

Converting treaties into tactics on military operations

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Abstract

Despite widespread State acceptance of the international law governing military use of force across the spectrum of operations, the humanitarian reality in today's armed conflicts and other situations of violence worldwide is troubling. The structure and incentives of armed forces dictate the need to more systematically integrate that law into operational practice. However, treaty and customary international law is not easily translated into coherent operational guidance and rules of engagement (RoE), a problem that is exacerbated by differences of language and perspective between the armed forces and neutral humanitarian actors with a stake in the law's implementation. The author examines the operative language of RoE with a view to facilitating the work of accurately integrating relevant law of armed conflict and human rights law norms. The analysis highlights three crucial debates surrounding the use of military force and their practical consequences for operations: the dividing line between the conduct of hostilities and law enforcement frameworks, the definition of membership in an organized armed group for the purpose of lethal targeting, and the debate surrounding civilian direct participation in hostilities and the consequent loss of protection against direct attack.

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The ineffectiveness of international law is an oft-heard accusation. The pessimism it induces is all the more potent when contrasted against the last century's claim to a new global order defined by the international rule of law. Indeed, the horrors of World War II led directly to the creation of the United Nations (UN), the Nuremburg and Tokyo international military tribunals, the modern corpus of international humanitarian law (IHL),¹ and the first treaties of international human rights law (IHRL). Today, every State is party to the four Geneva Conventions of 1949, the vast majority have ratified both of their 1977 Additional Protocols,² and the most important treaties limiting weapons that cause unnecessary suffering are broadly accepted. The customary law of armed conflict (LOAC) has expanded to fill in many of the gaps between the legal regimes governing international and non-international armed conflict. Furthermore, the pillar of human rights law, the International Covenant on Civil and Political Rights (ICCPR),³ is backed by almost 90% of UN member States. The end of the century even witnessed the creation of the first permanent international criminal court with jurisdiction over war crimes, crimes against humanity and genocide.

Nevertheless, a quick glance at an international news service on any given morning reveals the obvious: the basic principles of humanity enshrined in international law are not consistently respected in inter- and intra-State violence today. In all too many cases, they appear to be blatantly disregarded by both States and non-State armed groups. What explains the chasm between the expressed political will of the international community and the frequent lack of compliance with the law on the ground? Evidently the media plays a role: it is only the perceived breach of humanitarian norms – a dead wedding party, a physically abused prisoner, a crushed protest – that generates headlines. The wartime infantry battalion commander who decides to issue a warning to the civilian population prior to launching an attack on a nearby enemy weapons cache receives no public accolades for his decision to maintain a degree of humanity in the fog of war. However, despite the great strides that international

1 The terms “international humanitarian law” and “law of armed conflict” are used interchangeably in this text since they convey precisely the same meaning – albeit with a different semantic emphasis.

2 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, all of which were adopted on 12 August 1949 and entered into force on 21 October 1950. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), both adopted on 8 June 1977 and entered into force on 7 December 1978.

3 ICCPR, 16 December 1966 (entered into force 23 March 1976).

law has taken over the past century and a half, treaties and established legal custom are not adequately translating into consistent lawful behaviour on the ground.

The 31st International Conference of the Red Cross and Red Crescent in 2011 confirmed that

international humanitarian law, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. In almost all cases, what is required to improve the victims' situation is stricter compliance with that framework, rather than the adoption of new rules. If all the parties concerned showed perfect regard for international humanitarian law, most current humanitarian issues would not exist.⁴

The same can undoubtedly be said of the international law governing the use of force by armed forces below the threshold of armed conflict. Derived from the right to life in the ICCPR, the UN Basic Principles on the Use of Force and Firearms⁵ are widely accepted as the standard not only for traditional law enforcement professionals, but also for militaries employing force that does not constitute part of the conduct of hostilities in an armed conflict. However, actions speak louder than words – the 2011 Arab Spring and its consequent conflicts prominently demonstrated the challenges posed by military involvement in traditional law enforcement activities.

The compliance of a State's armed forces with the international law governing military operations depends on the will and capacity of its government, as reflected in the following steps:

1. becoming a party to the principal LOAC and IHRL treaties;
2. taking domestic legislative measures to implement and give substance to its international obligations, both treaty and customary, including the repression of breaches;⁶
3. developing an independent mechanism within the executive branch of government for objectively determining the existence of an armed conflict (including whether it is international or non-international), identifying the opposing party or parties, and thereby triggering the application of the LOAC; and
4. taking measures to ensure that the applicable provisions of the LOAC and IHRL are integrated into the operational practice of the military, and backed by the authority of the chief of defence.⁷

4 International Committee of the Red Cross (ICRC), "Strengthening Legal Protection for Victims of Armed Conflict", 31st International Conference of the Red Cross and Red Crescent, Geneva, October 2011, p. 4.

5 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990 (BPUFF).

6 There are several LOAC-specific obligations for States to respect and ensure respect of the law based on the Geneva Conventions (including common Article 1) and their Additional Protocols. There are similar obligations in IHRL, including Article 2 of the ICCPR. See ICRC, *The Domestic Implementation of Humanitarian Law: A Manual*, Geneva, April 2013.

7 See in particular AP I, Art. 87, as elaborated in ICRC, *Integrating the Law*, Geneva, May 2007, available at: www.icrc.org/eng/resources/documents/publication/p0900.htm (all internet references were accessed in December 2014).

The first two steps provide the foundation for compliance, and are often facilitated by an inter-ministerial IHL committee.⁸ The third step responds to an existential threat faced by the international law governing military operations: if for political reasons a State refuses to objectively classify the use of force employed by its armed forces in accordance with its treaty and customary legal obligations, then the intended beneficiaries of that law will bear the consequences, as will the humanitarian reputation of the State. Unfortunately, political manipulation of legal classification has become a more frequent manoeuvre in the exercise of an increasingly assertive notion of sovereignty. States have, for example, claimed that no armed conflict exists when the facts clearly reveal the contrary, or used lethal force in the first resort in situations that have not objectively crossed the threshold of armed conflict.⁹

The aim of this article is to examine the fourth step, which is derived from the success of the first three: how can LOAC and IHRL obligations be translated from raw treaty and customary provisions into operationally relevant, but legally accurate, rules that bind deployed armed forces? The inquiry begins with an overview of the psychological roots of military behaviour and the consequent need to integrate relevant legal norms into operational practice. It then addresses the International Committee of the Red Cross's (ICRC) dialogue with armed forces regarding the use of force both within and outside of armed conflict, and focuses on the problem of reconciling the language of international law with the language of operational orders and rules of engagement (RoE), with particular reference to the use of military force against persons. Throughout that analysis, it highlights those areas of legal disagreement on the law governing the use of force that are most likely to result in operational uncertainty – the dividing line between the law enforcement and conduct of hostilities frameworks, the LOAC definition of membership in an organized armed group for the purpose of lethal targeting, and the concept of civilian direct participation in hostilities – and suggests practical solutions aimed at balancing operational viability and force protection concerns with the diligent protection of the civilian population required by international law. This article does not directly address the specific challenge of improving compliance with non-State organized armed groups, but several of the core compliance issues remain the same.¹⁰

8 ICRC, above note 6, p. 127. For examples of the work of IHL committees, see Cristina Pellandini, "Ensuring national compliance with IHL: The role and impact of national IHL committees" and the accompanying section in this issue.

