

c. Commencement and territorial extent

The Act will come into force on such day as the Secretary of State may by order appoint.³⁴ An Order was made on 14 October 2009, stating that section 1 of the Act 'shall come into force on 5 April 2010.'³⁵ The Third Additional Protocol will come into force for the United Kingdom on 23 April 2010, being six months after deposit of the instrument of ratification.³⁶ This slight discrepancy in dates is normal UK practice: by bringing the relevant domestic law into effect before the treaty is in force internationally, the UK is assured of meeting its international obligations. No order has yet been made to bring into force section 2 of the Act which amends the United Nations Personnel Act 1997.

Like the texts of the 1949 Geneva Conventions and their 1977 Additional Protocols, the text of Additional Protocol III is inserted as a Schedule to the Geneva Conventions Act 1957.³⁷ Also like earlier Geneva Conventions Acts, the provisions of section 1 on the emblem and the Schedule of the 2009 Act may be extended to the Channel Islands, Isle of Man and British Overseas Territories.³⁸ The provisions of the Act extend to the whole of the UK. As far as Scotland is concerned, the Act relates only to reserved matters.³⁹

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II. CLEARING THE FOG OF WAR? THE ICRC'S INTERPRETIVE GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES

I. INTRODUCTION

In the summer of 2009, the International Committee of the Red Cross (ICRC) published a document setting out its 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.'¹ The purpose of the document is to help clarify and to assist in the interpretation of a principle that is undoubtedly accepted in international humanitarian law (IHL) but which is subject to much ambiguity. This is the principle that civilians are to be immune from direct attacks by the parties to an armed conflict, unless the civilian takes a direct part in hostilities. The principle is applicable in both international and non-international

³⁴ S 3(1) of the Geneva Conventions and United Nations Personnel (Protocols) Act 2009.

³⁵ The Geneva Conventions and United Nations Personnel (Protocols) Act 2009 (Commencement No. 1) Order 2009 (SI 2892/2009).

³⁶ Art 11(2) of the Third Additional Protocol.

³⁷ S 1(8).

³⁸ S 3(3). A similar provision in s 3(4) also provides for the extension of s 2.

³⁹ Geneva Conventions and United Nations Personnel (Protocols) Bill [HL], Explanatory Notes, 17th December 2008, 1.

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¹ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva 2009) ('*Interpretive Guidance*'), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0990?opendocument>.

armed conflicts and is codified in article 51(3) of Additional Protocol I (1977)² and article 13(3) of Additional Protocol II³ (1977) to the Geneva Conventions (1949) both of which state that: 'Civilians shall enjoy the protection [from direct attack] . . . , unless and for such time as they take a direct part in hostilities.' The Israeli Supreme Court held in the *Targeted Killings* case (2005) that this provision, in its entirety, reflects customary international law.⁴

The principle regarding the immunity of civilians from attack, except in cases of direct participation in hostilities, is a key component of the principle which requires belligerents to distinguish between civilians and combatants (the principle of distinction).⁵ The principle of distinction and notion of direct participation in hostilities addresses the most fundamental question in wartime: who can be targeted in an armed conflict? IHL will be unable to perform one of its primary purposes, the protection of those who do not take part in conflict, unless it is relatively clear who falls within the class of protected persons and who does not. Therefore an attempt to clarify these principles is of great importance and should help in clearing the fog of war.

Despite agreement on the principle that civilians who take a direct part in hostilities are subject to direct attack by the adversary, there has been much difficulty in applying it.⁶ Even the basic question of who is a civilian is one where answers have been unclear—particularly in non-international armed conflicts.⁷ There is little guidance on what the words 'direct participation' mean and little agreement on when a person is to be considered as no longer taking a direct part in hostilities so that he again benefits from civilian immunity. It is clear that a civilian who takes up arms and uses it offensively will be taking a direct part in hostilities. It is also certain that the concept of direct participation extends beyond those who bear arms. But how far does the concept of direct participation in hostilities extend beyond offensive violent acts? Does it extend to those who recruit and direct the acts of those who engage in violent acts? And

² First Additional Protocol to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 Dec 1979) 1125 UNTS 3 [Additional Protocol I].

