support for advocates of the category, although discussion is beyond the scope of this article. For more on this issue, see Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. (forthcoming 2010).

3. For the ICRC, there are three such elements: threshold of harm, direct causation, and belligerent nexus. See discussion *infra* Part IV.

As will become apparent, and despite admittedly useful contributions made by various aspects of the Interpretive Guidance, the constitutive elements evidence serious shortcomings with respect to both law and military common sense. Companion pieces contributed to this issue of the *N.Y.U. Journal of International Law and Politics* by fellow project participants identify flaws in other aspects of the Interpretive Guidance. Taken together, the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare. Accordingly, States involved in 21st century warfare are unlikely to view the document favourably, let alone use it to provide direction to their forces in the field.

II. THE NOTION OF DIRECT PARTICIPATION GENERALLY

Scholars and practitioners universally accept the normative premise that although civilians generally enjoy protection from attack under international humanitarian law (IHL), they lose such protection while directly participating in the hostilities. However, no authoritative guidance has existed on the question of which activities qualify as direct participation (or on how they so qualify), the subject of this article, or on the related issues of who qualifies as a civilian and how long the loss of protection lasts. Therefore, analysis has tended to be case-by-case and based upon vague and somewhat instinctual criteria; it verged on a “know it when you see it” approach. Through a process of extensive consultation with experts, the ICRC sought to provide greater clarity to these complex issues, ones which lie at the heart of warfare since they determine in many cases who may be attacked, and who may not.

The dilemma of identifying acts of “direct participation” by civilians and understanding their legal consequences haunts many current operations. Civilians saturate the modern battlefield, often engaging in activities that have traditionally been performed by members of the armed forces (combatants). The ongoing conflicts in Iraq and Afghanistan aptly illustrate the criticality of clarifying the status of those who in some way participate in military operations. US Central Command, which oversees both conflicts, was contracting for the

services of 242,230 civilians by September of 2009.⁴ Many performed relatively benign functions, such as cooking or participating in reconstruction projects. However, others accomplished military logistics and intelligence duties, and well over 10,000 provided security to the Coalition forces and associated personnel.⁵ Recent reports of Blackwater employees involved in Predator strikes against al Qaeda operatives have kept the issue of direct participation in the public eye,⁶ as has the 2009 debate, especially within NATO, over the policy of attacking drug lords in Afghanistan whose activities help to fund the Taliban.⁷ Prominent issues also include the status of civilians who pilot unmanned aerial vehicles, are involved in computer network attacks, or provide financing for insurgent and terrorist groups. There are few IHL topics as timely or contentious as direct participation in hostilities.

The concept of direct participation relates to the IHL principle of distinction between combatants and the civilian population.⁸ Recognized as “cardinal” by the International

4. MOSHE SCHWARTZ, CONG. RESEARCH SERV., DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 5 (Dec. 14, 2009).

5. *Id.* at 8 (noting that in Iraq as of September 2009, 12,684 civilian contractors were performing security functions). For detailed information on the use of contractors, see generally SCHWARTZ, *supra* note 4.

6. James Risen and Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 21, 2009, at A1, available at http://www.nytimes.com/2009/08/21/us/21intel.html?_r=1&scp=1&sq=C.I.A.%20Said%20to%20Use%20Outsiders%20to%20Put%20Bombs%20on%20Drones&st=cse; Mark Mazzetti, *Outsiders Hired As C.I.A. Planned To Kill Jihadists*, N.Y. TIMES, Aug. 20, 2009, at A1, available at <http://www.nytimes.com/2009/08/20/us/20intel.html?scp=1&sq=outsiders%20Hired%20As%20C.I.A.%20Planned%20to%20Kill%20Jihadists&st=cse>.

7. See generally James Risen, *Drug Chieftains Tied to Taliban are U.S. Targets*, N.Y. TIMES, Aug. 10, 2009, at A1, available at <http://www.nytimes.com/2009/08/10/world/asia/10afghan.html>; Judy Dempsey, *NATO Chief Presses Afghan Drug Fight*, N.Y. TIMES, Feb. 12, 2009, available at <http://www.nytimes.com/2009/02/12/world/asia/12nato.html>.

8. “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; see also *id.* art. 44 (“[C]ombatants are obligated to

Court of Justice,⁹ the distinction requirement finds expression in, *inter alia*: the prohibitions on direct attack against civilians, acts or threats of violence designed to spread terror among the civilian population, and indiscriminate attacks;¹⁰ the principle of proportionality, which bars an attack that can be expected to cause incidental loss of civilian life or injury to civilians that is excessive relative to its anticipated military advantage;¹¹ and

distinguish themselves from the civilian population while they are engaged in an attack.”). The rule unquestionably reflects customary international law in both international and non-international armed conflict. ICRC, *Customary International Humanitarian Law: Volume I: Rules 3* (2005) (prepared by Jean-Marie Henckaerts & Louise Doswald-Beck) [hereinafter *Customary International Law Rules*]; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEN, INT’L INST. OF HUMANITARIAN LAW, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* ch. 1.2.2 (2006) [hereinafter *NIAC Manual*], available at <http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill.pdf>.

9. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

10. See Additional Protocol I, *supra* note 8, art. 51 (prohibiting attacks on civilians and indiscriminate attacks); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4, adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (prescribing humane treatment for those not a part of hostilities); *Customary International Law Rules*, *supra* note 8, at 3 (“Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”); NIAC MANUAL, *supra* note 8, ch. 2.1.1 (stating that attacks allowed only against fighters and military targets). The International Criminal Tribunal for the former Yugoslavia has held the principle of distinction, as reflected in Article 51 of Additional Protocol I, to be customary in nature. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment, ¶ 45 & n.78 (Dec. 5, 2003); see also Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 110 (July 29, 2004) (noting the customary nature of much of the Geneva Convention, and specifically referring to the definition of civilians).

11. See Additional Protocol I, *supra* note 8, arts. 51(5)(b), 57(2)(b) (defining indiscriminate attacks as including those attacks where incidental harm to civilians would be excessive and explaining that attacks should be cancelled where there would be disproportionate loss of civilian life); *Customary International Law Rules*, *supra* note 8, at 46 (“Rule 14: Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.”); NIAC MANUAL, *supra* note 8, ch. 2.1.1.4 (explaining the rule of proportionality, which “derives from the general principle of distinction”).

the requirement to take precautions to minimize harm to civilians.¹²

International humanitarian law suspends such civilian protections “for such time as [civilians] take a direct part in hostilities.”¹³ In particular, civilians taking a direct part may be attacked, do not factor into proportionality calculations, and need not be considered when trying to minimize harm to civilians.¹⁴ This customary IHL rule is set forth for States parties in Article 51(3) of the 1977 Additional Protocol I to the 1949 Geneva Conventions for international armed conflict and Article 13(3) of Additional Protocol II for non-international armed conflict.¹⁵ Common Article 3 of the 1949 Geneva Conventions,¹⁶ the Statute of the International Criminal

12. See Additional Protocol I, *supra* note 8, art. 57 (detailing precautions to protect civilian life and how they are to be taken); *Customary International Law Rules*, *supra* note 8, at 51-67 (explaining the precautions necessary for attacks); NIAC MANUAL, *supra* note 8, ch. 2.1.2 (explaining the precautions necessary in planning and carrying out attacks).

13. See *infra* note 15 and accompanying text.

14. See, for example, the Report of the Inter-American Commission on Human Rights in *Abella*, which notes:

[W]hen civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in fighting, whether singly or as a member of a group, they thereby become legitimate military targets. As such, they are subject to direct individualized attack *to the same extent as combatants*. Thus, by virtue of their hostile acts, the Tablada attackers *lost* the benefits of the above mentioned precautions in attack and against the effects of indiscriminate or disproportionate attacks pertaining to *peaceable* civilians.

Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 ¶ 178 (1997).

15. Additional Protocol I, *supra* note 8, art. 51(3); Additional Protocol II, *supra* note 10, art. 13(3). In the Targeted Killings Case, the government of Israel conceded that Article 51(3) reflected customary law, with the exception of the “for such time” component. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] ¶ 30. The Israeli Supreme Court found that the entire provision was customary in nature. *Id.* ¶ 38.

16. These identical provisions set out in each Geneva Convention that humane treatment is due those “taking no active part in the hostilities.” Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3(1), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of the WOUNDED, SICK, and Shipwrecked Members of Armed Forces at Sea art. 3(1), August 12, 1949, 6

Court,¹⁷ military manuals,¹⁸ and restatements of customary IHL¹⁹ likewise adopt the notion in various forms.

The direct participation rule presents three interpretive issues, each of which is addressed by the Interpretive Guidance: (1) what is a civilian?; (2) what is direct participation?; and (3) when is protection suspended? Companion contributions in this issue deal with the Guidance's highly problematic handling of the first and third questions, as well as its dubious assertion of purported restrictions on attacks against direct participants.²⁰ This article explores the meaning of the term "direct participation" and its treatment by the ICRC in the document. The concept is central to the suspension of the protections civilians enjoy, for such protections remain intact absent an act qualifying as "direct participation."

U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention III, *supra* note 2, art. 3(1); Geneva Convention IV, *supra* note 2, art. 3(1). Note that Common Article 3 employs the terminology "active part in hostilities." The terms "active" and "direct" are synonymous. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) ("These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous.").