9 See, for example, Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 94.

10 See Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 5–51.

The roots of military legal compliance

In the context of armed conflicts and other situations of violence, military officers and soldiers are frequently called upon to make extraordinarily complex decisions involving the life and death of human beings. Even junior officers and non-commissioned members may take decisions with consequences that directly affect the strategic interests of the State, including its perceived legitimacy within the international order, its diplomatic clout, its liability to paying damages or being subject to reprisals, and the loss of support of its own electorate. The “strategic corporal”¹¹ may win an apparent tactical victory while simultaneously undermining national policy. Accordingly, operational commanders are painstakingly trained and given the tools to control the use of force by their subordinates. They are specifically required by the LOAC to “prevent and, where necessary, to suppress and report to competent authorities” breaches of the law, and to take disciplinary or penal action as appropriate.¹² Their obligation to prevent and suppress explicitly includes ensuring that their subordinates are aware of their LOAC obligations.¹³ However, the concept of prevention is much broader than the requirement to instruct, and includes employing the means of command and control available to the commander. In modern armed forces, the most proximate directives on the use of force are rules of engagement. RoE are generally appended to an operational order that has been written and vetted by the operational commander and his military staff, including specialist planning, intelligence, operational and legal personnel. The commander and staff are first and foremost guided by the intent expressed by their operational and strategic-level superiors. They are also guided by their own field experience, the instruction they have received at military educational facilities such as command and staff college, and by doctrine. The RoE they request and authorize from more senior levels of command are ultimately reduced to a simplified and context-relevant pocket card carried by the soldier deployed on operations.

Accordingly, although the tactical decision of a soldier to apply lethal force might appear to be isolated, he or she is but the executive end of a chain of authority that reaches up to the commander-in-chief of the armed forces and the minister of defence. Indeed, soldiers go through vigorous training designed to ensure that their individuality is partially subsumed within the larger military structure that they support. Their creativity of action and leadership is only encouraged within defined limits. Almost every action they take on operations is determined or at least constrained by the orders they receive. Even the most innocuous breach of discipline – failure to adequately shine one’s shoes, for example – has had consequences throughout their military careers, ranging from losing individual weekend leave privileges to causing the collective punishment of their unit. One

11 This term was coined by General Charles Krulak in his article “The Strategic Corporal: Leadership in the Three Block War”, *Marines Magazine*, January 1999.

12 AP I, Art. 87.

13 *Ibid.*, Art. 87(2).

result of this combination of training, operations, incentives and disincentives is that a soldier and his or her fellow unit members have a bond of loyalty between them that is arguably closer than that of married couples.¹⁴

As an ICRC study entitled “The Roots of Behaviour in War” contends, the conduct of individual soldiers on operations may in large part be attributed to three criteria: conformity, which accounts for the dilution of individual responsibility; hierarchy, which shifts a degree of responsibility from subordinate to superior; and, consequently, a degree of moral disengagement.¹⁵ Analyzing these observations, the study affirms that there is a gulf between personal attitudes and knowledge on the one hand, and actual behaviour on the other.¹⁶ Accordingly, neither military nor civilian organizations that aim to ensure the compliance of armed forces with international standards may complacently assume that lecturing officers and soldiers on the law, however persuasively, actually influences behaviour on the battlefield. Indeed, stand-alone courses on the LOAC may be of marginal utility. Given a choice between following a direct order – with all of its personal and collective consequences – and following a course of action based on the loose recollection of a LOAC course given by someone outside of the soldier’s operational chain of command, there is no competition. If the execution of a given order would blatantly violate one of the cardinal LOAC principles, the decision of an officer or soldier to openly question it to his or her superior is more likely to depend on morality learned as a child than on a mandatory legal course, although the latter will be given greater weight if it has been delivered by a figure of authority from the soldier’s own chain of command.

Integrating the law into operational practice

In order to modify the comportment of soldiers to better reflect international law, one must alter the very structures that guide military decision-making.¹⁷ At the highest level, the law should be encouraged in macro terms through military strategic policy, and backed by an order from the chief of defence requiring that the planning and execution of operations reflect applicable international rules, setting out responsibilities for implementation.¹⁸ The law must equally form an integral part of joint and service-specific doctrine, from which classroom education and field training curricula are derived. It must also be reflected in the acquisition and employment of military weapons and equipment.¹⁹ The key to this process of integration is ensuring that the law forms a seamless part of existing operational guidance, and does not stand on its own. Indeed, the law

14 Daniel Munoz-Rojas and Jean-Jacques Frésard, “The Roots of Behaviour in War: Understanding and Preventing IHL Violations”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, p. 194.

15 *Ibid.*, p. 190.

16 *Ibid.*, p. 196.

17 ICRC, above note 7, pp. 17–35.

18 *Ibid.*

19 See AP I, Art. 36.

need not even be mentioned in the main body of guiding documents. For example, a tactical military manual governing the employment of artillery that already contains profession-specific terms accurately reflecting the principles of distinction, proportionality and precautions in attack²⁰ is far more likely to influence conformity with the law than a manual that sets out treaty provisions verbatim. Doctrine and training in turn serve as sources for operational orders and RoE that are directly applied at the tactical level.²¹ Finally, the credibility of the orders that the soldier receives depends on the ability of the military disciplinary system to respond rapidly and effectively, maintaining an effective general deterrent against undisciplined conduct and creating an environment conducive to the respect of the law. The legal lessons learned from operations should then be captured and fed into policy and doctrine, thereby creating a continuous cycle of integration.

Even this cursory overview of the process of integrating international law into military operations demonstrates its complexity. In each domain – policy, doctrine, education, field training, operational orders and RoE – there is a procedure for determining the international law relevant to foreseen operations, formulating the operational implications of that law, and seamlessly integrating it into existing guidance, curricula and practice.²² As such, there must be high-level commitment to the process, capacity to carry it out, and a senior hand guiding it forward. Military legal advisers must play a role throughout the process to ensure that operational guidance ultimately reflects the international law upon which it is based.²³ However, it is military operators – not their counsel – who should drive the process in order to ensure its central relevance to the military mission, and that legal vocabulary does not obfuscate guidance directed at the “pointy end” of military operations.

Dialogue on use of force: Reconciling military necessity with humanity

As the internationally mandated guardian of IHL,²⁴ the ICRC works closely with State armed forces in peacetime to integrate the law into operational practice. However, its central priority is to maintain a confidential operational dialogue with those armed forces, militias and organized armed groups currently engaged in armed conflict and other situations of violence in order to address identified

20 These principles are reflected in the treaty and customary rules governing the conduct of hostilities in armed conflict, including AP I, Arts 48–58, and Rules 1–21 of Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

21 ICRC, *Decision-Making Process in Military Combat Operations*, Geneva, October 2013, available at: www.icrc.org/eng/resources/documents/publication/p4120.htm.