³ Second Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 Dec 1979) 1125 UNTS 3 [Additional Protocol II].

⁴ See *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) para 30.

⁵ Art 51(2) Additional Protocol I.
⁶ See, for example, M Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict' in H Fischer et al (eds), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (BWV, Berlin, 2004); JR Heaton, 'Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces' (2005) 57 *Air Force Law Review* 155; O Ben-Naftali and KR Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 *Cornell International Law Journal* 233; RS Schondorf, 'Are "Targeted Killings" Unlawful? The Israeli Supreme Court's Response: A Preliminary Assessment' (2007) 5 *Journal of International Criminal Justice* 2, 301; Harvard University Program on Humanitarian Policy and Conflict Research, Policy Brief, 'IHL and Civilian Participation in the Hostilities in the OPT' (2007) available at <<http://hpcrresearch.org/pdfs/ParticipationBrief.pdf>>; R Lyall 'Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States' (2008) 9 *Melbourne Journal of International Law* 2, 313.

⁷ See M Bothe, 'Direct Participation in Hostilities in Non-International Armed Conflict', Expert paper submitted to the Second Expert Meeting on the Notion of Direct Participation in Hostilities (The Hague, 2004).

does it extend as far as those who provide intelligence or financial or logistical support to persons who bear arms? These questions have assumed increased importance in recent years because of the changing nature of armed conflict, and in particular, the increasing involvement of civilians in armed conflict. These changes result partly from the increase in asymmetric conflicts with non-State actors but also from the increased use of civilians (eg private contractors) even by States in the general war effort.⁸ This trend makes it essential that the questions regarding when civilians may be targeted in war are clarified.

The ICRC has worked on its Interpretive Guidance for a number of years and convened a series of expert meetings in the course of its work.⁹ However, the final document is not intended to reflect the view of the experts, who all contributed to the process in their individual capacities.¹⁰ Rather, this document sets out the official views of the ICRC on the topic. Prior to this ICRC document, some guidance on the notion of direct participation in hostilities (or DPH) was to be found in the ICRC Commentary on Additional Protocol I¹¹ and in the *Targeted Killings* case (2005) of the Israeli Supreme Court.¹²

The ICRC's interpretive guidance attempts to answer 3 questions:¹³

- Who is considered a civilian for the purposes of the principle of distinction?
- What conduct amounts to direct participation in hostilities?
- What modalities govern the loss of protection against direct attack? [In short when is a person considered as no longer taking a direct part in hostilities, how is that determined and what are the consequences?]

⁸ See, for example, ME Guillory, 'Civilianizing the Force: Is the United States Crossing the Rubicon?' (2001) 51 *Air Force Law Review* 111; A Faite, 'Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law' (2004) 4 *Defence Studies* 2, 166, 174; M Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2004–2005) 5 *Chicago Journal of International Law* 511; E-C Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 (863) *International Review of the Red Cross* 525; L Doswald-Beck, 'Private Military Companies under International Humanitarian Law' in S Chesterman and C Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (OUP, Oxford, 2007); M Sossai, 'Status of Private Military Companies in the Law of War: The Question of Direct Participation in Hostilities' (European University Institute Working Paper 2009/6); R de Nevers, 'Private Security Companies and the Laws of War' (2009) 40 *Security Dialogue* 2,169.

⁹ See ICRC, *Summary Report: First Expert Meeting on the Notion of Direct Participation in Hostilities* (The Hague 2003); ICRC, *Summary Report: Second Expert Meeting on the Notion of Direct Participation in Hostilities* (The Hague 2004); ICRC, *Summary Report: Third Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva 2005); ICRC, *Summary Report: Fourth Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva 2006); ICRC, *Summary Report: Fifth Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva 2008), all available at <<http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709>>.

¹⁰ See ICRC, *Interpretive Guidance*, 6.
¹¹ See Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987) paras 1942–1945.

¹² *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006).