17. The Rome Statute criminalizes attacks on civilians "not taking direct part in hostilities." Rome Statute of the International Criminal Court arts. 8(2)(b)(i), (e)(i), UN Doc. A/CONF.183/9, 37 I.L.M. 1002 (July 17, 1998) [hereinafter Rome Statute].

18. See, e.g., U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, DOC. NWP 1-14M/MCWP 5-12.1/COMDTPUB P5600.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 8.2.2 (July 2007) [hereinafter COMMANDER'S HANDBOOK] (allowing attacks on unlawful combatants "who are taking a direct part in hostilities"); UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL ON THE LAW OF ARMED CONFLICT ch. 5.3.2. (2004) [hereinafter UK MANUAL] ("A civilian has no right to participate directly in hostilities. If he does, he loses his immunity.").

19. E.g., *Customary International Law Rules*, *supra* note 8, at 19 ("Rule 6. Civilians are protected against attack unless and for such time as they take a direct part in hostilities."); NIAC MANUAL, *supra* note 8, ch. 2.1.1.2 ("Civilians lose their protection from attack if they take an active (direct) part in hostilities.").

20. See the companion contributions in this volume: 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); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); 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).

Before turning to the substance of the notion of direct participation, it is essential to understand that the three issues resident in the rule operate in concert. First, the rule only applies to those who qualify as “civilians.”²¹ This status is of great functional importance on the battlefield, for without it, individuals are generally subject to attack at any time and place. By the Interpretive Guidance’s approach, members of the armed forces and participants in a *levee en masse* do not qualify as civilians, and may therefore be attacked based solely on their status as such regardless of whether they are directly participating in hostilities at the time of the attack. Members of organized armed groups belonging to a party to a conflict who have a “continuous combat function” are also disqualified as civilians, although the term “direct participation” remains relevant as to them because a “continuous [combat] function involves the preparation, execution, or command of acts or operations *amounting to direct participation in hostilities.*”²² Like combatants, those with a continuous combat function may be attacked on the basis of their status alone. Members of an organized armed group who do not regularly perform combat duties continue to enjoy full civilian protection from attack unless they directly participate. This author disagrees with both the “belonging to a party” and “continuous combat function” criteria proposed in the Interpretive Guidance, and has set forth his criticisms thereof elsewhere.²³

Second, the highly controversial “for such time” component of the direct participation rule depends in the first instance on an act of direct participation. The extensive debates over which acts preparatory to direct participation suspend civilian protection and when suspension begins and ends assume an act of direct participation as a condition precedent. In other words, only actions related to a defined act of direct participation raise the question of the meaning of the phrase “for such time.”

21. The Interpretive Guidance explication of civilian status applies only to issues of direct participation, not to other matters where civilian status is relevant, such as detention. *Interpretive Guidance, supra* note 1, at 11. *See* discussion *supra* note 2.

22. *Interpretive Guidance, supra* note 1, at 34 (emphasis added).

23. Schmitt, *supra* note 2.

III. DEFINING DIRECT PARTICIPATION

A. *Prior Efforts to Define Direct Participation*

At the heart of the expert process was the attempt to define the term “direct participation.” As highlighted by the ICRC in its *Customary International Humanitarian Law* study, “outside the few uncontested examples . . . , in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice.”²⁴ Accordingly, States tend to address direct participation issues in a case-by-case fashion. This practice is reflected in the various law of war manuals that serve as guidance for forces in the field. The *Commander’s Handbook on the Law of Naval Operations*, which is the most recent US manual, is emblematic.

Unlawful combatants who are not members of forces or parties declared hostile but who are taking a direct part in hostilities may be attacked while they are taking a direct part in hostilities, unless they are *hors de combat*. Direct participation in hostilities must be judged on a case-by-case basis. Some examples include taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy

24. *Customary International Law Rules*, *supra* note 8, at 23. There is, however, a generally accepted understanding of “hostilities,” a term which appeared as a section heading in the 1907 Regulations annexed to the Hague Convention IV. The first chapter of the section implies its meaning: “Means of Injuring the Enemy, Sieges, and Bombardments.” Convention (IV) Respecting the Laws and Customs of War on Land annex, § 2, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague IV]. The ICRC Commentary to Additional Protocol I defines hostile acts as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.” ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* ¶ 1942 (Yvez Sandoz et al. eds., 1987) [hereinafter *Additional Protocol Commentary*]. A similar approach has been taken by the Inter-American Commission on Human Rights. See Inter-Am. C.H.R., Third Report on the Human Rights Situation in Columbia, OEA/Ser.L/V/II.102, doc. 9 rev. 1 ch. 4, ¶ 53 (Feb. 26, 1999) (“It is generally understood in humanitarian law that the phrase ‘direct participation in hostilities’ means acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and material.”). The Supreme Court of Israel has accepted this definition. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] ¶ 33.

property. Also civilians serving as lookouts or guards, or intelligence agents for military forces may be considered to be directly participating in hostilities. Combatants in the field must make an honest determination as to whether a particular person is or is not taking a direct part in hostilities based on the person's behavior, location, attire, and other information available at the time.²⁵

The *Handbook* proffers no criteria for making the referenced case-by-case determination. Nor does the UK's *Manual on the Law of Armed Conflict*. Like its American counterpart, it merely cites the principle and offers illustrative examples.

Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an antiaircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not, but they are at risk from attacks on those objectives since military objectives may be attacked whether or not civilians are present.²⁶

Mirroring State practice, judicial bodies usually deal with potential acts of direct participation in a case-by-case manner, again typically through reference to examples. In *Prosecutor v. Strugar*, the Appeals Chamber of the International Criminal Tribunal noted,

Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such. . . . Moreover, to hold all activities in support of military operations as amounting to direct

25. COMMANDER'S HANDBOOK, *supra* note 18, ch. 8.2.2.

26. UK MANUAL, *supra* note 18, ch. 5.3.3. The Australian manual similarly provides:

Civilians are only protected as long as they refrain from taking a direct part in hostilities. Whether or not a civilian is involved in hostilities is a difficult question, which must be determined by the facts of each individual case. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities; civilians working in a store on a military air base may not necessarily be taking such a direct part.

AUSTRALIAN DEFENCE FORCE, AUSTRALIAN DEFENCE DOCTRINE PUBLICATION (ADDP) 06.4, LAW OF ARMED CONFLICT ch. 5.36 (May, 2006).

participation in hostilities would in practice render the principle of distinction meaningless.

The Appeals Chamber also takes note of examples of direct and indirect forms of participation in hostilities included in military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols. Examples of active or direct participation in hostilities include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces. Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training, or the correct maintenance of the weapons.

On the basis of the foregoing, the Appeals Chamber holds that in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to

the individual circumstances of the victim at the time of the alleged offence.²⁷

Earlier, a Trial Chamber of the Tribunal had held,

It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.²⁸

In its landmark *Targeted Killings* case, the Israeli Supreme Court also adopted a case-by-case approach:

[T]he following cases should also be included in the definition of taking a "direct part" in hostilities: a person who collects intelligence on the army, whether on issues regarding the hostilities, or beyond those issues; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may. . . . However, a person who sells food or medicine to an unlawful combatant is not taking a direct part, rather an indirect part in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. The same is the case regarding a person who distributes propaganda supporting those unlawful combatants.²⁹

27. Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶¶ 176-79 (July 17, 2008). The Chamber's wide array of sources in support of its examples included military manuals from numerous countries, international tribunal judgments, U.S. Military Commission decisions, reports of State practice, reports and decisions of human rights bodies, and even the 1923 Hague Rules of Aerial Warfare.

28. Prosecutor v. Tadic, Case No. IT 94-1-T, Judgment, ¶ 616 (May 7, 1997).

29. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] ¶ 35 (citations omitted). For commentary on the judgment, see generally Hilly Moodrick Even-Khen, *Can We Now Tell What "Direct Participation in Hostilities" Is?*, 40 ISR. L. REV. 213 (2007); William J.

Academic treatment of the notion is in accord, typically tending towards exemplification rather than explication. For example, according to Professor Yoram Dinstein,

[T]he adjective ‘direct’ does not shed much light on the extent of participation required. For instance, a driver delivering ammunition to combatants and a person who gathers military intelligence in enemy-controlled territory are commonly acknowledged to be actively taking part in hostilities. There is a disparity between the latter and a civilian who retrieves intelligence data from satellites or listening posts, working in terminals located in his home country. Needless to say, perhaps, a mere contribution to the general war effort (e.g., by supplying foodstuffs to combatants) is not tantamount to active participation in hostilities.³⁰

B. *Defining Direct Participation for the ICRC Guidance*

In consonance with the practice of defining the notion by reference to examples, experts at the first meeting in 2003 instinctively began by assessing whether specified acts amounted to direct participation. In other words, they employed a case-by-case approach bereft of criteria against which to assess par-

Fenrick, *The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities*, 5 J. INT’L CRIM. JUST. 332 (2007); Michelle Lesh, *The Public Committee Against Torture in Israel v. The Government of Israel: The Israeli High Court of Justice Targeted Killing Decision*, 8 MELB. J. INT’L L. 373 (2007); Nils Melzer, *Targeted Killing or Less Harmful Means?—Israel’s High Court Judgment on Targeted Killings and the Restrictive Function of Military Necessity*, 9 Y.B. INT’L HUMANITARIAN L. 87 (2006); Roy S. Schondorf, *Editorial Comment, The Targeted Killings Judgment: A Preliminary Assessment*, 5 J. INT’L CRIM. JUST. 301 (2007).

30. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27-28 (2004). For other enumerations of illustrative scenarios, see A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 11-12 (2d ed. 2004) (providing a list of 20 examples ranging from cases which are clearly direct participation, such as attacking the enemy armed forces, to those which are clearly not, like financing the government through taxation); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 536-46 (2005) (working through a number of activities to evaluate what would constitute direct participation, including: human shields, rescue operations, logistics, maintenance, and reconstruction).

ticular actions. Consensus quickly emerged over certain activities that clearly qualified (e.g., conducting attacks, capturing combatants or their equipment, sabotaging lines of communication) or did not (e.g., working in canteens or in factories producing munitions).³¹ However, many examples evoked discord, the paradigmatic example being that of a civilian driving an ammunition truck in a combat zone.³² Although everyone agreed that the truck itself represented a military objective, disagreement surrounded the driver.³³ Some participants suggested he was a direct participant who could be targeted either in the truck or away from it.³⁴ Others opined that he was entitled to full civilian protection such that any harm to

31. ICRC, SUMMARY REPORT: DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 2-3 (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2003-03-report-dph-2003-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2003-03-report-dph-2003-icrc.pdf).

32. See, e.g., DINSTEIN, *supra* note 30, at 27 (stating that a such a driver would be actively taking part in hostilities); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990) (noting the unresolved debate about whether intentionally killing such a driver would constitute a war crime); ROGERS, *supra* note 30, at 9-10 (suggesting that the act does not amount to direct participation).

33. All agreed that direct delivery of ammunition to an active firing position, as distinct from delivery to the area of operations, would constitute direct participation. The Interpretive Guidance expressly acknowledges this position. *Interpretive Guidance*, *supra* note 1, at 56.

34. The Israeli Supreme Court adopted the position that the driver would be a direct participant. *Targeted Killings* ¶ 35. In *United States v. Hamdan*, a military commission found that driving a truck with weapons constituted direct participation:

The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. The fact that U.S. and coalition forces had the only air assets against which the missiles might have been used supports a finding that the accused actively participated in hostilities against the United States and its coalition partners. Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of "direct participation."

United States v. Hamdan, Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction, at 6 (Dec. 19, 2007), available at <http://www.defense.gov/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf>.

him incident from the attack on the truck implicated issues of proportionality and the requirement to take precautions in attack. This simple but contentious exercise revealed the pressing need to develop criteria by which direct participation could be ascertained, as distinct from either instinctive case-by-case analysis or comparative analysis by reference to agreed-upon lists.

Proposals of factors that might bear on qualification for direct participation varied widely within the expert group. For some, the intent of the actor to harm the enemy was the key, although other experts objected that *mens rea* might be difficult to discern in the heat of battle. A number of experts suggested that proximity to the frontlines could serve as a distinguisher, but the range of modern weapons systems (with which an attack can be launched far from the “fight”) and the fact that they potentially rendered entire countries “battlespaces” augured against adoption of a geographical criterion. The group rejected the factor of extent of military command and control over a civilian’s actions as instead bearing primarily on the issue of responsibility and as failing to address situations where civilians acted autonomously, albeit in support of one of the parties. A standard focusing on “the criticality of the act to the direct application of violence against the enemy” drew greater support and began to give the discussions visible direction.³⁵ For example, whereas collecting and analyzing strategic intelligence would generally not be direct participation, collecting tactical intelligence on the battlefield would qualify. Similarly, preparing an aircraft for a specific combat mission would amount to direct participation, whereas performing scheduled depot level maintenance would not. However, the criterion was not viewed as wholly satisfactory by the entire group.

During the discussions, the ICRC’s *Commentary on the Additional Protocols* proved useful, although various participants pointed out, correctly, that it is non-binding, reflecting only the ICRC’s position at the time of publication. According to the commentary to Article 51 (3), “‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy

35. See Schmitt, *supra* note 30, at 534 (suggesting that this may be the best way to analyze particular acts).

armed forces.”³⁶ It distinguishes “direct participation in hostilities” from “participation in the war effort,” explaining that,

The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.³⁷

Hostilities are “acts of war which are intended by their nature and purpose to hit specifically the personnel and *matériel* of the armed forces of the adverse Party.”³⁸

The commentary, therefore, points to two factors which help differentiate direct participation from other acts civilians engage in during an armed conflict. First, an act that negatively impacts the enemy’s military effort, or in which harm was intended, usually qualifies. Second, a relatively direct nexus between that action and the resulting harm should exist; in other words, direct participation must be distinguishable from indirect participation. The group of experts generally accepted these premises as appropriate points of departure in crafting criteria. Beyond the commentary, the group discussions, as evidenced by suggestions of criticality, command and control, and proximity as possible criteria, indicated a third consensus premise—linkage to the armed conflict.

IV. PARSING THE INTERPRETIVE GUIDANCE’S CONSTITUTIVE ELEMENTS

Over time, the threads that emerged from the process matured into the ICRC’s proposed “constitutive elements” of direct participation.

1) The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and

36. *Additional Protocol Commentary*, *supra* note 24, ¶ 1944.

37. *Id.* ¶ 1945.

38. *Id.* ¶ 1679.

- 2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and 3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).³⁹

Each merits separate discussion.

A. *Threshold of Harm*

Of the three, the “threshold of harm” constitutive element constitutes the conceptual foundation on which the notion of direct participation is built. International humanitarian law represents a delicate balance between the dictates of military necessity and humanitarian considerations, a balance famously codified in the 1868 St. Petersburg Declaration’s acknowledgement that at a certain point “the necessities of war ought to yield to the demands of humanity.”⁴⁰ The direct participation rule represents a paradigmatic example of this dynamic in that attack is permitted against civilians only in the face of clear military necessity—where those civilians are so harming the enemy (or benefitting its opponents, a point missed by the Guidance) that withdrawal of their protection from attack is merited. The quandary lies in determining the nature and degree of “harm” justifying such a dramatic step. Does any action disadvantaging a side to the conflict suffice or do situations exist where the harm lacks the severity necessary to outweigh humanitarian considerations? In other words, how should the concept of “harm” be understood for direct participation purposes? Of particular concern is the question of whether harm is a zero-sum game in which one side’s gain must necessarily constitute disadvantage to the other.

The Interpretive Guidance frames the “threshold of harm” constitutive element in the alternative, that is, the harm contemplated may either adversely affect the enemy or harm

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

40. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, available at <http://www.icrc.org/IHL.NSF/FULL/130?OpenDocument>.

protected persons or objects. As far as it goes, the Guidance is generally sound. Therefore, this section devotes considerable attention to its approach to both alternatives. Yet both exhibit the same deficiency—under-inclusiveness. In other words, strict application of the threshold of harm constitutive element would exclude conduct that by a reasonable assessment should amount to direct participation. In the case of acts harmful to the enemy, the result would be to exaggerate humanitarian considerations at the expense of military necessity. By contrast, under-inclusiveness with regard to harm to civilians and civilian property has the converse effect.

1. *Acts Harmful to the Enemy*

The notion of acts harmful to the enemy is a familiar one in international humanitarian law; typically, those who would otherwise be entitled to protection from attack lose it when they engage in such acts. Various provisions found in Additional Protocol I illustrate the practice. The wounded, sick, and shipwrecked are defined in part as those who “refrain from any act of hostility.”⁴¹ No matter how severely injured or how hopelessly shipwrecked they are, such individuals may be attacked for as long as they threaten the enemy or attempt to escape.⁴² Medical units forfeit their protection from attack when “used to commit, outside their humanitarian function, acts harmful to the enemy,”⁴³ as do civil defense organizations and personnel who engage in “acts harmful to the enemy.”⁴⁴ An aircrew member who parachutes from an aircraft in distress likewise forfeits protection when “it is apparent that he is engaging in a hostile act.”⁴⁵ Similarly, an individual “hors de combat” by virtue of capture, expressing intent to surrender, or being incapacitated by wounds or sickness only enjoys pro-

41. Additional Protocol I, *supra* note 8, arts. 8(a), (b).

42. *See Additional Protocol Commentary, supra* note 24, ¶ 306 (noting that it is “unreasonable to ask a soldier to spare someone who is threatening him, or, otherwise, is attempting to escape”).

43. Additional Protocol I, *supra* note 8, art. 13(1); *see also* Geneva Convention I, *supra* note 16, art. 21 (using similar language to indicate when fixed establishments and mobile medical units can lose their protection); Geneva Convention IV, *supra* note 2, art. 19 (using similar language to indicate when civilian hospitals forfeit their protection).

44. Additional Protocol I, *supra* note 8, art. 65(1).

45. *Id.* art. 42(2).

tection from attack if “he abstains from any hostile act and does not attempt to escape.”⁴⁶ The commentary to the provision notes that the caveat is based in the “fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked.”⁴⁷ An unofficial, albeit respected, second commentary to the provision explains that the commission of hostile acts implies the individual is “still participating in the battle, or directly supporting battle action.”⁴⁸

The concept of harmful acts extends beyond engaging in combat with the enemy. As the commentary to the provision on medical units notes, “the definition of *harmful* is very broad. It refers not only to direct harm inflicted on the enemy, for example, by firing at him, but also to any attempts at deliberately hindering his military operations in any way whatsoever.”⁴⁹ In fact, the 1974-1977 Diplomatic Conference which drafted the Additional Protocols did not deem it necessary to define the phrase because it was “self-explanatory.”⁵⁰ In doing so, it echoed the attitude of the 1949 Diplomatic Conference with regard to a similar provision in Geneva Convention I (addressing the sick and wounded on land). Although the ICRC had proposed a definition of harmful act as “[a]cts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations,” participants in the conference saw no need to include such a definition in the Convention.⁵¹

Along the same lines, while most IHL “conduct of hostilities” prohibitions are expressed in terms of “attacks,”⁵² acts of

46. *Id.* art. 41(2).

