NOT ALL CIVILIANS ARE CREATED EQUAL:

THE PRINCIPLE OF DISTINCTION, THE QUESTION OF DIRECT PARTICIPATION IN HOSTILITIES AND EVOLVING RESTRAINTS ON THE USE OF FORCE IN WARFARE

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I. Introduction

Warfare is fundamentally different today than in 1949 when states convened to draft and sign the four Geneva Conventions, which provided the foundation for the laws of war or international humanitarian law (IHL). After two horrific World Wars, inter-state conflict was the fundamental challenge to global peace and security at the time. Accordingly, the post-war global governance structure and the laws of war were primarily developed to regulate state-to-state war.

Today, states primarily fight wars against non-state armed groups (NSAG). These are often referred to as "asymmetric conflicts," due to the fact that the state often enjoys superior technology, training and manpower. To stand a chance against states with superior militaries, NSAGs often violate IHL, and more specifically the principle of distinction, by refusing to distinguish themselves from the civilian population. Due to the asymmetry of power, blending in with noncombatants is often a critical part of the NSAG's strategy in places such as Afghanistan, Iraq, the Palestinian territories, and Somalia.

The challenge of distinguishing combatants from noncombatants in contemporary wars necessitates fresh thinking about how to protect civilians while providing armed forces clear targeting guidelines. More specifically, the nature of contemporary warfare requires developing an international consensus on the scope of activities which constitute "direct participation in hostilities," or for which acts civilians lose their protected status. Indeed, uniform guidelines establishing when and how

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individuals lose immunity in war are necessary to provide militaries clear targeting guidelines while safeguarding protections for noncombatants.

This article seeks to addresses this challenge. Specifically, it will attempt to answer the following questions: How should armed forces discriminate between combatants and non-combatants in conflicts during which insurgents refuse to distinguish themselves from the civilian population? What criteria are to be used to determine that an individual is directly participating in hostilities (DPH), and thus not protected from direct attack? Finally, given the challenge of adhering to the principle of distinction in asymmetric conflicts, should restraints on the use of force be more restrictive in these conflicts than in conventional warfare?

This article will be divided into three parts. First, it will review the legal obligation to distinguish between combatants and noncombatants in war, the historical evolution of this principle, and the challenge state militaries face in observing this norm in asymmetric conflicts. The second section will analyze criteria developed by the International Committee of the Red Cross (ICRC) for distinguishing between combatants, civilians participating in hostilities and civilians protected against direct attack. Such criteria were developed for and published in the ICRC's 2009 report entitled, "Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law."

The final section analyzes restraints on the use of force during asymmetric conflicts between sophisticated state militaries and poorly trained and equipped non-state actors. In doing so, this article will demonstrate the logic of more restrictive restraints on lethal force during irregular warfare. In particular, this article contends that international human rights law should control lethal force during occupations or non-international armed conflicts where a party controls significant territory. Such a change would require that security forces exhaust non-lethal measures before resorting to deadly force, which could result in fewer noncombatant casualties at little additional risk to security forces.

II. The Problem of Distinction in 21st Century Warfare

A. The Historical Evolution of the Distinction Principle

The distinction principle is arguably the simplest, albeit most fundamental rule of IHL. According to the rule, parties to an armed

conflict must always "distinguish between the civilian population and combatants and between civilian objects and military objectives."[1] As the International Criminal Tribunal for Former Yugoslavia recently affirmed, intentionally violating this principle is never justified.[2] Indeed, knowingly directing an attack against noncombatants is a manifest violation of IHL.

The obligation to distinguish combatants from noncombatants has historically been recognized across cultures and nations.[3] As early as the 5th century B.C., Sun Tzu, the prominent Chinese military general, wrote "treat the captives well and care for them…generally in war the best policy is to take a state intact; to ruin it is inferior to this."[4] By the 2nd century B.C., Egypt and Sumeria had devised a complex set of rules governing the resort to and conduct of war, which included the obligation to distinguish combatants from noncombatants. [5] Around the same time, the Hindu civilization produced the *Book of Manu,* prescribing a set of rules similar to the Hague regulations of 1907, which included a prohibition on attacking civilians.[6] Thus, the distinction principle was recognized long before it was codified in 20th century treaties.

While a long recognized principle, compliance has been imperfect at best. As law of war scholar Gary Solis highlights, war has often been "waged not only against states and their armies, but against the

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[1] The distinction principle is codified in the Geneva Conventions and a norm of customary international law. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, U.N. Doc. A/32/144, annex I [hereinafter Protocol I]; International Committee of the Red Cross, Customary International Humanitarian Law database r. 1, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 [hereinafter ICRC Customary IHL] (last visited June 1, 2012) (explaining that, in the view of the ICRC, the obligation to distinguish between combatants and noncombatants in military operations is a rule of binding customary international law).