¹³ See ICRC, *Interpretive Guidance*, 12–13.

II. WHO IS A CIVILIAN AND THUS *PRIMA FACIE* IMMUNE FROM ATTACK?

At first glance, the question who is a civilian for the purposes of the principle of distinction (and the law relating to targeting) is relatively clear with regard to international armed conflicts but is uncertain in the case of non-international armed conflicts. This is because Additional Protocol I provides a definition of the term for the purposes of international armed conflicts. According to article 50(1) of Additional Protocol I (API), which applies to international armed conflicts, a civilian is ‘any person who does not belong to one of the categories of persons referred to in article 4A(1), (2), (3) and (6) of the Third Convention and in article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.’¹⁴ However, although Part IV of Additional Protocol II¹⁵ (dealing with non-international armed conflicts) uses the term “civilian”¹⁶ it does not provide a definition. In the Interpretive Guidance, the ICRC provides different definitions of the concept of civilian for international and non-international armed conflict. According to the Interpretive Guidance:

I. The concept of civilian in international armed conflict: For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. The concept of civilian in non-international armed conflict: For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’).

The ICRC’s definition of ‘civilian’ in international armed conflicts is based on article 50(1) of Additional Protocol I. However, questions remain as to the comprehensiveness of the definition provided in both article 50 and in the ICRC’s Interpretive Guidance. These questions relate primarily to the status of irregular forces in international armed conflicts and are discussed in Section A below.

A. The Status of Irregular Forces in International Armed Conflicts

In the commentary to the Interpretive Guidance,¹⁷ the ICRC makes the important point that members of irregular groups that belong to a State that is a party to an armed conflict but who do not fulfil the conditions in article 4(A)(2) of the Third Geneva Convention (GCIII) for prisoner of war status¹⁸ will nevertheless be members of the

¹⁴ See art 50(1) Additional Protocol I.

¹⁵ Second Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 Dec 1987) 1125 UNTS 609.

¹⁶ See arts 13–18, Additional Protocol II.

¹⁷ ICRC, *Interpretive Guidance*, 21–23.

¹⁸ Under art 4(A)(2) of GCIII, members of irregular groups which belong to a State will be entitled to prisoner of war status, only if they fulfil the following conditions: (a) that of being

armed forces of the State and are therefore not civilians *for the law relating to the conduct of hostilities*. A cursory reading of article 50 in combination with article 4 of GCIII might lead to the conclusion that such persons are civilians given that they fall outside the categories listed in article 50. However, it must be remembered that article 4 of GCIII was not drafted for the purpose of the law relating to targeting or the conduct of hostilities. That provision addresses itself to prisoner of war status and issues relating to internment and detention of combatants. There is a distinction between the rules relating to the targeting, rules relating to detention and those relating to prosecution.¹⁹ A person may be classified differently depending on the purposes for which classification is being made. A member of an organized armed group that belongs to a State who falls outside the scope of application of GCIII will fall within the scope of the Fourth Convention (which is titled as the Convention Relative to the Protection of Civilian Persons in Time of War—GCIV).²⁰ However, the protections accorded such a person under that latter Convention deal mainly with fundamental rules of humane treatment as well as rules relating to internment. Coming within the scope of the Fourth Convention does not necessarily mean that a person is *not* to be regarded as a combatant for the purposes of the conduct of hostilities. One would suspect that State practice bears this out and that States do not consider themselves to be more restricted when it comes to targeting irregular groups that belong to a State but which do not comply with article 4(A)(2) of GCIII. Indeed, it would be a very odd situation, if members of irregular groups that do not comply with the rules of international law concerning distinction, or with the laws and customs of more generally, thereby gain additional protections from targeting because they are now regarded as civilians for the purpose of the law relating to the conduct of hostilities.

In any case, the category of persons being discussed (irregulars who are part of groups that belong to a State but who do not meet the conditions in article 4(A)(2) of GCIII) would be part of the armed forces of a State under article 43 of AP I and therefore would not be civilians under article 50(1). Article 43 defines the armed forces of a party as consisting ‘of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.’ It is recognized that this definition applies not only to regular forces but also to irregular forces which belong to a State.²¹ Moreover, although there is controversy

commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.