47. *Additional Protocol Commentary*, *supra* note 24, ¶ 1605.

48. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 223 (1982).

49. *Additional Protocol Commentary*, *supra* note 24, ¶ 551.

50. *Id.* ¶ 550.

51. *Id.*; ICRC, *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 200-201 (Jean S. Pictet ed., 1952).

52. Examples from Additional Protocol I of prohibitions framed in terms of attacks include, *inter alia*: the prohibition on indiscriminate attacks (Additional Protocol I, *supra* note 8, art. 51(4)); the limitation of attacks to military objectives (*id.* art. 52(2)); the prohibition on reprisals against civilians (*id.* art. 51(6)); the principle of proportionality (*id.* arts. 51(5), 57(2)); the rules regarding precautions (*id.* art. 57); and prohibitions of attacks on civil-

direct participation need not rise to this level. Attacks are defined in Additional Protocol I as “acts of violence against the adversary, whether in offense or defence.”⁵³ Direct participation, by contrast, need not involve violence, nor even be related to specific violent military actions. Examples cited in the Interpretive Guidance, all of which proved uncontroversial in the experts’ discussions, illustrate the broad coverage of the concept: “armed or unarmed activities restricting or disturbing deployments, logistics and communications”; “capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary,” including “denying the adversary the military use of certain objects, equipment and territory, [and] guarding captured military personnel of the adversary to prevent them being forcibly liberated”; “clearing mines placed by the adversary”; “[e]lectronic interference with military computer networks . . . , whether through computer network attacks (CNA) or computer network exploitation (CNE)”; and “wiretapping the adversary’s high command or transmitting tactical targeting information for an attack.”⁵⁴

The Interpretive Guidance appropriately notes that the quantum of harm caused the enemy does not affect the threshold. Specifically, “military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects, but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict.”⁵⁵ This being so, choice of the term “threshold,” a quantitative concept, was unfortunate. The issue is the nature of the harm, not any particular threshold.

To amount to an adverse effect, *military* operations or capacity must be affected. This requirement comports with Additional Protocol I’s definition of military objectives, which re-

ians (*id.* art. 51(2)), civilian objects (*id.* art. 52(1)), objects indispensable to the survival of the civilian population (*id.* art. 54(2)), the natural environment (*id.* art. 55(2)), and works and installations containing dangerous forces (*id.* art. 56).

53. *Id.* art. 49(1).

54. *Interpretive Guidance*, *supra* note 1, at 48.

55. *Id.* at 47.

flects customary international law.⁵⁶ By Article 51(2), military objectives are objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Objects which do not contribute militarily, nor offer an attacker an advantage that is military in nature, do not qualify. Political, economic, and other advantages or contributions, such as impacting civilian morale, fail to suffice, even though they can be decisive in terms of victory or defeat.

Applying this definition, a civilian object used for military purposes (or which will be so used) may be attacked. One used for other purposes, even if somehow contributing to a Party’s position in the conflict (as in a broadcast station used to demoralize the enemy civilian population), enjoys immunity from attack. Analogously, an act of direct participation must impact the enemy’s military wherewithal. For instance, an individual broadcasting negative messages to the enemy civilian population is not directly participating even though such broadcasts may contribute to a loss of support for the war effort. Universal acceptance of the military objective definition supports restricting the notion of direct participation to harm which is military in nature.

It should be noted that there is a long-standing debate over whether “war-sustaining” objects, such as “economic

56. See *Customary International Law Rules*, *supra* note 8, at 23 (“Rule 8: In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”); NIAC MANUAL, *supra* note 8, ch. 1.1.4 (“Although Additional Protocol I is widely ratified, some countries, led by the United States, strenuously object to certain aspects of it. Despite this, there is no objection to the definition of military objectives, which is now considered to be customary international law . . .”). The adoption of a substantially similar definition in the United States Naval Handbook, COMMANDER’S HANDBOOK, *supra* note 18, ch. 8.2 (“Military objectives are . . . those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.”) is especially relevant to the customary status of the definition in that the United States is not a party to Additional Protocol I.

targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability," qualify as military objectives.⁵⁷ The US *Commander's Handbook on the Law of Naval Operations* suggests they do,⁵⁸ although the assertion is hotly contested.⁵⁹ This debate has no bearing on the issue of military effect in the context of direct participation, for the experts generally agreed that workers in a munitions factory, the paradigmatic "war-supporting" entity and thus one with greater nexus to military operations than war-sustaining functions like oil exportation, were not direct participants.⁶⁰

As drafted, the constitutive element of threshold of harm appears under-inclusive in that it focuses solely on adverse effect on the enemy—harm is the determinative criterion.⁶¹ But

57. This phrase appeared in the 1995 edition of *The Commander's Handbook*. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, DOC. NWP 1-14M/MCWP 5-2.1 COMDTPUB P5800.1, ch. 8.1.1 & n.11 (Oct. 1995), *reprinted in* NAVAL WAR COLLEGE, *73 INTERNATIONAL LAW STUDIES* (A.R. Thomas & James C. Duncan eds., 1999) (annotated version). The phrase "war-sustaining" was retained in the July 2007 edition, for which an annotated version has yet to be published. *COMMANDER'S HANDBOOK*, *supra* note 18, ch. 8.2. "War-fighting" implies combat operations or activities closely associated thereto. "War-supporting" activities are those which indirectly support combat operations, such as the production of armaments. "War-sustaining" refers to activities that undergird a war effort, such as the export of items that generate income, allowing the eventual funding of the war effort.

58. *COMMANDER'S HANDBOOK*, *supra* note 18, ch. 8.2.

59. For example, according to Professor Dinstein, the assertion "goes too far." DINSTEIN, *supra* note 30, at 87.

60. The Interpretive Guidance expressly rules out "war-sustaining" activities as examples of direct participation. *Interpretive Guidance*, *supra* note 1, at 51. However, its interpretation of the notion ("political, economic or media activities supporting the general war effort (e.g., political propaganda, financial transactions, production of agricultural or non-military industrial goods)," *id.*) is much broader than that adopted by the United States for the purpose of illustrating military objectives. See *supra* note 57 and accompanying text.

61. An interesting twist on the issue of adverse effect on military operations or capacity that the Interpretive Guidance fails to address is whether activities that affect either organized armed groups (for more, see the companion contribution in this volume by Brigadier-General Kenneth Watkin, Watkin, *supra* note 20) or individual direct participants can qualify as direct participation. Presumably, the former would because the fact that the group is operating on behalf of a party means that party would be adversely impacted. The latter should also qualify, for even though the direct participant is not entitled under IHL to participate in hostilities, his activities do pre-

while it would not be direct participation to refuse to engage in actions that would positively affect one of the parties, as in the case of a civilian who refuses to provide information, it would be to perform acts likely to enhance a party's military operations or military capacity.⁶²

In practice, harm and benefit are related in the sense that conflict is usually a zero sum game—a contribution to one side typically weakens its opponent. The Guidance's distinction between them is therefore somewhat artificial. In fact, the strengthening of the enemy's capacity can prove as much a concern as the weakening of one's own forces. This is especially true where the strengthening yields asymmetrical advantage to the enemy. As an example, the development of simple improvised explosive devices by Iraqi insurgent forces dramatically altered the course of battle. Beyond the casualties caused, the development, production, training for use, and fielding of IED's necessitated costly investment in counter-technologies, hurt the morale of Coalition forces, and negatively affected perceptions as to the benefits of the conflict at home.

Clearly, limitation to harm renders the threshold element under-inclusive. The consequences of under-inclusiveness are compounded by incorporation of this limitation into the second constitutive element, direct causation, which requires that a specific act be directly linked causally to harm befalling the

sumably benefit one side to the conflict. Therefore, an attack or other action directed against him would itself have military consequences. The scenario is not far-fetched. Consider Iraq, where individual civilians are paid for each improvised explosive device implanted against the Coalition forces. In many cases, they are not members of an organized armed group, but rather simply civilians attempting, albeit unlawfully, to make a living. If other Iraqi civilians, perhaps from an opposing ethnic group, attacked them while they were burying the IED, a benefit would inure to the Coalition.

62. For instance, the U.S. Air Force's Commander's Handbook noted that "rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack." U.S. AIR FORCE, PAMPHLET 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT ¶ 2.8 (July 25, 1980) (rescinded pending issuance of new Department of Defense Manual); *see also* U.S. AIR FORCE, PAMPHLET 110-131, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ¶ 4.2e (Nov. 19, 1976) (rescinded pending issuance of new Department of Defense Manual) (using very similar language in making the same point).

enemy (discussed below). In the case of actions enhancing one side's capability, such a causal link to specific harm may not be apparent. For instance, consider the examples of building defensive positions at a military base certain to be attacked or repairing a battle-damaged runway at a forward airfield so it can be used to launch aircraft. Both actions affect the enemy's operations, but their causal relationship to the strengthening of one's own ability to engage in defensive or offensive operations is greater than to the weakening of the enemy in some tangible way. The deleterious effect of adopting the first element's harm notion is evident.