22 ICRC, above note 7, pp. 17–35.

23 See AP I, Art. 82.

24 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 and amended by the 26th International Conference of the Red Cross and Red Crescent at Geneva in December 1995 and by the 29th International Conference of the Red Cross and Red Crescent at Geneva in June 2006.

humanitarian problems. For example, the ICRC and the various State and non-State parties to the armed conflict in Afghanistan steadily increased the scope and intensity of their dialogue on the conduct of hostilities after 2001. The source of that dialogue remains the civilian population, who contact the ICRC in theatre with allegations of unlawful actions by the warring parties. Where credible, these allegations are presented bilaterally and confidentially to the responsible party, and framed in terms of their respective international legal obligations. The recipients of that information have tended to appreciate a neutral, confidential perspective on the humanitarian effect of their operations on the civilian population. However, the dialogue presents both legal and practical challenges.

Two solitudes

When the ICRC interacts with armed forces and organized armed groups regarding the conduct of operations in armed conflict, their disparate perspectives inevitably come into sharp relief. Whereas disciplined armed forces are certainly preoccupied with civilian protection, they naturally interpret the law in a manner that is most conducive to protecting the security and ensuring the operational viability of the young men and women they put in harm's way. Although credible humanitarian organizations will certainly account for military necessity to the degree that is possible within their frame of reference, their main focus is invariably on the beneficiaries of IHL, and civilians in particular. In order to bridge that gap, the ICRC's civil–military dialogue is normally guided by former senior military officers. Nevertheless, whether at the level of public debate – such as the heated discussions between governments and civil society following the publication of the ICRC's *Interpretive Guidance on Direct Participation in Hostilities under International Law* (ICRC Interpretive Guidance)²⁵ – or at the level of confidential dialogue between the ICRC and armed forces regarding lawful conduct in detention and the conduct of hostilities, this difference of perspectives should be acknowledged at the outset.

To take one example, the legal debate following NATO's 1999 air campaign in Kosovo and Serbia touched on whether the decision to fly high-altitude sorties outside of the range of surface-to-air missiles potentially violated the LOAC principles of distinction, proportionality and precautions in attack.²⁶ From a military perspective, major factors in the decision to fly at higher altitude would have included the life of the aircrew, the expense that went into their training, the cost of the aircraft, and even the political and military fallout of a NATO ally losing an aircraft – combined with the fact that impressive new technology

25 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Law*, ICRC, Geneva, May 2009 (ICRC Interpretive Guidance).

26 See International Criminal Tribunal for the former Yugoslavia, Office of the Prosecutor, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 13 June 2000, para. 56; Human Rights Watch, "The Crisis in Kosovo", *Civilian Deaths in the NATO Air Campaign*, Vol. 12, No. 1, 2000; A. P. V. Rogers, "Zero-Casualty Warfare", *International Review of the Red Cross*, No. 837, March 2000.

allowed them to direct attacks with precision-guided munitions which, for the most part, did not require naked-eye identification.²⁷ From a civil society perspective, the first consideration was whether the civilian population could be better protected if the air force took on more risk by flying at lower altitude.²⁸ Ultimately the armed forces' decision depended on a difficult judgement regarding the relative value of military assets, both personnel and equipment, on the one hand, and the lives of civilians, and the sanctity of their residences and essential objects, on the other. It also tested the boundaries of the LOAC principle of proportionality,²⁹ and whether anticipated concrete and direct military advantage as weighed against expected incidental loss of civilians and civilian infrastructure could include the safety of military assets.³⁰ Lastly, it tested the principle of precautions in attack, and the degree to which taking greater military risk is "feasible" in accordance with treaty and customary law.³¹ It is therefore unsurprising to note that the two sides of the debate disagreed, and neither side had an irrefutable case. The difference is at its core one of perspective.

However, the discrete points of divergence between military and humanitarian actors should not overshadow the fact that there is general agreement on the vast majority of applicable international law. Take for example the IHL concepts of distinction in attack, humane treatment of detainees and caring without discrimination for the wounded on the battlefield: none of these are contentious for either disciplined armed forces or organized armed groups. The devil often lurks in the details, but true points of disagreement usually lie in the margins of legal interpretation, where new developments including widespread State confrontation with violent extremist organizations continue to test the boundaries of existing international law.

Finding common ground

When ICRC delegates engage in a confidential dialogue with State armed forces regarding the use of force both within and outside of armed conflict, they are often confronted with a language barrier. Legal and protection delegates quote directly from the Geneva Conventions, the Additional Protocols, the customary LOAC, IHRL treaties such as the ICCPR, and soft-law instruments such as the UN's Basic Principles on the Use of Force and Firearms. They highlight the demarcation between the type of force available between the parties to an armed conflict (the conduct of hostilities framework) and force employed by armed forces in other situations of violence (the law enforcement framework). Where

27 There were however cases in which altitude became a factor for visual identification. See, for example, the NATO bombing of Djakovica-Decane, in which civilian vehicles forming part of a refugee convoy were mistaken for a military convoy. See Human Rights Watch, above note 26.

28 *Ibid.*

29 See AP I, Arts 51(5)(b) and 57(2)(b).

30 See Robin Geiss, "The Principle of Proportionality: 'Force Protection' as a Military Advantage", *Israel Law Review*, Vol. 45, No. 1, 2012, pp. 71–89; Michael Schmitt, "Fault Lines in the Law of Attack", in *Essays on Law and War at the Fault Lines*, TMC Asser Press, The Hague, 2012, pp. 296–297.

31 *Ibid.*

relevant, they draw a clear line between international and non-international armed conflict in order to ensure that the appropriate law is being applied. They also ensure that the humanitarian protections contained in the LOAC are considered without regard to the legal framework governing the sovereign resort to the use of force in international relations, the *jus ad bellum*.

Their counterparts in the uniformed legal services are familiar with the treaties underlying these frameworks, but as a general rule they view them as primary sources of law without direct operational implications. In the military construct, relevant treaties and customary law are taken into account at the strategic, operational and tactical levels through doctrine, operational orders and RoE. For professional armed forces, the law is considered the outer boundary of permissible conduct, and their own internal directives are in most cases restricted by national policy that they consider to fall well short of that boundary. On deployed operations, the legal officer's primary task is to interpret the operational order, and to develop an expertise on the RoE implemented by the commander, ensuring that they comply with the State's international obligations – but the focus is on the RoE themselves. In the case of multinational operations, the commander's plans will often be shaped by the RoE caveats expressed by various troop-contributing countries, which are subject not only to different treaty obligations and interpretations but also to different levels of political will to take risks on operations.³² Despite these complications, both the operational commander and his legal adviser must ensure that the RoE are simple and do not place soldiers in a position of uncertainty. Accordingly, treaty and customary law primarily play a background role at the level of planning and executing operations – with certain exceptions such as the detailed treatment of prisoners of war under the Third Geneva Convention.³³ The following section therefore aims to bridge the terminology gap on military operations, while highlighting some of the most difficult points of legal contention.