¹⁹ R Goodman, ‘The Detention of Civilians in Armed Conflict’ (2009) 103 AJIL 48; D Akande, ‘The Obama Administration’s Interpretation of the Authority to Detain at Guantanamo: Some Areas of Progress’ EJIL: Talk! (18 March 2009) available at <<http://www.ejiltalk.org/the-obama-administrations-interpretation-of-the-authority-to-detain-at-guantanamo-some-areas-of-progress/>>.

²⁰ See K Dörmann, ‘Legal Situation of “Unlawful/Unprivileged Combatants” ’ (2003) 849 International Review of the Red Cross 45. However, it should be noted that art 5 of GCIV permits belligerent States to restrict some of the protections accorded by the Convention where this is necessary for reasons of security.

²¹ See Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC Geneva 1987) paras 1659–1674; M Bothe, KJ Partsch and WA Solf, *New Rules for Victims of Armed*

regarding the customary law status of Art. 44 of Additional Protocol I, article 43 is generally agreed to represent customary international law.²²

What is left unclear in the ICRC interpretive guidance is the position of irregular forces that take part in an international armed conflict (or a conflict to which the rules of international armed conflict apply) but which do not belong to a State. Irregulars taking part in an international armed conflict would not belong to a State in cases where there is no command link between the irregular group and a State that is engaged in an armed conflict. Also, irregular groups would not belong to a State where only one of the sides that is engaged in the *actual fighting* in an armed conflict is a State though the conflict is still classified as an international armed conflict. For example, when there are hostilities in the occupied Palestinian territories, the conflict is widely regarded as international,²³ however Israel is the only State involved in the conflict and it is not thought that the Palestinian groups engaged in the conflict belong to another State. Also, it is probably the case that where a State engages in hostilities with a non-State group on the territory of another State but without the consent of that latter, there is an international armed conflict.²⁴ In these sorts of cases, the ICRC's definition of civilian in international armed conflicts would lead to the conclusion that members of these groups are not civilians. When this is combined with the narrow definition of direct participation in hostilities adopted by the ICRC in the Interpretive Guidance, the result is unsatisfactory. It might mean that in the sort of cases covered by this scenario the entire group of fighters on one side are to be regarded as civilians²⁵ with limited rights for the State to target such civilians.

Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (Martinus Nijhoff, The Hague, 1982), 234.

²² See J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press, Cambridge, 2005) Rule 4, 16.

²³ See *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006), para 21: 'Our starting point is that the law that applies to the armed conflict between Israel and the terrorist organizations in the area is the international law dealing with armed conflicts.' See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, paras 89–101; Report of the United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, UN Doc A/HRC/12/48 (15 Sep 2009), paras 270–285.

²⁴ In support of this view is the *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda)* (2005) ICJ Rep paras 217–220, where the Court applies the international humanitarian law relating to international armed conflict to the action of Ugandan forces in the DRC (and not just in relation to occupied territory). Some authors and the US government have taken the view that the type of conflict under consideration is a non-international armed conflict. However, such a view ignores the fact that a use of force by one State on the territory of another State, without the consent of the latter, is a use of force *against* that latter State under the *jus ad bellum*, even if the purpose of the use of force is to engage non-State forces. See *Armed Activities* case (2005) ICJ Rep paras 149 & 153. An international armed conflict arises whenever there is a resort to force between States (*Prosecutor v Tadic, Merits Appeal Judgment*, para 84, July 15, 1999 (1999) 28 ILM 1518), however, this does not mean that both States must actually use force. It is sufficient if one State uses force against another State. In support of the view expressed here regarding the international status of certain conflicts involving the transnational use of force against non-State groups, see P Alston, J Morgan-Foster and W Abresch, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflicts: Extrajudicial Executions in the "War on Terror"' (2008) 19 EJIL 1, 183.

²⁵ See D Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 EJIL 2, 171.