As these examples illustrate, restricting the threshold element to negative consequences for the enemy, when considered in light of the directness constitutive element, further risks an overly narrow interpretation of direct participation. Providing additional support to rejection of any limitation of the threshold element to harm is the fact that the Guidance itself extends the element to actions taken against civilians and civilian objects "regardless of any military harm to the opposing party to the conflict."⁶³ Thus, it recognizes the incongruity of the limitation in certain circumstances.

Critics of extending the threshold element to beneficial actions would counter that doing so might cause it to be over-inclusive. However, any concern along these lines is better dealt with by requiring a particular degree of linkage between the act and the enhancement of military capacity, a second constitutive element issue, than through excluding benefit from the ambit of the first. In other words, the determinative issue in the direct participation context is not whether an act harms or benefits a party. So long as it does either, it should satisfy the threshold element. But the elements are cumulative; each must be satisfied. Therefore, the key is whether the acts in question are sufficiently casually related to the resulting harm/benefit to qualify as directly caused. That subject is discussed in greater depth below.

2. *Harm to Civilians and Civilian Objects*

The second prong of the threshold of harm element envisages "death, injury, or destruction on persons or objects

63. *Interpretive Guidance*, *supra* note 1, at 50.

protected against direct attack.”⁶⁴ The paradigmatic examples are civilians and civilian objects. This provision was not a focus of the expert meetings, although general consensus existed that such harm should somehow be included.⁶⁵ Doing so certainly makes sense from a humanitarian perspective on the battlefield; it allows a party to intervene forcefully when civilians are being victimized.

Originally, the draft Interpretive Guidance limited the objects of harm to “persons or objects *not under the effective control* of the acting individual.”⁶⁶ The premise of the “under effective control” verbiage was that once civilians or civilian objects fell under the control of an individual (as during detention), harm to them would not be taking place in the context of ongoing hostilities.⁶⁷ Analytically, the distinction made a degree of sense. Harming those under one’s control, in contrast to those who are not, differs in that the actor has certain affirmative obligations with regard to the well-being of the former.⁶⁸ However, by the limitation, large-scale violence against

64. *Id.* at 46.

65. Similarly, in discussing the concept of hostilities, the Israeli Supreme Court has noted “that acts which by nature and objective are intended to cause damage to civilians should be added to that definition.” HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] ¶ 33. To the extent that harming civilians constitutes hostilities, the act of a civilian attacking a civilian should, assuming the other constitutive elements are met, constitute direct participation.

66. ICRC, Draft, *Interpretive Guidance on the Notion of “Direct Participation in Hostilities”* 26 (Fourth Expert Meeting, Nov. 27-28, 2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2006-02-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2006-02-background-doc-icrc.pdf) (emphasis added). The text was retained in a revised version of the draft later circulated among the experts. ICRC, Revised Draft, *Interpretive Guidance on the Notion of “Direct Participation in Hostilities”* 34 (Fourth Expert Meeting, Nov. 27-28, 2006), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2008-02-background-doc-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2008-02-background-doc-icrc.pdf).

67. Of course, even outside of the context of ongoing hostilities, any mistreatment might well violate international humanitarian law and might also constitute a war crime.

68. See, e.g., Geneva Convention IV, *supra* note 2 (containing provisions specific to acts against persons “who find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals”); Hague IV, *supra* note 24 (containing different provisions to deal with those under a party’s control and those not under control). The provisions of these instruments are generally considered customary law. E.g., International Criminal Tribunal at Nuremberg, Judgment, 1 Trial of the Major War

the civilian population would not qualify as harm in the context of hostilities when taking place, as it typically does, on territory controlled by the individuals carrying it out. It would exclude situations where the actions constituted an integral part of the military operations (as in cleansing an area of a potentially dangerous population), where a goal of the conflict was to target a population, or where the acts rose to the level of crimes against humanity or genocide.⁶⁹ Absent qualification of the actions as direct participation, the perpetrators, who would in many cases constitute civilians immune from attack, could only be targeted in situations meeting the strict common law principle of defense of others. In a combat environment, this would preclude classic military operations against a group or individuals to stop the killing.⁷⁰

In the final Interpretive Guidance, the “under effective control” aspect of the element was wisely dropped.⁷¹ Presumably, then, infliction of death, injury or destruction even on persons under a party’s control would qualify as direct participation, especially since there need be no military harm, according to the Interpretive Guidance, incident to such actions.

Criminals Before the International Military Tribunal at 254 (Oct. 1, 1946); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 258 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 172 (July 9); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 35, 41, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993) (approved unanimously by the Security Council, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993)).

69. These examples were discussed extensively at the 2008 International Committee of the Red Cross Expert Meeting. ICRC, Summary Report, *Fifth Expert Meeting on the Notion of Direct Participation in Hostilities* 62-66 (Feb. 6, 2008) (prepared by Nils Melzer) [hereinafter *Fifth Meeting Report*], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/2008-05-report-dph-2008-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/2008-05-report-dph-2008-icrc.pdf).

70. Those opposed to this position argued that action could be taken against them if they qualified as members of an organized armed group belong to a party to the conflict (or, in certain cases, as an action in defense of others). *Id.* For more on this issue, see the companion contribution in this volume by Brigadier-General Kenneth Watkin. Watkin, *supra* note 20.

71. It was dropped over the objection of a number of experts who argued that the actions did not amount to “hostilities” as a matter of international humanitarian law due to the control exercised by the perpetrators. According to this group, the actions might be unlawful (as war crimes, crimes against humanity, and genocide), but would not amount to participation in hostilities. *Fifth Meeting Report*, *supra* note 69, at 64-65.

The key is not whether the victims are under effective control or not, but whether the action is in some way connected to the armed conflict. For instance, a prison guard may kill a prisoner for purely private reasons or a prisoner might be executed without receiving appropriate due process. Neither action would constitute direct participation. On the other hand, adopting a practice of killing prisoners of a particular ethnic group during an ethnic conflict would meet the standard.⁷²

The sole surviving distinction in the Interpretive Guidance's constitutive element regarding protected persons and objects is therefore quantitative—that the action leads to death, injury, or destruction, as distinct from other forms of harm, such as deportation. Of course, the other two elements of direct participation discussed *infra*, causation and belligerent nexus, would continue to apply, thereby excluding, for instance, purely criminal acts.

To the extent that killing or injuring a civilian or damaging protected property without any military impact on the opponent rises to the level of direct participation, it is not clear why other actions would not. The Interpretive Guidance justifies the inclusion of harm to protected persons and objects in this constitutive element by noting that the definition of “attacks” in Article 49 of Additional Protocol I (“acts of violence against the adversary”) “does not specify the target, but the belligerent nexus of an attack, so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities.”⁷³ The Guidance accurately cites International Criminal Tribunal for the former Yugoslavia case law on sniping attacks against civilians and bombardment of civilian villages or urban residential areas as supportive of the premise that attacks on civilians qualify as “attacks” in the IHL sense.⁷⁴

But this begs the question of why other actions do not amount to direct participation, especially since the “not under

72. The third constitutive element, belligerent nexus, factors into such an interpretation. See *Fifth Meeting Report*, *supra* note 69, at 62 (explaining the view of the experts that the belligerent nexus element would be sufficient to connect the acts to the armed conflict).

73. *Interpretive Guidance*, *supra* note 1, at 49.

74. *Id.* at 49 nn.109-110 (citing *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶¶ 27, 52 (Dec. 5, 2003); *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶¶ 283-89 (Jan. 31, 2005)).

the effective control” criterion has been removed (i.e., negative actions against the civilian population not amounting to attacks are most likely to occur when those civilians are under control of a party or individual). Although the Interpretive Guidance expressly rejects a limitation of direct participation to “attacks” in the context of acts harmful to the enemy’s military operations, it offers no justification for such a limitation in the context of protected persons and objects. A better standard is one which includes any harmful acts directed against protected persons or objects when said acts are either part of the armed conflict’s “war strategy,” as in the case of deportations, or when there is an evident relationship with ongoing hostilities.

The obvious example of the latter is hostage-taking, discussed at some length by the experts.⁷⁵ Its nexus to the armed conflict might well be greater than that of situations in which civilians are physically harmed because the motivation for the hostage-taking is often tied to the conflict. Examples include demands that prisoners be released or troops withdrawn, as has occurred repeatedly during the conflicts in Iraq, Afghanistan, and Israel.⁷⁶

3. *Likelihood*

Finally, the threshold of harm constitutive element provides that the harm caused need merely be “likely.”⁷⁷ It need not actually eventuate. This is a sensible provision.⁷⁸ It is designed less to indicate probability of harm, than to make clear that combatants need not wait to react to direct participation until the harm materializes. For instance, it would be absurd

75. *Fifth Meeting Report*, *supra* note 69, at 67-69.

76. When hostage-taking fails to meet the belligerent nexus constitutive element, it will not comprise direct participation, as with the criminal seizure of hostages in the hope of securing a ransom. However, hostage-taking for the purpose of securing a ransom to be used to support hostilities would constitute direct participation.

77. *Interpretive Guidance*, *supra* note 1, at 47.