Reconciling rules of engagement with international law

Although relevant international law must permeate military policy, doctrine and training, rules of engagement entail the most direct consequences for the use of force on operations. RoE vary from State to State, but they are increasingly uniform and there are certain common precepts underlying them.³⁴ They are orders governing the type and amount of force that may be employed in military operations against persons and objects, and they are generally annexed to an operational order that encompasses the entirety of land, air or sea operations in a given area of responsibility. They are circumscribed by policy and international law,

32 See Martin Zwanenburg, "International Humanitarian Law Interoperability in Multinational Operations", *International Review of the Red Cross* Vol. 95, No. 891, 2013, pp. 681–705.

33 Above note 2.

34 See Alan Cole, Phillip Drew, Rob McLaughlin and Dennis Mandsager, *Rules of Engagement Handbook*, International Institute of Humanitarian Law, Sanremo, November 2009.

but are primarily driven by the operational requirements of the commander. As a general rule, they authorize the use of force against persons³⁵ on two bases: conduct and status.³⁶ Conduct-based RoE are premised on self-defence, applicable throughout the entire spectrum of military operations, and are generally reflective of IHRL “law enforcement” or “non-combat operations” use of force principles. Status-based RoE are applicable solely to the conduct of hostilities during an armed conflict. Translating relevant international law into these categories of force is a difficult task that fundamentally challenges the balance between operational prerogatives including force protection on the one hand and civilian protection on the other.

Status-based RoE

Determining membership in an organized armed group

Status-based RoE are drafted for the context of armed conflict, authorizing the use of lethal force in the first resort against members of the fighting forces of the opposing party to the conflict. Subject to the requirement of military necessity, this authority is not limited by the conduct of those fighting forces; indeed, like soldiers of regular armed forces, members of the armed wing of a non-State party to an armed conflict may be attacked even when they are outside of the immediate vicinity of active hostilities, and even when they are unarmed at the moment of attack.³⁷ There is no contradiction between this category of RoE and the LOAC governing the conduct of hostilities, which recognizes attacks against military objectives and subjects them to the principles of distinction, proportionality and precautions, as well as the prohibition on causing unnecessary suffering.³⁸

In practice, the most controversial aspect of status-based RoE is the determination of membership in an organized armed group – or, in RoE terms, a declared hostile force. In the absence of formal membership criteria established by law, the decision as to who may be targeted by an opposing force has historically been governed by relatively loose standards and has been the subject of a wide latitude of interpretation for operational commanders. It is therefore unsurprising that the section of the ICRC Interpretive Guidance setting out functional membership criteria for organized armed groups was controversial, insofar as it recommended a more structured framework for decisions that had previously been the preserve of policy and command discretion.³⁹ Given the global prevalence of non-international armed conflicts, the increasing

35 RoE governing the use of force against objects are beyond the scope of this article.

36 These generic categories of force may be subdivided under several headings: use of force in defence of self and others, mission accomplishment, targeting in armed conflict, operations related to property, etc. See *ibid.*, Annex B.

37 See section “Restraints on the Use of Force against Otherwise Lawful Targets?”, below. Fighters may not be attacked if they are *hors de combat*. Medical and religious personnel remain protected against attack.

38 See AP I, Arts 48–58.

39 ICRC Interpretive Guidance, above note 25, pp. 32–36.

intermingling of civilians and fighting forces on the modern battlefield, and a paucity of guidance on the issue, rational criteria were fundamentally required in order to preserve the integrity of the principle of distinction under the law of armed conflict.⁴⁰

The ICRC's proposed criterion for *de facto* membership in an organized armed group is an individual's continuous combat function (CCF), distinguishable from the merely temporary loss of protection associated with civilian direct participation in hostilities by his or her lasting integration into an organized armed group.⁴¹ The permanency of such a function may be exhibited overtly, for example through a uniform or distinctive sign, or openly carrying weapons for the group; or through other conclusive actions, such as directly participating in hostilities in support of the group on a repeated basis in circumstances indicating that such conduct constitutes a continuous function.⁴² Those cases in which membership is not readily apparent therefore require a difficult analysis of whether an individual's function on the part of the organized armed group is indeed continuous, and whether it meets the three cumulative elements of direct participation in hostilities: a minimum threshold of harm, direct causation of that harm, and a nexus to the hostilities.⁴³

Critics of the ICRC's membership approach have argued that the CCF test creates complexity and uncertainty for the soldier on the ground, thereby undermining force protection.⁴⁴ However, the complexity inherent in determining membership certainly predates the ICRC Interpretive Guidance. Indeed, the absence of formal incorporation into organized armed groups is a factual reality of modern warfare. As recognized by Corn and Jenks, "this [CCF] test provides a logical and workable method to trigger status based targeting authority in [non-international armed conflict]".⁴⁵ Moreover, it is important not to lose sight of the fact that soldiers are always entitled to use lethal force in individual and unit self-defence against an imminent lethal threat.⁴⁶ The

40 See Dr. Jakob Kellenberger's Foreword to *ibid.*, pp. 4–7.

41 *Ibid.*, pp. 24, 31–32. From this perspective, it is important to note that the RoE term "declared hostile force" must be defined as the fighting forces of a party to the armed conflict, as opposed to its civilian component (which might include its political leadership, civilian employees and others), whether those forces belongs to a State or non-State party. This article uses the term "organized armed group" to represent only the armed wing of a non-State party to an armed conflict.

42 *Ibid.*, p. 35.

43 *Ibid.*, Chapter 2.

44 See, for example, Kenneth Watkin, "Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 662–664.

45 Geoff Corn and Chris Jenks, "The Two Sides of the Combatant Coin", *University of Pennsylvania Journal of International Law*, Vol. 33, 2011, p. 338. See also Nils Melzer, "Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities", *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 856: "the ICRC's Interpretive Guidance cannot, and does not purport to, replace the issuing of contextualized rules of engagement or the judgment of the operational commander. Instead, it aims to facilitate the task of those responsible for the planning and conduct of operations by providing useful and coherent concepts and principles based on which the required distinctions and determinations ought to be made."