In these exceptional cases where the armed group does not belong to a State it is better to use the definition of civilian adopted by the ICRC Interpretive Guidance with respect to non-international armed conflicts. This would mean that any member of such a group with a continuous combat function would be not be regarded as a civilian. However, the problem with the solution just suggested is that it would deviate from article 50(1) of the Geneva Conventions since the category of fighters now under consideration would not fall under article 4 of GCIII or article 43 of GCIV and would therefore be civilians under that provision.

B. The Status of Non-State Groups in Non-International Armed Conflicts

With regard to non-international armed conflicts, the ICRC makes a distinction between members of the armed forces of a State and of the armed forces of non-State groups. Only those who assume a continuous combat function are said to be members of organized armed forces of a non-State party. One possible criticism of this distinction is that it creates a lack of equality between the State and non-State forces. Any member of the armed forces of a State (with the exception of medical and religious personnel)²⁶ is a legitimate target at all times, including the cook, the cleaner, the lawyer and others without a combat function.²⁷ However, on the ICRC's approach for non-State forces in non-international armed conflicts, individuals who do not have a continuous combat function will be civilians. They are therefore immune from direct attack unless they engage in a specific act which amounts to direct participation in hostilities, and only for such time.

An alternative approach might simply have been to provide that any member of an organized armed group is not a civilian and then try to define what membership means.²⁸ However, one problem with this approach would be how one defines the organized armed group. Does organised armed group refer to the broad organization involved in the fight (eg Hamas, Hezbollah, the IRA?) or merely to the fighting wing of the group? The ICRC is clearly trying to confine the definition to the fighting wing but the difficulty is how one defines that wing when there will likely be few formal indicia to define the fighting wing. So rather than have two definitional problems—(i) defining the armed group and (ii) defining membership—it is easier to focus simply on the membership question (which is itself very difficult) and to let that define the group. Anyone who continuously takes a direct part in hostilities is clearly a part of the fighting wing of the group. Beyond that, with groups who don't wear uniforms or have other external indicia of membership, it will be difficult to know if other persons (who do not have a continuous combat function) are parts of the armed/fighting wing of a broader group. Thus, the ICRC have taken a pragmatic approach rather than one dictated by logic. But that is not a bad thing. This is particularly so, since persons who do

²⁶ Medical Personnel and Religious personnel who are members of the armed forces are not subject to attack. See in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP, Oxford, 2008) §610, §818.

²⁷ See K Ipsen, 'Combatants and Non-Combatants' in D Fleck (ed), *The Handbook of International Humanitarian Law* (2nd edn, OUP, Oxford, 2008), §314, 99.

²⁸ See Y Dinstein, C Garraway & M Schmitt, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law, San Remo, 2006), reprinted in 36 *Israel Yearbook on Human Rights* (2006) §1.1.2 which adopts a membership approach but does not define membership.

not have a continuous combat function can still be targeted in instances where they take a direct part in hostilities, and can be detained for violating domestic or international law.

III. WHAT CONSTITUTES DIRECT PARTICIPATION IN HOSTILITIES?

The key part of the ICRC's Interpretive Guidance is the attempt to define direct participation. The relevant principles are set out as follows:

V. Constitutive elements of direct participation in hostilities: In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

In essence, direct participation is defined as engaging in an act or taking part in a military operation which directly causes, and is intended to cause, harm to the military of the adversary or to protected persons or objects. The first constitutive element of this definition—threshold of harm—goes beyond the Commentary on Additional Protocol I which had defined direct participation overly narrowly. That commentary stated that 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.²⁹ However, as the Israeli Supreme Court correctly noted in the *Targeted Killings* case this was too narrow³⁰ as it appears to exclude acts intended to cause damage to civilians (eg suicide bombings) and such acts should be regarded as hostile acts.

The second element—direct causation—is really the key principle in this area. To lose protection, civilians may either engage in acts which directly cause harm or engage in an operation which directly causes harm. In the commentary to the Interpretive Guidance, the ICRC states that:

In the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets, or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services) would have a potentially important, but still indirect, impact on the military capacity or operations of that party. Other examples of indirect participation include scientific research and design, as well as production and transport of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm. Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm

²⁹ Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987) para 1944.