78. One expert suggested replacement of the term “likely” with “intended” on the basis that the key is what is intended to happen rather than what may happen. *Fifth Meeting Report*, *supra* note 69, at 66. The ICRC elected to retain the term, arguing that the standard was an objective one. Subjective intent only appears in the belligerent nexus element. In any event, the important point is that the harm need not actually occur.

to suggest that a civilian shooting at a combatant, but missing, would not be directly participating because no harm resulted. As noted during the expert discussions, “wherever a civilian had a subjective ‘intent’ to cause harm that was objectively identifiable, there would also be an objective ‘likelihood’ that he or she would cause such harm.”⁷⁹

B. *Direct Causation*

The second constitutive element requires either that an act qualifying under the threshold requirement of the first element have a direct causal link to the harm likely to be caused to a party’s military operations or capacity (or to protected persons and objects) or be an “integral part” of a coordinated military operation likely to cause said harm.⁸⁰ All the experts agreed on the centrality of a relatively close relationship between the act in question and the consequences affecting the ongoing hostilities, a requirement reflected in the Interpretive Guidance.

In light of such consensus, the ICRC could have simply left the matter for case-by-case adjudication; however, it elected, consistent with its desire to brighten the lines of analysis, to provide more concrete guidance. The Interpretive Guidance usefully distinguishes direct from indirect causation of harm to the enemy, although the analysis is weakened by the regrettable limitation to “harm” (as distinct from “benefit”) and a questionable assertion that the harm must be caused in but a single casual step. It also suggests that harm must result from a physical act,⁸¹ a criterion evidencing insensitivity to the nature of modern combat operations. A strength of the Guidance is its focus on the integrality of an act to a coordinated military operation. By the criterion, acts which are integral to an operation that result in the requisite harm satisfy the direct causation constitutive element. As will be explained, the Guidance erred in failing to extending this notion beyond coordinated operations.

79. *Fifth Meeting Report*, *supra* note 69, at 66.

80. *Interpretive Guidance*, *supra* note 1, at 51.

81. *Id.* at 56-57 (differentiating between behaviors on the basis of whether or not they are physical acts).

1. *Direct vs. Indirect Causation*

As with any question of causation—whether in tort, criminal, or international law—the determinative factor is the nature of the relationship between the act in question (cause) and a particular effect. The Interpretive Guidance adopts the standard of “direct” cause in explication of the requisite causal relation between the act of purported direct participation and the hostilities. In doing so, it does not employ any particular jurisdiction’s understanding of the term, such as that of “proximate” cause in US tort law.⁸² Rather, it crafts its own definition, one that differentiates “direct” from “indirect” causation.

Rationalizing this approach, the Guidance points out that the adjective “direct” (or active) in the relevant treaty provisions necessarily means that there is a corresponding category of “indirect” participation which does not entail a loss of protection.⁸³ In other words, sometimes causation is so direct that the shield of humanitarian considerations must yield in the face of military necessity, while in other situations the causal connection is too weak to overcome humanitarian factors. Although the experts agreed with this dichotomy as a general matter,⁸⁴ the Guidance’s treatment of it is lacking in certain regards, particularly in being under inclusive.

82. See generally *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928) (landmark case discussing the meaning of proximate causation, with differing interpretations by the majority (Cardozo, C.J.) and dissent (Andrews, J.)).

83. *Interpretive Guidance*, *supra* note 1, at 51. Support for the distinction between direct and indirect is found in the ICRC Commentary to Article 43 of Additional Protocol I: “[T]o restrict this concept [of direct participation in hostilities] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.” *Additional Protocol Commentary*, *supra* note 24, ¶ 1679; see also *id.* ¶ 1945 (“There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.”).

84. Indeed, the distinction is common. For instance, the Inter-American Commission on Human Rights has opined,

2. *Harm vs. Benefit*

To begin with, and as with the first constitutive element, an exclusive focus solely on harm, without consideration of benefit, permeates the notion of directness. The Interpretive Guidance opines that “individual conduct that merely builds up or maintains the capacity of a party to harm its adversary” is indirect.⁸⁵ In many cases, such as the general recruitment of fighters or contributing funds to a “cause,” that is an accurate statement. But it would be too restrictive to exclude some instances of capability building. The recruitment of suicide bombers and the purchase of materials in order to build suicide vests are cases in point. While these actions could be styled as weakening the enemy’s operations or capabilities in order to fit them into the formula employed in the element, the Guidance envisages no such interpretation. That being so, the criterion must be expanded to capacity building that comprises more than simply enhancing general military capacity in that it can be linked to specific operations, or types of operations, that are relatively imminent.

3. *The “One Causal Step” Requirement*

Beyond the harm-benefit issue, the Guidance proves under-inclusive in suggesting that the “harm in question must be brought about in one causal step.”⁸⁶ Lamentably, it fails to expound on the meaning of this criterion or tender any legal

[C]ivilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

Inter-Am. C.H.R., Third Report on the Human Rights Situation in Columbia, OEA/Ser.L/V/II.102, doc. 9 rev. 1 ch. 4, ¶ 56 (Feb. 26, 1999); *see also* U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Final Report on the Situation of Human Rights in El Salvador*, ¶ 140, U.N. Doc. E/CN.4/1985/18, (Feb. 1, 1985) (*prepared by* José Antonio Pastor Ridruejo) (noting that those who supply means of subsistence to guerrilla fighters must still be considered civilians as they take no part in combat).

85. *Interpretive Guidance*, *supra* note 1, at 53.

86. *Id.*

justification for its assertion. Instead, the Guidance merely sets forth examples of indirect participation (e.g., economic sanctions or providing an adversary with supplies and services).⁸⁷

The phraseology “one causal step” is confusing, since the Interpretive Guidance cannot possibly have meant that there could literally be but a single step between the act of direct participation and its impact on hostilities. For example, gathering tactical intelligence on the battlefield is undeniably direct participation, but it does not necessarily affect hostilities in a single step. The intelligence acquired may need to be fused with other intelligence, analyzed, and disseminated to fighting forces before its military effect can occur. Moreover, the Guidance itself notes that the direct causation standard does not require that the act be indispensable to the causation of harm,⁸⁸ a proviso seemingly inconsistent with a literal application of the ostensible one causal step criterion.

Indeed, the Interpretive Guidance eschews single tests for direct causation altogether. Significantly, and although the *Commentary on the Additional Protocols* seems to imply that the consequences of an act of direct participation must occur immediately on the heels of that act,⁸⁹ the Interpretive Guidance correctly points out that causal proximity and temporal, or even geographical, proximity need not coincide.⁹⁰ The example of placing a pressure-activated improvised explosive in a roadbed that does not go off for several days illustrates the point. It also rejects characterization of an act as direct participation on the sole basis that it is connected with the resulting harm through an uninterrupted chain of events.⁹¹ An example is that of a munitions worker who makes ammunition in a

87. *Id.*

88. *Id.* at 54.

89. *Additional Protocol Commentary*, *supra* note 24, ¶ 4787 (“The term ‘direct participation in hostilities’ . . . implies that there is a sufficient causal relationship between the act of participation and its immediate consequences.”); *id.* ¶ 1679 (“Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”).

90. *Interpretive Guidance*, *supra* note 1, at 55 (using as examples delayed and remote-controlled weapon systems).

91. *Id.* at 54. Unfortunately, the example in the Guidance, assembly and storage of an IED, in this author’s opinion clearly constitutes direct participation (*see infra* notes 98-99 and accompanying text).

factory far from the battlefield, which is then immediately and directly transported to the front for use in combat.

4. *The “Integral Part” Criterion*

Much more useful is the standard employed in the element’s second criterion, “integral part,” although the Interpretive Guidance unfortunately limits its application to situations involving coordinated military operations.⁹² This concept satisfactorily and sufficiently encompasses the essence of direct causation on the battlefield regardless of whether the act occurs as part of an operation mounted by a group or by an individual. As will be discussed, it is the “integral part” test, and that test alone, which should have been employed as determining whether an act directly or indirectly causes a result.

The benefits of an approach focusing on integrality rather than number of steps should be apparent. After all, it is difficult to conceive of an indirect, yet integral act. And acts many steps removed from an eventual hostile act may nevertheless be integral to an operation. An example is acquiring the materials to build an improvised explosive device or suicide vest to be used in a predetermined attack. Perhaps most importantly, from a practical perspective, those involved in armed conflict are likely to have a much better grasp of which acts are integral to a “military” operation than of those which meet a juridical test of direct causation.

The concept of “integral,” then, usefully distinguishes *de minimis* acts which might be causal, but are too removed in scope and effect from ongoing hostilities to merit a loss of protection, from those which justify such loss. Military training, an example cited in the Interpretive Guidance, illustrates the dynamic.⁹³ General training of recruits undeniably contributes to a party’s military prowess; effective recruit training will often be the difference between eventual victory and defeat on the battlefield. Nevertheless, the causal link between the training and subsequent combat action is attenuated. On the other hand, training fighters to conduct a particular operation would, as the Guidance concedes, suffice;⁹⁴ the link is rela-

92. *Interpretive Guidance*, *supra* note 1, at 51.

93. *Interpretive Guidance*, *supra* note 1, at 53.

94. *Id.*

tively direct and the training is integral to the ultimate conduct of the operation.