46 See the following section, "Conduct-Based RoE".

complexity of deciding upon membership in an organized armed group only becomes manifest in those cases where the targeting force wishes to take the initiative to use lethal force against an individual whose membership is not readily apparent (which will certainly be a minority of cases), and such a decision will by definition only be necessary where there is no imminent threat to the life of friendly forces – i.e., where individual or unit self-defence is not applicable. Deliberate targeting of this nature is not based on a hasty decision, and will normally take place after a targeting board has been convened to discuss, amongst other operational issues, the legality of the proposed attack. It is also important to note that the presence of one or more civilians amongst members of an organized armed group, including civilians whose support to the group falls short of a CCF, does not necessarily render the members immune from attack. On the contrary, civilians who accompany those forces will constitute lawful incidental casualties in an attack against the members of the armed group if the expected incidental harm is not excessive in relation to the military advantage anticipated in the attack.⁴⁷

Critics have also argued that the ICRC’s membership criteria for organized armed groups⁴⁸ are narrower than those accepted for State armed forces – i.e., that the test does not capture a sufficient category of individuals who should be targetable.⁴⁹ One prominent commentator cites the example of a cook recruited into the regular armed forces who may be attacked at any time, whereas a cook for a non-State party to the conflict is a civilian who may only be attacked if and for such time as he directly participates in hostilities.⁵⁰ However, the cook recruited by the armed forces is still a rifleman, trained and equipped to engage in hostilities in the event that he is needed for that purpose.⁵¹ In contrast, a contractor employed by the same armed forces for the exclusive purpose of cooking would remain protected from direct attack as a civilian, albeit one who is more likely than most civilians to become a lawful incidental casualty in an attack against a military objective. Likewise, a cook for the non-State party who additionally maintains a CCF for its armed wing would be targetable under RoE as a matter of status by virtue of this function.

On the other hand, that same CCF test has been criticized by the relevant UN Special Rapporteur because it allows *de facto* members of an organized armed group to be targeted “anywhere, at any time”, despite the fact that the treaty language of Additional Protocol I only limits civilian protection “for such time as” an individual directly participates – i.e., that the test potentially goes too far.⁵²

47 This is the concept of proportionality in attack contained in AP I.

48 Importantly, these same criteria are applicable to irregular armed forces belonging to a State party to an armed conflict. See ICRC Interpretive Guidance, above note 25, pp. 25, 31.

49 See Michael Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010, pp. 21–24. See also K. Watkin, above note 44.

50 M. Schmitt, above note 49, p. 23.

51 N. Melzer, above note 45, p. 852.

52 Report of the Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions, Philip Alston, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, pp. 20–21.

It is worth noting that the question of membership in an organized armed group has always been vexed. The ICRC Interpretive Guidance did not create the problem, but rather offered a practically oriented criterion for individual membership based on a balance between the principles of military necessity and humanity.⁵³

The determination of membership in an organized armed group is heavily reliant upon the availability of accurate intelligence. Decisions regarding who may be deliberately targeted within the context of an armed conflict are normally carried out by a targeting board that creates a Joint Prioritized Effects List (JPTEL) or similar tool. Inevitably the decision as to whether a given individual may be placed on that list is influenced by available information and is not based on 100% certainty. However, the LOAC does not require certainty – it requires that all feasible precautions be taken in planning and executing the attack to ensure that the proposed target is indeed lawful. In effect, the attacking force must overcome the presumption that the proposed target benefits from civilian protection.⁵⁴ What the ICRC Interpretive Guidance proposed in support of that difficult analysis are parameters defining the distinction between individuals who play an indirect, war-sustaining role for an organized armed group, and those who are legitimately characterized as members of its armed wing.

Conduct-based RoE

Defining self-defence under international law

In contrast to status-based RoE, conduct-based RoE reflect a soldier's inherent right of self-defence, which is generally framed as a use of force in response to a hostile act or demonstrated hostile intent.⁵⁵ The availability of force in individual or unit self-defence represents a protective shield applicable in any scenario, from peace to armed conflict, for which no more robust measure of force is available under international law. Stepping back from military parlance, the exercise of self-defence by armed forces is well articulated in IHRL, and the use of force authorized in response to either a hostile act or hostile intent must be reconciled with defined limitations. That law allows for the graduated use of necessary force only in proportion to the threat posed, and the use of lethal force only in the defence of oneself or other persons from an imminent threat of death or serious injury. This standard is derived from the right to life, the core of the ICCPR,⁵⁶ and is elaborated in a widely accepted soft-law instrument, the UN Basic Principles on the Use of Force and Firearms.⁵⁷ However, although the extraterritorial application of IHRL is accepted by the UN Human Rights Committee and international tribunals, a minority of States take the position that

53 N. Melzer, above note 45, pp. 837–855.

54 See AP I, Art. 50(1), note 2.

55 For a discussion of the meaning of the concepts of hostile act and hostile intent, see A. Cole *et al.*, above note 34, Part II.

56 ICCPR, above note 3, Art. 6.

57 Above note 5.

the ICCPR was exclusively intended to regulate a government's relationship with individuals on its own territory.⁵⁸ In the case of expeditionary operations, these States therefore rely on the more nebulous general principles of law governing individual self-defence.⁵⁹ Differing sources of law potentially give rise to friction points in the dialogue between the ICRC and governments, such as the level of imminence of harm required before lethal force may be employed under the rubric of demonstrated hostile intent. This dialogue is rendered even more difficult by the fact that the RoE definition of imminence is normally classified information.

“Law enforcement” in armed conflict?

It is a source of legal confusion that even within the context of an ongoing armed conflict, armed forces carry out tasks involving the use of force that do not form part of the conduct of hostilities. These are often referred to as law enforcement tasks,⁶⁰ even though they are not carried out by traditional law enforcement authorities, nor are they necessarily aimed at enforcing the domestic law of the host State (which is why they are perhaps more accurately referred to as “non-combat operations”). In fact, they may take place beyond the reach of the domestic law of the host State, in some cases as a result of a status-of-forces agreement. For example, deployed armed forces are today likely to set up checkpoints, carry out cordon and search operations, and use force to detain civilians who represent an imperative threat to their security. They may occasionally be called in for crowd or riot control duties near their own bases or elsewhere in the absence of the civil authorities normally given this assignment. These activities often have strong ties to the ongoing armed conflict, and have therefore perplexed those tasked with applying the relevant international legal framework: are such functions covered by the LOAC, and what is the relevance of IHRL?

Following the *Nuclear Weapons* Advisory Opinion of the International Court of Justice, governments have attempted to apply a *lex specialis* test in order to determine the applicable legal framework, but this has proven difficult in

58 UN Human Rights Committee, ICCPR General Comment 31, “The Nature of the General Obligation Imposed on States Parties to the Covenant”, UN Doc. CCPR/C/21/Rev. 1/Add.13, 29 March 2004, para. 10. For a summary of the contrary position held by the United States, and a critique of that position, see Beth Van Schaack, “The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change”, *International Law Studies*, Vol. 20, No. 90, 2014.

59 UN Charter, Art. 38. See Terry Gill, Carl Marchand, Hans Boddens Hosang and Paul Ducheine, General Report for the 19th Congress of the International Society for Military Law and the Law of War, Quebec City, 1–4 May 2012, Parts 4, 5, 6. See also Gloria Gaggioli (ed.), *Expert Meeting: The Use of Force in Armed Conflicts – Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, Geneva, October 2013, pp. 11–12.