³⁰ *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) para 33.

inflicted on the adversary will generally remain indirect. Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.³¹

The ICRC has taken a narrow view of the scope of direct participation. In my view, this is right approach to take. A narrow interpretation is suggested by the text and structure of the provisions which deal with direct participation in hostilities. The text of the relevant provisions speak not of participation in armed conflict but of participation in hostilities, something narrower than being involved in the conflict in general. Participation in hostilities suggests participation in military operations. Furthermore, participation must be 'direct'. So not all participation in military operations means loss of protection from attack. A narrow view is also suggested by the purpose of the rule limiting the targeting of civilians to those who take a direct part in hostilities. There is a distinction to be made between acts of participation in hostilities and acts which generally sustain the war effort. This is a crucial distinction as it may be the case that much activity in a state in armed conflict may go towards sustaining the war effort. To permit anyone who is involved in the war sustaining effort to be a target of lethal weapons is to allow for unrestricted warfare—practically everyone could be a target. This would be a regressive move.³²

In general, the ICRC approach on what constitutes taking a direct part is similar to the approach taken, on this question, by the Israeli Supreme Court in the *Targeted Killings* case.³³ Both seem to come to the same conclusions with regard to examples given (perhaps with the exception of voluntary human shields).³⁴ However, the main contribution of the ICRC's work is that it provides the analytical tools by which to reach those answers. The key tool here being the requirement that harm that results (or is intended to result) from an act must be brought about within one causal step of the act (or the operation of which the act forms a part).

IV. LOSS OF PROTECTION—REJECTING THE CONTINUOUS DIRECT PARTICIPATION APPROACH?

It is to be recalled that article 51(3) of AP I states that civilians lose protection from direct attack only 'for such time' as they take a direct part in hostilities. In the *Targeted Killings* case, the Israeli Supreme Court dismissed the argument of the Israeli government (and a view shared by the US³⁵) that the 'for such time' part of the

³¹ ICRC, *Interpretive Guidance*, 52–53.

³² On this analysis, the recent practice by the US and NATO of targeting Afghan drug traffickers with links to the Taleban fails to respect the direct participation in hostilities principle: see D Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' *EJIL: Talk!* (13 Sept. 2009), available at <<http://www.ejiltalk.org/index.php>>.

³³ *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HJC 769/02 (13 Dec 2006) [*Targeted Killings* case], paras 34–37.

³⁴ The ICRC takes the view that only those voluntary human shields who create a physical obstacle to military operations directly cause the threshold of harm required for direct participation in hostilities [ICRC, *Interpretive Guidance*, 56–57] while the Israeli Supreme Court seems to assume that all voluntary human shields take a direct part in hostilities. Israeli SC [*Targeted Killings* case, para 36].

³⁵ See J Bellinger, 'Unlawful Enemy Combatants' *Opinio Juris* blog (17 Jan 2007) available at <<http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants>>.

provision does not reflect customary international law.³⁶ This leads to the question when direct participation ceases.

In keeping with the narrow approach to direct participation, the ICRC takes the view that loss of protection from attack only arises for so long as the civilian is engaged in the specific act which amounts to direct participation. The relevant part of the Interpretive Guidance states:

VII. Temporal Scope of Loss of Protection: Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

This suggests that the ICRC rejects the notion of continuous direct participation.³⁷ This is the idea that a person who takes a direct part in hostilities remains a valid target until he opts out of the hostilities through extended non-participation. On this view, such a person is always subject to attack even in the periods when not specifically engaging in the hostile act. This view is contrary to the narrow notion of direct participation in hostilities adopted by the ICRC. However, the ICRC was willing to broaden slightly the notion of the specific act which constitutes taking a direct part in hostilities. It stated that:

VI. Beginning and End of Direct Participation in Hostilities: Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.³⁸

The ICRC's apparent rejection of the notion of continuous direct participation does not, in most cases, change the results one would arrive at if one adopted a continuous direct participation analysis. In most cases, adopting either the ICRC approach or the continuous direct participation approach would probably mean that a person who takes part in a series of hostile acts would lose immunity from targeting, even beyond the specific occasions when he acts. All that is changed is the category into which the person falls. This is because, on the ICRC's analysis, the person would probably be classified as a member of an organized armed group and thus subject to direct attack for so long as he is a member. Recall that membership in such group is defined as a person who assumes a continuous combat function. So applying, the ICRC analysis one would arrive at the same conclusion as the Israeli Supreme Court when it said:

On the other hand, a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.³⁹

³⁶ See *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) paras 12, 30.

³⁷ See M Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict' in H Fischer et al (eds), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck* (BWV, Berlin 2004), 509–510.

³⁸ ICRC, *Interpretive Guidance*, 65–68.

³⁹ *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) para 39.

The only difference is that on the ICRC's analysis, if the person is involved in a non-international armed conflict, that person would not be a civilian taking a direct part in hostilities but rather a member of an organized armed group—which would mean the person is a legitimate target at all times.

However, there are some situations in which there would be a difference between the continuous direct participation approach and the ICRC approach. Firstly, there would be a difference (in the case of international and non-international armed conflicts) when the person concerned is not a member of an armed group but, rather, acts independently. Secondly, there would be a difference in the case of an international armed conflict where the group involved in the fight does not belong to a party to the conflict, as explained above.⁴⁰ In both cases, a continuous direct participation approach would mean that the person concerned is subject to attack at all times, even in 'periods of rest'. However, analysis under the ICRC Interpretive Guidance would lead to the view that the person concerned is a civilian and is not continuously subject to attack but only when he acts.

In the first situation highlighted above, the narrow approach to direct participation by the ICRC Interpretive Guidance is more in keeping with the spirit of the direct participation rule. The purpose of the rule is to ensure that civilians are only targeted when they pose an immediate danger to military forces and the civilian population. When the danger is not immediate, belligerent parties are obliged to seek other means of combating the threat posed by civilians. One danger of the continuous direct participation approach is that it increases the possibility of error given that a person can be targeted at moments when not involved in hostile acts. Such an approach to targeting raises the question how the belligerent can be confident that individual poses a significant danger and will return to the fight. In the case of a person who is a member of an armed group and whose function is to fight, membership of the group and assumption of a fighting capacity within the group is itself an indication of the dangers posed by the individual. Where the person is not a member of a group dedicated to fighting, one ought to be much more careful in deciding to target the person with lethal force and should do so only when unavoidable, ie when the person engages in an act which will itself cause harm. However, taking a membership approach to the definition of who is not a civilian does not eliminate the difficulty that belligerents will face. Determinations, often difficult ones, will be faced in making the assessment as to whether a person is a member of the armed group with a continuous combat function. The best indication of such membership would of course be past conduct but there must be scope for parties to the conflict to make the assessment that persons who have not performed such acts in the past have nevertheless taken up membership and have assumed a combat function. If this were not so, it might be impossible to target persons tasked with one-off missions (eg suicide bombers) before they undertake that mission.

In the case of members of armed groups who do not belong to the State but who participate in an international armed conflict, the second situation above, the suggestion made earlier⁴¹ is that it is better to use the definition of civilian that the ICRC adopts for non-international armed conflicts. In such cases, the persons ought not to be regarded as civilians simply because their group has failed to subject itself to the

⁴⁰ See Section II.A above.

⁴¹ *ibid.*

State. These persons should also be regarded as having lost their immunity from attack as they pose exactly the same dangers.