Although the Interpretive Guidance approach would draw the line at training an attacker for a predetermined mission, only a broader interpretation is likely to satisfy States. In particular, training for a particular type of mission which, although the trainer may not know precisely when or where it will be conducted, is likely to occur with certainty in the near future should be included. An individual who instructs a terrorist on how to use a suicide bomber's vest may be unaware of the specific attack the trainee is to launch, but he surely understands that an attack is relatively imminent. Unlike training an individual to use a rifle, a skill that is of wide application and relatively imperishable, suicide bombers do not receive their guidance until an attack is about to occur (lest they lose their nerve). Such training is integral to the subsequent attack.⁹⁵

As noted, the Interpretive Guidance restricts the "integral part" approach to collective operations, that is, those requiring various acts performed by multiple individuals. The cases of an air attack involving someone on the ground designating the target for a laser bomb and that of a lookout during an ambush are illustrative. That it was necessary to include the "integral part" qualifier at all reveals the weakness of the "one causal step" criterion. In such collective operations, the criterion of directly causing (in one step) the harm might not be met by all the individuals taking part in the operation, even though it is self-evident that they are deeply involved in the operation. In particular, individuals ordering or planning a mission, though plainly direct participants, might not be characterized as directly participating absent the integral component of the element.⁹⁶

95. The case of civilians training fighters must be distinguished from that of members of organized armed groups such as Hamas, Hezbollah, or the Taliban who provide training to fellow fighters. The issue in the latter case is the qualification as members of the organized armed group for direct participation purposes. That the Interpretive Guidance would qualify such individuals as civilians because they do not have a "continuous combat function" illustrates the inadequacy of that standard. For more on this issue, see Schmitt, *supra* note 2.

96. The Israeli Supreme Court correctly held that ordering acts of direct participation was itself direct participation. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] ¶ 37.

But the limitation to collective operations is misplaced, a fact demonstrated by the Interpretive Guidance's example of the assembly or storage of an improvised explosive device in a workshop, or the purchase or smuggling of its components. According to the Guidance, the actions "may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting or detonation of that device, do not cause that harm directly."⁹⁷ Despite this position, few States would hesitate, on the basis that the action is not "direct enough," to attack those in the process of assembling IEDs.⁹⁸ On the contrary, if they receive actionable intelligence that assembly is underway, it would be absurd to expect them to delay attack since, given the clandestine nature by which such devices are emplaced, an immediate attack may be the only option for foiling a later operation employing the device. The attack would be justifiable because assembly amounts to an integral part of subsequent operations almost certain to occur in the near future and relatively nearby.⁹⁹

This case must be distinguished from that of the ammunition factory worker cited above, in which the causal link is distant. Such work, occurring far from the battlefield and with no knowledge of how, where, and when the ammunition will be used, is not integral to any particular operations or group of operations. It cannot be treated as the equivalent of the work of an individual who makes an IED on or near the area of operations for relatively immediate use against the enemy.¹⁰⁰ While geographical or temporal proximity do not alone indicate that an act satisfies the causal constitutive element of direct participation, they do bear on the extent to which an act

97. *Interpretive Guidance*, *supra* note 1, at 54.

98. The experts were divided on this issue. Nearly all those with military experience or who serve governments involved in combat supported the characterization of IED assembly as direct participation.

99. This issue is related to that of the temporal aspects of direct participation, in particular whether an act is "preparatory," thereby meeting the "for such time" aspect. See *Interpretive Guidance*, *supra* note 1, at 65-67 (discussing preparatory measures); Schmitt, *supra* note 2 (commenting on the Interpretive Guidance's treatment of this issue).

100. It should be noted that such devices will often be assembled by members of an organized armed group. If so, the Interpretive Guidance suggests the activity does not constitute a "continuous combat function," which again illustrates the weakness of that standard.

will qualify as integral to an operation.¹⁰¹ Indeed, the ICRC *Commentary* suggests that the proximity of an activity in “time and place” to the resulting harm is a relevant consideration in determining whether an act is direct.¹⁰²

5. *Physical Acts*

Finally, the Interpretive Guidance seems to suggest that to be direct, the harm caused must have resulted from a physical act. For instance, it distinguishes between a civilian who physically shields a military objective, as in blocking passage over a bridge, from one who merely goes to a military objective hoping the enemy will refrain from attacking it because of his presence.¹⁰³ In both cases, the enemy suffers harm. But the latter, according to the Guidance, does not “directly” harm the enemy because the action does not physically impede an attack. The Guidance could not have selected a more contentious, or indeed weaker, example to make its point.

Many of the experts, particularly those with military experience, balked at the characterization. By operation of the rule of proportionality, a sufficient number of voluntary human shields at a military objective,¹⁰⁴ if not treated as direct participants, could absolutely immunize the target as a matter of law because their death or injury would be excessive in relation to the military advantage likely to result from the attack. Recall that the threshold of harm necessary to constitute direct

101. This point is acknowledged by the Interpretive Guidance. *Interpretive Guidance*, *supra* note 1, at 55; *see also, e.g.*, United States v. Hamdan, Reconsideration of Ruling on Motion to Dismiss for Lack of Jurisdiction, at 6 (Dec. 19, 2007), available at <http://www.defense.gov/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf> (“[T]he accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations.”).

102. *Cf. Additional Protocol Commentary*, *supra* note 24, ¶ 2023 (noting that depending on “time and place” and other factors, an establishment with dual civilian/military use might be a legitimate military target).

103. *Interpretive Guidance*, *supra* note 1, at 56-57.

104. The prevailing opinion among the experts was that involuntary shields, i.e., those forced to serve as shields against their will or whose presence was taken advantage of by the enemy to shield military objectives, did not qualify as direct participants. *See Fifth Meeting Report*, *supra* note 69, at 70-72 (explaining the experts’ opinions on human shields, both voluntary and involuntary).

participation is adverse effect on the enemy's military operations, the ultimate "harm." By contrast, acts of physically shielding may well be ineffective. In the bridge scenario, military forces could simply remove the voluntary human shields from the bridge.

It makes little sense to treat the former as civilians not directly participating, and the latter as direct participants. Tellingly, the Interpretive Guidance offers no legal basis for the distinction. Nor does it even point to soft law instruments, such as the ICRC *Commentary on the Additional Protocols*. It also ignores State practice to the contrary, as evidenced by military manuals. The US *Commander's Handbook on the Law of Naval Operations*, for instance, provides that "such persons may . . . be considered to be taking a direct part in hostilities or contributing directly to the enemy's warfighting/war-sustaining capability, and may be excluded from the proportionality analysis."¹⁰⁵ The failure to cite this pre-existing provision in a law of war manual of the world's most powerful military is especially confusing in light of the ICRC's *Customary International Humanitarian Law* study's heavy reliance on manuals to support assertions that various rules represent customary norms.¹⁰⁶ Additionally, the Israeli Supreme Court adopted this position in its 2006 *Targeted Killings* case.¹⁰⁷

The Interpretive Guidance's approach is particularly noxious in that the act of shielding is itself a violation of international humanitarian law.¹⁰⁸ Article 51(7) of Additional Protocol I provides that "[t]he presence or movement of the civilian

105. COMMANDER'S HANDBOOK, *supra* note 18, ch. 8.3.2.

106. ICRC, *Customary International Humanitarian Law: Volume 2: Practice* 4196-4207 (2005) (prepared by Jean-Marie Henckaerts & Louise Doswald-Beck) (listing the manuals used). For the official U.S. reaction to the study, including its reliance on manuals as a source of State practice, see John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007). For the ICRC's surrebuttal, see Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to U.S. Comments*, 89 INT'L REV. RED CROSS 473 (2007).

107. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] ¶ 36 (finding that when civilians serve as human shields "of their own free will, out of support for the terrorist organization, they should be seen as persons taking a direct part in the hostilities").

108. This dates back at least to 1919, when a Commission tasked with identifying German (and other enemy) violations of law cited the prohibition on

population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations.”¹⁰⁹ The norm undoubtedly reflects customary law, as reflected in State practice.¹¹⁰

While Article 51(8) of Additional Protocol I cautions that violation of the prohibition does not release an attacker from its obligation with respect to civilians and the civilian population,¹¹¹ the provision cannot be read in isolation from Article 51(3). Article 51(3) denies civilians the “protection afforded by this Section” for such time as they directly participate.¹¹² Since Article 51(8) appears in the referenced section, it is inapplicable if the shields qualify as direct participants, as they logically must.¹¹³

In sum, the constitutive element of direct causation is helpful in setting out the parameters of direct participation, particularly with regard to its theoretical distinction between direct and indirect participation and its integral criterion, which is of greater value than the Guidance affords it. However, as disagreement over the specific examples cited illustrates, the constitutive element as proffered by the ICRC does

using human shields. Miguel A. Marin, *The Evolution and Present Status of the Laws of War*, 92 RECUEIL DES COURS 629, 678 (1957).

109. Additional Protocol I, *supra* note 8, art. 51(7).

110. See *Customary International Law Rules*, *supra* note 8, at 337 (“Rule 97. The use of human shields is prohibited.”); NIAC MANUAL, *supra* note 8, ch. 2.3.8 (“The use of civilians . . . to shield a military objective or operation is forbidden. It is also forbidden to use them to obstruct an adversary’s operations.”); Rome Statute, *supra* note 17, art. 8(2)(b)(xxiii) (labelling as a “serious violation of the laws and customs applicable in international armed conflict, within the established framework of international law,” the use of a “civilian, or other protected person to render certain points, areas or military forces immune from military operations”); COMMANDER’S HANDBOOK, *supra* note 18, ch. 8.3.2 (“Deliberate use of civilians to shield military objectives from enemy attacks is prohibited.”); UK MANUAL, *supra* note 18, chs. 5.22 (“[c]ivilians not to be used as shields”); *id.* ch. 15.24.1 (“The use of human shields is prohibited.”).