60 This is derived from the fact that the UN Code of Conduct for Law Enforcement Officials, adopted by UNGA Res. 34/169 of 17 December 1979, uses the term “law enforcement officials” to describe “all officers of the law ... who exercise police powers, especially the powers of arrest or detention”, inclusive of armed forces, in Art. 1(a). The same terminology is employed in the BPUFF, above note 5.

practice.⁶¹ In deciding whether the ICCPR right to life is applicable to the use of force in armed conflict, the Court stated:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁶²

However, the opinion did not specify what situations constitute "hostilities" for which the LOAC prevails over IHRL. Possible factors might include the location of the engagement, its proximity to the conflict zone, the actor using force and the degree of military control over that territory in order to determine whether the LOAC, IHRL or some combination thereof applies to a given use of force.⁶³

In a meeting entitled "The Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms", the majority of a professionally diverse group of experts agreed that "the main (if not the only) legal criterion for determining whether a situation is covered by the conduct of hostilities or law enforcement paradigms is the status, function or conduct of the person against whom force may be used".⁶⁴ If accepted, this is a very attractive test from a practitioner's perspective. When a soldier uses force against a member of an organized armed group who is not *hors de combat*, the situation is covered by the LOAC governing the conduct of hostilities; that is, lethal force in the first resort is permissible, except where there is a manifest lack of military necessity to employ it.⁶⁵ When that soldier uses force against a civilian who is directly participating in hostilities, the situation is covered by the same body of law. It is only when the soldier directs force against a civilian or a group of civilians not directly participating in hostilities that we must look to the law enforcement paradigm contained in human rights law: graduated use of force, and the use of lethal force only in response to an imminent threat to life.⁶⁶

To take a hypothetical armed conflict example analyzed in the expert study, armed forces called in lieu of overwhelmed civil authorities to quell a violent demonstration must obviously be trained and equipped for the task in accordance

61 International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, para. 25. See also ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports* 2004, para. 106; and ICJ, *Case Concerning Armed Activity on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, *ICJ Reports* 2005, paras 216–220.

62 ICJ, *Nuclear Weapons*, above note 61, para. 25.

63 See for example G. Gaggioli, above note 59, pp. 9–12.

64 *Ibid.*, p. 59.

65 ICRC Interpretive Guidance, above note 25, Recommendation IX. See section "Restraints on the Use of Force against Otherwise Lawful Targets?", below.

66 See BPUFF, above note 5.

with use of force principles derived from the IHRL right to life standard⁶⁷ – that is, they may apply only necessary and graduated force that is proportionate to the threat using appropriate equipment such as shields, batons and pepper spray, and they must attempt to de-escalate the situation. However, should those armed forces discover that there is a member of the opposing organized armed group lurking amongst the protesters, then the LOAC governing the conduct of hostilities allows them to apply lethal force against that fighter in the first resort insofar as the concrete and direct military advantage anticipated in that attack outweighs the expected harm to civilians and civilian objects, and all feasible precautions including the choice of appropriate means and methods of warfare are taken to spare the civilian population. This could in some cases imply lawful incidental harm or death to surrounding protesters, as recognized by the LOAC, although these would ideally be avoided through the exercise of sufficient precautions.

Adjusting RoE to a developing interpretation of civilian direct participation in hostilities

The heated debate that followed the publication of the ICRC Interpretive Guidance provided a wealth of perspective on the balance that must be struck between the principles of military necessity and humanity in the law of targeting. However, the academic and occasionally emotional nature of that debate has tended to overshadow the practical consequences of the Interpretive Guidance for the use of force on military operations. The following paragraphs highlight the most common misconceptions that have prevented a more productive dialogue with some armed forces on the integration of the Interpretive Guidance into operational practice: the oft-confused notion of the “revolving door” of civilian protection; the availability of the use of force against civilians not or no longer taking a direct part in hostilities; the status of civilians who work in close proximity to military objectives; and, most controversially, the ICRC’s assertion that the law may restrain the use of lethal force against otherwise lawful targets.

Revolving door, spinning reality

One of the fascinating, if bewildering, debates regarding the ICRC Interpretive Guidance concerns the so-called “revolving door” of civilian direct participation in hostilities. It is worth recalling Article 51(3) of Additional Protocol I, the genesis of the Interpretive Guidance, which is widely recognized as customary LOAC binding on all States in both international and non-international armed conflict:⁶⁸

67 *Ibid.* See also G. Gaggioli, above note 59.

68 ICRC Customary Law Study, above note 20, Rule 6. See also AP II, Art. 13(3), note 2.

Civilians shall enjoy the protection afforded by this Section unless and *for such time as* they take a direct part in hostilities. [Emphasis added.]

As is clear from this language, the “revolving door” is not an ICRC creation, other than perhaps its nomenclature. It is a direct implication of this text. The phrase “for such time as” plainly implies that a civilian regains his/her protection following an act of direct participation in hostilities – as a simple matter of treaty construction, the inclusion of those four words imposes a finite window on loss of protection, following which it is regained. However, the Interpretive Guidance also acknowledges the military necessity of using lethal force in the first resort against *de facto* members of an organized armed group – i.e., those who have forfeited their civilian status and the protection that it grants. For such members, the “door” is not revolving but firmly locked, and it cannot be unlocked until they show conclusively that they have permanently disengaged from their combat function for the group, e.g. through desertion or through an enduring transfer to non-military functions.⁶⁹

It is therefore inaccurate to argue, as some have, that the ICRC is suggesting that the “farmer by day and fighter by night” may only be lawfully targeted during periods of nocturnal military activity.⁷⁰ Indeed, by the ICRC’s reading, the farmer with a CCF on behalf of a party to the conflict is not a civilian, and may be targeted night or day, except for cases in which there is no manifest military necessity to do so.⁷¹ Moreover, it does not matter whether he actually takes part in operations every night or once every week – he may be targeted night or day as a matter of status for the duration of his function, which might be months or years. It should be emphasized that an individual farmer who carries out an act of direct participation in hostilities but does so without taking on functional membership in a pre-existing organized group is not a status-based concern in the conduct of hostilities framework. To the extent that the farmer is not lastingly integrated, he cannot be considered a member of an organized armed group belonging to a non-State party to the conflict as contemplated by common Article 3 of the four Geneva Conventions and the widely accepted *Tadić* criteria defining non-international armed conflict.⁷² His act of direct participation – as opposed to mere criminality – is by definition specifically designed to support one party to the conflict to the detriment of another, but insofar as he acts of his own accord and without the element of consent by the party necessary to establish functional membership, he remains a civilian.⁷³ A “civilian” is defined as any individual who is not a member of the organized fighting forces, and the farmer’s

69 ICRC Interpretive Guidance, above note 25, Recommendation VII.

70 See, for example, William Boothby, *Conflict Law: The Influence of New Weapons Technology, Human Rights and Emerging Actors*, TMC Asser Press, The Hague, 2013, p. 252.

71 See section “Restrictions on the Use of Force against Otherwise Lawful Targets?”, below.

72 See International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70; and *Prosecutor v. Ramush Haradinaj*, Trial Chamber, Judgment, 29 November 2012, paras. 392–396, which elaborate on the *Tadić* intensity and organization requirements.