V. DOES IHL REQUIRE A CAPTURE RATHER THAN KILL APPROACH?

What will probably be the most controversial aspect of the ICRC's approach in the Interpretive Guidance is the penultimate principle:

IX. Restraints on the use of force in direct attack: In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

This principle suggests that even if one reaches the conclusion that a person is one of those that IHL says may be targeted, a party to a conflict must as a general matter consider whether it is necessary to do so. In other words, where it is possible to disable the threat from that person by several means, the party to the conflict should use the least harmful means can be employed taking the circumstances into account. This principle is said to be based on a general principle of military necessity which stipulates that belligerent parties can only take such action as is necessary to overcome the other party, even if the proposed action is not prohibited by principles of IHL.⁴² So if a person can be captured rather than killed, there is an obligation to do so even in cases where the person is not a civilian or where he is a civilian taking a direct part in hostilities.

This view of the law finds support in the *Targeted Killings* case.⁴³ However, it is not certain that that Court was seeking to apply principles of IHL in this part of the decision. The court cited the ECHR's decision in *McCann v United Kingdom*⁴⁴ and it is therefore likely that this least harmful means approach was an importation from human rights law.⁴⁵ The argument that IHL does take this approach is made by the author of the ICRC's Interpretive Guidance, Dr Nils Melzer in his monograph.⁴⁶ In Melzer's view, the principle of military necessity not only has a permissive function but also has a restrictive function. In his view, this restrictive function is a general principle which underlies all of IHL and which means that even when specific principles of IHL do not forbid action that action is forbidden where not justified by military necessity. Thus military necessity acts as an additional level of restraint on belligerents in addition to specific rules of IHL.

There is some support for this general view of military necessity in military manuals.⁴⁷ However, there seems to be no practice of States in which it is contended that

⁴² ICRC, *Interpretive Guidance*, 78–82.

⁴³ *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006) para 40.

⁴⁴ (1995) 21 EHRR 97.

⁴⁵ Harvard University Program on Humanitarian Policy and Conflict Research, Policy Brief 'IHL and Civilian Participation in the Hostilities in the OPT' (2007, available at <http://hpcrresearch.org/pdfs/ParticipationBrief.pdf>), 12.

⁴⁶ N Melzer, *Targeted Killing in International Law* (Oxford University Press, Oxford, 2008) 278 ff.

⁴⁷ See, for example, C Greenwood, 'Historical Development and Legal Basis' in D Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (2nd edn, OUP, Oxford, 2008) §131 & 38;

the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular case. Given that there is a principle which specifically prohibits the use of weapons which cause unnecessary suffering to combatants⁴⁸ it appears strange that no specific principle has emerged prohibited unnecessary targeting if the view is taken that the general doctrine of military necessity leads to such a conclusion. What is strange that is that the general doctrine of military necessity has led to the development of a specific principle with regard to weaponry and suffering caused by weaponry but States have refrained from elucidating a specific principle about the act of targeting of combatants when such targeting is not necessary. It would seem that this silence is not accidental. In the context of targeting of persons, the view may be taken that IHL has already made the calculation as to what is necessary from the military perspective. In other words, the view may be taken that IHL has already determined the range of persons against whom lethal force may be used and this determination is already based on ground of military necessity. Therefore, no further and more specific restraints exist with regard to who is subject to lethal force. Application of a more specific capture rather than kill approach may be difficult to apply given that those engaged in the conduct of hostilities may not be in a position to know that it is possible to disable a threat by capturing rather than by killing. In the more traditional battlefield situations, soldiers may not be aware that if they refrain from targeting members of the opposing force in their sight, it would be possible (perhaps even easier) for colleagues placed elsewhere to capture those opposing belligerents.

VI. CONCLUSION

All in all, the main contribution of the ICRC in this area is to provide analytical tools in an area where they have long been lacking. There has long been broad agreement on the verbal expression of the key principles here and even agreement on how the principles may play out in particular cases. What we have lacked is how we get from the former to the latter. Lacking that roadmap we lose our way when we try to get other results where instinct alone does not help us. Now we have some tools for doing so.

DAPO AKANDE*

United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, Oxford, 2004) 21–22; United States Department of the Navy, *Commander's Handbook on the Law of Naval Operations* (Office of the Chief of Naval Operations, Washington DC, 1989) §5.3.1; Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863, art 14.

⁴⁸ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) 8 July 1996, ICJ Rep 1996, 226, para 78.

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