111. Additional Protocol I, *supra* note 8, art. 51(8).

112. *Id.* art. 51(3).

113. See Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT’L L. 292 (2009) (discussing human shields as direct participants).

not represent a sure-fire formula for unambiguous and unasailable determinations.

C. *Belligerent Nexus*

The third constitutive element, belligerent nexus, is the least controversial of the three. By it, the act in question must in some direct way be tied to the armed conflict, thereby excluding actions such as looting or civil unrest that merely take advantage of the instability incident to conflict.¹¹⁴ This is so even if a party to the conflict is the object of the act, as in the case of theft of military property for personal gain or self-defense against a combatant acting criminally, for instance during a rape or other form of assault.

Although the act in question must be “specifically designed to directly cause the required threshold of harm,” the Interpretive Guidance correctly distinguishes design from the subjective intent of the actor.¹¹⁵ Thus, civilians impressed into fighting or children under the age of 15 can be treated as direct participants even though their participation is, as a matter of fact or law, involuntary.¹¹⁶ The question is not whether the

114. Belligerent nexus in the context of direct participation is narrower than usage of the term as a precondition for qualification of an act as a war crime. *See, e.g.,* Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 58 (June 12, 2002) (“The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”); *see also* Prosecutor v. Rutaganda, Case No. ICTR-96-3-A, Appeals Chamber Judgment, ¶ 570 (May 26, 2003) (agreeing with the *Kunarac* criteria).

115. *Interpretive Guidance, supra* note 1, at 58-59.

116. *See* Geneva Convention IV, *supra* note 2, arts. 40, 51 (provisions forbidding forced labor and military service); Additional Protocol I, *supra* note 8, art. 77(2) (forbidding recruitment of children into armed forces); Additional Protocol II, *supra* note 10, art. 4(3) (forbidding the recruitment of children, and forbidding allowing children to participate in hostilities); *see also Customary International Law Rules, supra* note 8, at 330, 482, 485 (prohibitions against forced labor, the recruitment of children, and allowing children to participate in hostilities); Rome Statute, *supra* note 17, arts. 8.2(a)(v), 8.2(b)(xv), 8.2(b)(xxvi), 8.2(e)(vii) (criminalizing in international armed conflict forcing individuals into military service, forcing individuals to fight against their home state, conscripting children, using children to participate in hostilities; and criminalizing in non-international

participants wanted to harm the enemy, but instead whether their actions were of a nature to do so.

The sole flaw in the constitutive element is that the act must be “in support of a party to the conflict and to the detriment of another.”¹¹⁷ As noted *supra* in the context of the previous elements, there are two problems with such an approach. First, it presumes a zero-sum game in which one party necessarily benefits from the harm caused the other. Yet, in the complex environment of modern conflict, it is entirely possible that an organized armed group or an individual civilian might be opposed to both sides of a conflict, the paradigmatic example being the case where they hope to fill a void left by defeat of the government, as was the case with Shia militia in Iraq during the early days of the war. Second, it suggests that harm is the *sine qua non* of direct participation. As has been illustrated, direct participation can also include acts that directly enhance the military capacity or operations of a party, without resulting in direct and immediate harm to the enemy. In light of these factors, the belligerent nexus is better styled as acts “in support of a party to the conflict *or* to the detriment of another.”

D. *Grey Areas*

According to the Interpretive Guidance, “All feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against attack.”¹¹⁸ Unquestionably, an attacker has an obligation to take all reasonable steps to confirm his target. Article 57(2)(a)(i) of Additional Protocol I provides that an attacker must “[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives,”¹¹⁹ a provision which reflects customary law.¹²⁰

armed conflict conscripting children, and using children to participate in hostilities).

117. *Interpretive Guidance*, *supra* note 1, at 58.

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

119. Additional Protocol I, *supra* note 8, art. 57(2)(a)(i).

120. *Customary International Law Rules*, *supra* note 8, at 55 (“Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives.”); UK MANUAL, *supra* note 18, ch. 5.32 (stating that at-

Moreover, Article 50(1), arguably reflective of a customary norm, provides that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”¹²¹

However, recall that the issue of direct participation only arises if an individual is a civilian; those who are not, absent situations such as being *hors de combat*, may be attacked at any time. But what of doubt as to whether *conduct* being engaged in by a civilian (or one presumed to be a civilian when status is unclear) amounts to direct participation? As should be apparent from the disagreement surrounding the various particular examples cited earlier, many activities fall into a grey area where reasonable observers differ.

The Interpretive Guidance suggests that a presumption against direct participation should attach.¹²² Without providing any basis in law for its position, the Guidance reasons that civilians enjoy a general protection from attack, such that doubt about the qualification of conduct should be resolved in their favor and against their susceptibility to attack. This “narrow” approach is counterpoised against one which argues for a presumption that questionable activities qualify as acts of direct participation. As noted by this author in a passage cited by the Israeli Supreme Court,

Gray areas should be interpreted liberally, i.e., in favor of finding direct participation. One of the sem-

tackers shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives”).

121. Additional Protocol I, *supra* note 8, art. 50(1); see *Customary International Law Rules*, *supra* note 8, at 53-54 (restating the rule of doubt in almost identical words as Additional Protocol I, and further discussing the case of doubt). Application of the rule has been subjected to important qualifications. See, e.g., UK Statement upon Ratification of Additional Protocol I, Reservations § h (Jan. 28, 1998), available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (qualifying the rule by speaking of “substantial” doubt and the obligation of a commander to protect his or her forces); UK MANUAL, *supra* note 18, ch. 5.3.4 (qualifying the rule by speaking of “substantial” doubt and the overriding obligation of a commander to protect his or her forces). There is no comparable provision in treaty law governing non-international armed conflict. However, the ICRC Commentary to Additional Protocol II provides that “in case of doubt regarding the status of an individual, he is presumed to be a civilian.” *Additional Protocol Commentary*, *supra* note 24, ¶ 4789.

122. *Interpretive Guidance*, *supra* note 1, at 75-76.

inal purposes of the law is to make possible a clear distinction between civilians and combatants. Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities. Moreover, a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted. Although it might seem counter-intuitive to broadly interpret the activities that subject civilians to attack, in fact, doing so is likely to enhance the protection of the civilian population as a whole.¹²³

Lest the approach seem harsh, it must be remembered that the situation only arises at the border between direct and indirect participation. In other words, the civilian is by definition already participating, on his or her own volition, in the conflict in a manner direct enough to raise questions. Therefore, it is reasonable for that individual to bear the burden of risk, rather than the combatant who will be harmed by the action.

V. CONCLUSION

Of the three major foci of the notion of direct participation, the constitutive elements of direct participation set forth in the Interpretive Guidance prove the most satisfactory. The others, the concept of civilian and the temporal scope of participation, are fatally flawed, as is the unnecessary and faulty discussion of restraints on the use of force in direct attack.¹²⁴

The benefit of the constitutive elements lies in the effort to discern criteria against which acts may be assessed. In this regard, the Interpretive Guidance is superior to the various ad hoc lists in the sense that those tasked with applying the norm

123. Michael N. Schmitt, "Direct Participation in Hostilities" and 21st Century Armed Conflict, in *CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift für Dieter Fleck* 505, 509 (Horst Fischer et al. eds., 2004). All but the last sentence of this quotation was cited by the Targeted Killings case, HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] ¶ 34.

124. These topics are discussed in the companion contributions in this volume. For citations, see *supra* note 20.

on the battlefield are provided guidelines against which to gauge an action. Moreover, as a general matter, the three constitutive elements reflect factors that undoubtedly must play into such an analysis. Their deficiencies lie at the margins, typically faults of under-inclusiveness. Failure to explicitly acknowledge that direct participation can comprise enhancing one side's military capacity is unsound, as is the "one step" explanation of causation. Additionally, States that engage in conflict on a frequent or intense scale will certainly reject the Guidance's treatment of various examples, such as those of voluntary human shielding and the assembly of IEDs. Said treatment reflects a troubling ignorance of the realities of 21st century battlefield combat. Finally, the asserted presumption that gray areas should be resolved in favor of not finding direct participation is problematic.

Ultimately, though, it is possible to tease three key cumulative factors bearing on determinations regarding direct participation from the constitutive elements. First, the act must be likely to adversely affect or enhance the military operations or military capacity of a party to conflict. Inclusion of harm to persons or objects protected from attack, when related to the conflict, is a reasonable extension of this norm. Second, the act must constitute an integral part of the conduct that adversely harms one party or benefits another militarily. In other words, there must be a close relationship between the act and the harm or benefit. The phrase "integral part" encompasses both acts that in themselves cause the harm or benefit and those which contribute in a relatively direct sense to the causation of such harm or benefit. Finally, there must be a nexus between the act in question and the ongoing hostilities. It is not enough that the act merely occur during the hostilities.

Of course, it must be noted that the sufficiency of these factors depends on rectification of defects found elsewhere in the Interpretive Guidance. In particular, it is necessary to dispense with the "belonging to a Party" and "continuous combat function" aspects of the concept of organized armed groups, extend participation as far up and downstream as there is a causal link, and close the revolving door of participation. Absent these essential course corrections, the three determinative factors suggested will exist out of context and, therefore, fail to operate as intended.