73 ICRC Interpretive Guidance, above note 25, pp. 58–64.

loss of protection under Article 51(3) is necessarily temporary.⁷⁴ That stated, the ICRC Interpretive Guidance recognizes as a matter of military necessity that he is targetable throughout the stages of preparation for, deployment to, execution of and return from an act of direct participation. Moreover, any collection of farmers and others who form a separate group that meets the organizational requirements and engages in nocturnal hostilities against government forces with a sufficient level of intensity to be considered an additional organized armed group party to the conflict will be targetable as a matter of status, regardless of their daytime vocation.⁷⁵

Use of force against civilians who support an organized armed group

To reiterate, members of an organized armed group are lethally targetable as a matter of status. Civilians who carry out acts of direct participation in hostilities may also be directly targeted, but only as a function of their conduct. There appears to be an underlying misperception amongst some critics of the ICRC Interpretive Guidance that it opens up two categories of civilians – indirect participants in hostilities and those who have previously directly participated – who represent a potentially deadly threat to friendly armed forces but must be left untouched. The category of indirect participants might include arms manufacturers and vendors, cooks, drivers, propagandists and others who are not otherwise directly participating in hostilities but whose actions have varying degrees of ancillary effect on the conduct of hostilities. Those critics appear to underplay two important facts: first, that a civilian who does not or no longer directly participates is protected against direct attack but may nevertheless be subject to robust measures under the law enforcement framework,⁷⁶ up to and including deadly force in self-defence against the imminent threat of death or serious injury posed by that individual; and second, that such an individual may nevertheless be detained and ultimately interned under the LOAC framework if he/she represents an imperative threat to State security.⁷⁷ Such an individual may also be prosecuted for a range of criminal offences under the domestic law of the host State or, in appropriate cases, the national law of the sending State applied extraterritorially. Should that civilian at some point become a member of an organized armed group,⁷⁸ he loses his civilian protection and is targetable as a matter of status under the LOAC. The legal restriction of force in situations that do not amount to the conduct of hostilities does in some cases impose upon armed forces greater risks, since rather than employing a weapon from a safe distance (e.g. a remotely piloted aircraft) to kill a civilian, they must carry out a tactical operation to detain. However, it is important to bear in mind that the use

74 *Ibid.*, Recommendation II.

75 See the LOAC definition of armed conflict found in the documents cited at note 72.

76 See section “Conduct-Based ROE”, above.

77 Subject of course to procedural safeguards. See Jelena Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 375–391.

78 As defined by a CCF per the ICRC. See ICRC Interpretive Guidance, above note 25, pp. 32–36.

of lethal force remains permissible in cases where it is strictly unavoidable in order to protect life.⁷⁹

Civilians who indirectly participate in hostilities: A legal challenge to zero-casualty warfare

Another serious charge against the ICRC Interpretive Guidance is that it allows individuals who only indirectly participate in hostilities to remain protected against direct attack even though they are in direct contact with the means of warfare that will, in short order, be used to kill State armed forces.⁸⁰ For example, a civilian whose sole role is to manufacture, store and ultimately sell improvised explosive devices (IEDs) to an organized armed group does not, according to the ICRC's interpretive criteria, directly participate in hostilities, since his acts only indirectly cause harm. Nevertheless, the means of warfare themselves – in this scenario, the IEDs – remain valid military objectives.⁸¹ The fact that the manufacturer works in close proximity to military objectives renders him more likely to become an incidental civilian casualty in an attack on those objectives, which will be lawful provided that the law governing the conduct of hostilities, including the principles of proportionality and precautions in attack, have been respected. Indeed, the Interpretive Guidance acknowledges that civilians who work in proximity to armed forces and other military objectives are more exposed than other civilians to the “dangers arising from military operations, including the risk of incidental death or injury”.⁸² Accordingly, armed forces that as a matter of policy will not accept even a single incidental civilian casualty in attacks against military objectives place themselves in a precarious position with respect to the law of targeting as framed by the Interpretive Guidance. They effectively eliminate a significant legal avenue for the attack of legitimate military objectives that pose a direct threat to friendly forces.

Restraints on the use of force against otherwise lawful targets?

The most genuinely controversial aspect of the ICRC Interpretive Guidance remains Recommendation IX, “Restraints on the Use of Force in Direct Attack”, which is stated as follows:

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

79 See BPUFF, above note 5.

80 Michael Schmitt, “Deconstructing Direct Participation in Hostilities: The Constitutive Elements”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, p. 731.

81 See AP I, Art. 52.

82 ICRC Interpretive Guidance, above note 25, p. 38.

necessary to accomplish a legitimate military purpose in the prevailing circumstances.⁸³

These words triggered a debate over whether the ICRC was proposing a least harmful means or “capture instead of kill” standard in relation to legitimate military objectives, effectively undermining the presumption that lethal force could be used in the first resort against enemy fighting forces and civilians who directly participate in hostilities during armed conflict.⁸⁴ As more than one commentator opined, the standard was raising a particular interpretation of the principles of humanity and military necessity into a black-letter legal restriction.⁸⁵ It has also been argued that the standard is difficult to apply in practice, injecting an undue element of uncertainty into targeting decisions made on the ground and thereby potentially endangering the targeting force.⁸⁶

First and foremost, it must be stressed that Recommendation IX does not propose an unconditional obligation to “capture instead of kill” in all circumstances. The recommendation is best distilled in the following paragraph:

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there *manifestly is no necessity* for the use of lethal force.⁸⁷

The presumption remains that lethal force may be used in the first resort against a lawful military objective. Recommendation IX evidently set out to place a limitation on the use of deadly force in situations where, *without endangering friendly forces*, it is possible to disable or remove a fighter from the battlefield using sub-lethal tactics. Such cases are likely to be limited, given that even unknown factors, such as a firearm hidden on the person of the proposed target, potentially represent a danger. Only those rare cases for which there is no apparent risk inherent in capturing the target rather than killing him would be covered by this recommendation. As recently clarified, “In the ICRC’s view, a legitimate target may be killed at any time, unless it is clear that he/she may be captured without additional risk to the operating forces.”⁸⁸

83 *Ibid.*, Recommendation IX.

84 Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 818–853. See the responses by Geoff Corn, Laurie Blank, Chris Jenks and Eric Jensen, “Belligerent Targeting and the Invalidity of the Least Harmful Means Rule”, *International Legal Studies*, Vol. 89, 2013; and Michael Schmitt, “Wound, Capture or Kill: A Reply to Ryan Goodman’s ‘The Power to Kill or Capture Enemy Combatants’”, *European Journal of International Law*, Vol. 24, No. 3, 2013, pp. 855–861.

85 See, for example, M. Schmitt, above note 49. See also W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010, pp. 769–830. See the reply to Parks in N. Melzer, above note 45, pp. 892–913.

86 W. Hays Parks, above note 85, p. 810.

87 ICRC Interpretive Guidance, above note 25, p. 82 (emphasis added).

88 G. Gaggioli, above note 59, p. 17.

To take an armed conflict example, an unarmed child who sits alone outside of a forward operating base and makes a discrete mobile telephone phone call every time a military convoy exits, notifying non-State armed forces far down the road to prepare improvised explosive devices, very likely meets the elements of direct participation in hostilities. Depending on the circumstances, facts might also lead the targeting forces to conclude that he is a member of that organized armed group with a CCF. In either case, the legal starting point for the State armed forces is that lethal force could be used in the first resort against that child in the relevant time frame of participation. However, in the absence of any tangible threat such as potential sniper fire from enemy forces, there is manifestly no military necessity to use lethal force in the first resort against the child. If he could be easily approached and detained, then no logical military commander would in practice order an attack. In addition to obvious humanitarian and strategic considerations, a live culprit represents a crucial source of tactical intelligence for the detaining force. Moreover, carrying out an attack where there is no military necessity to do so arguably represents a serious breach of discipline. Recommendation IX may from this perspective be viewed as a crystallization of the LOAC principle of military necessity already embedded in military doctrine worldwide. Whether it eventually evolves into a specific binding norm of the LOAC will depend on whether States are ultimately persuaded by its humanitarian and practical logic and will thereby convert it into customary law through their practice.

Setting the legal debate aside, if this standard is accepted, it can be taught in a manner that is readily grasped at the operational and tactical levels. Soldiers can be trained to use lethal force against lawful targets except in circumstances where there is manifestly no military necessity, at least from their unit's tactical vantage point, to do so.⁸⁹ It would not take a great deal of creativity to integrate this standard into operational practice – inclusive of policy, doctrine, operational planning and RoE – without undermining the element of certainty that is central to force protection and the effectiveness of operations.

The use of force in defence of property under RoE

Under the rubric of self-defence or “operations related to property”, it is common for rules of engagement to allow for the use of force to protect property.⁹⁰ It is important to examine such RoE through the lens of international law. In armed conflict, a positively identified member of an organized armed group may be targeted by opposing forces as a matter of status, and regardless of whether that fighter represents an actual or current threat to military property. Furthermore, in cases where a civilian threatens military property in a manner that amounts to

89 The term “manifest” is currently used by most armed forces in the context of the duty to disobey a “manifestly unlawful order”. See for example the Queen’s Regulations and Orders for the Canadian Forces, Art. 19.015, “Lawful Commands and Orders”.

90 A. Cole *et al.*, above note 34, pp. 39–41.

direct participation in hostilities – for example, by sabotaging a compound of military vehicles in order to weaken the military capability of the armed forces – he too is subject to lethal force in the first resort.⁹¹

However, it is difficult to reconcile the IHRL use of force limits with RoE that allow for the use of lethal force against a civilian representing an imminent threat to property (whether “mission-essential” or otherwise) in two cases: where there is no armed conflict, and, if an armed conflict exists, where the civilian’s act does not amount to direct participation in hostilities. Where applicable, IHRL use of force standards are clear that resort to lethal use of firearms is limited to situations where it is strictly unavoidable in order to protect life, thereby excluding such use in the protection of objects the manipulation of which does not represent an imminent threat of death or serious injury.⁹² Accordingly, civilians who, without attempting to support one party of an armed conflict over another, threaten military property (e.g. by attempting to steal supplies for material gain) remain a law enforcement concern. The use of lethal force against such civilians is therefore restricted to situations in which they pose an imminent threat to life – for example, to the soldiers who are attempting to capture and detain them.

Summary: Reconciling RoE with international law

As the foregoing section demonstrates, the languages of RoE and international law are fundamentally different. It is nevertheless of vital importance that they are reconciled in order to ensure legally compliant behaviour on military operations. It is easy to assume that RoE have already taken all relevant international law into account, given the lawyering that goes into their creation. It is also easy to assume that new developments in the law, such as the most recent academic reflections on direct participation in hostilities, can fit seamlessly into the existing structure of RoE. However, RoE need to be parsed in order to define those aspects of status-, conduct- and defence of property-based rules that are directly implicated by the complex inter-relationship between the LOAC and IHRL. Moreover, it is clear that those aspects of the ICRC Interpretive Guidance accepted by States need to be re-examined by RoE drafters in order to grasp their implications for the law of targeting. It is today insufficient to draft RoE solely on the basis of precedent.

Conclusion

It is surprising how little of the discourse on compliance with international law during armed conflict and other situations of violence actually addresses the roots of military behaviour. Encouraging compliance with international law is at its

91 Unless there is no manifest military necessity to use such lethal force. See ICRC Interpretive Guidance, above note 25, Recommendation IX.

92 See BPUFF, above note 5, para. 9.

core a question of examining the motivation of the soldier who pulls the trigger. Research reveals that the soldier has very little latitude regarding his vocation, no matter how many LOAC dissemination sessions he has attended or how successful civil society has been in altering his mindset about international law. On operations, he is ultimately a servant of the orders he receives, with latitude to question only the most egregious instructions, and that is precisely the situation that armed forces intend to create. Accordingly, governments and civil society seeking better military compliance with the law need to adjust their efforts so as to influence the source of those orders: strategic policy, doctrine, classroom education, field training, standard operating procedures, even the unwritten practical guidance passed from one officer to another – any instruments that feed into the operational decision-making of the soldier's chain of command, and ultimately into his conscious undertaking to pull the trigger. Given the difficulty of engaging armed forces with respect to their guarded world of operations, this is no easy task. However, armed forces define themselves in relation to discipline, and it is rarely difficult to persuade them that international legal compliance is at its heart a matter of discipline.

As this article has argued, the most proximate instruments of command and control over military use of force are the operational order and its appended rules of engagement, neither of which normally have a holistic and transparent connection to international law. When the ICRC and operational commanders engage in confidential dialogue regarding the humanitarian consequences of military operations on the civilian population, they therefore begin from very different vantage points. They must first agree upon or at least express their disagreements regarding the applicable international legal framework, and then work through differences of legal interpretation, bearing in mind the competing principles of military necessity and humanity that permeate the law governing military operations. Throughout that discussion, they should acknowledge that the languages of international law and RoE are fundamentally different. It is only once this reconciliation of perspectives and terminology has taken place that substantive discussions regarding the application of the relevant international law can begin.

The friction points between the principles of military necessity and humanity have most prominently been revealed during recent debates surrounding the definition of membership in an organized armed group, the notion of civilian direct participation in hostilities and the dividing line between the law enforcement and conduct of hostilities legal frameworks. Key legal developments in these areas have yet to be fully translated into mainstream rules of engagement, purportedly due to their complexity and the consequent uncertainty they create for soldiers. However, soldiers well trained on conduct-based rules of engagement will never be legally uncertain insofar as their immediate safety is concerned, and the uncertainty surrounding some situations in which lethal force might be available in the first resort was not created by recent legal developments. On the contrary, those legal developments provide a logical structure upon which RoE may be built in order to address the factual complexity that is inherent to modern warfare.