[2] Prosecutor v. Galic, Case No. IT-98-29-T, Trial Chamber Judgment and Opinion, ¶ 44 (Dec. 5, 2003).

[3] For a review of the origins of the laws of war, see 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 4 (Leon Friedman ed., 1972) [hereinafter THE LAW OF WAR: A DOCUMENTARY HISTORY].

[4] SUN TZU, THE ART OF WAR 76 (1963).

[5] JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 7 – 8 (1985).

[6] Chris af Jochnick & Roger Normand, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. J. 49, 60 (1994).

inhabitants of the enemy states, as well."[7] Indeed, the history of warfare is full of tales of unspeakable barbarism, atrocities and massacres against combatants and civilians alike. Empires expanded through military conquest, involving pillage, rape, murder and often the wholesale destruction of nations and civilizations. The development of international law to govern armed conflicts was eventually seen as necessary to restrain mankind's worst impulses.

Absent any means of holding militaries accountable for intentionally killing civilians, pragmatism best explains if and why civilians were protected from direct attack. As Leon Friedman highlights, civilian populations were spared because they could "work for, pay tribute to, or be conscripted into, the victorious army."[8] Further, "unrestrained warfare would jeopardize reconciliation and make later trade and peaceful intercourse impossible."[9] Thus, "protections granted to noncombatants and civilians grew generally out of a utilitarian view of warfare and not from an ideological desire to preserve them from the horrors of war."[10]

Indeed, as Eric Talbot Jensen highlights, Sun Tzu's concerns for protecting "captives and enemy property and persons was not born from a humanitarian desire to preserve his adversary but as part of the overall goal to conquer the enemy."[11] Therefore, when marauding armies adhered to the principle of distinction, they most likely did so for pragmatic, rather than moral reasons. Empires needed human capital to grow their power and influence, and thus there was no reason to kill civilians, unless it was deemed necessary. Rather, there was a compelling reason to leave noncombatants unharmed.

The first discussion of the principle of distinction from a humanitarian perspective may be found in the writing of Francisco de Vitoria, one of the first western Law of War theorists. Vitoria noted that the "deliberate slaughter of the innocent is never lawful in itself…the basis of a just war is wrong done. But wrong is not done by an innocent

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[7] GARY SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 251 (2010).
[8] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 4.
[9] *Id.*
[10] Eric Talbot Jensen, *The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DEN. J. INT'L L. & POL'Y 2, 245 (2008).
[11] *Id.*

person."[12] Nevertheless, Vitoria supported an exception to the rule—military necessity. According to Vitoria, states could lawfully target innocent civilians if necessary to secure military victory.[13] Indeed, the notion that military necessity could override the obligation to distinguish between combatant and civilian largely remained an acceptable viewpoint until the drafting of the Geneva Conventions of 1949.[14]

Hugo Grotius, who is considered the father of international law, qualified Vitoria's arguments. According to Grotius, nations "must take care, so far as is possible, to prevent the death of innocent civilians, even by accident."[15] Further, Grotius noted, "it is the bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction."[16] Thus, the modern day conception of proportionality and the requirement that states take precautions to prevent civilian deaths are found in the writing of Grotius.

Until the 19th century, the laws of war were only codified in bilateral treaties and reflected in state practice. Developments in new military technology, such as explosive bullets, spurred new interest in codifying a uniform set of protections for combatants in multilateral treaties. After Henry Dunant's gruesome account of the Battle of Solferino sent shockwaves through Europe, Western nations convened in Geneva to codify protections for combatants. While limited in scope to specific weapons, such as exploding bullets, agreements signed by the European powers gave rise to the notion of the prohibition against unnecessary suffering.[17]

Just a year prior, Francis Lieber, a general in charge of Union forces during the U.S. Civil War, had been commissioned to propose a code of regulations governing armed conflict for U.S soldiers.[18] The Lieber code, which was complete, humane, and comprehensible, quickly became an authoritative text, impacting military codes far beyond U.S. borders.

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[12] Francisco de Vitoria, *On the Indies and the Law of War* (1532), *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 13.
[13] *Id*.
[14] Jochnick & Normand, *supra* note 6, at 64.
[15] Hugo Grotius, *The Law of War and Peace* bk. III, ch. XI, r. viii (1625), *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 87.
[16] *Id.*
[17] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 151.
[18] SOLIS, *supra* note 7, at 41.

Many European nations adopted instructions based on the Code, and it served as the basis for manuals for the American Army and The Hague Conventions of 1899 and 1907.[19]

Indeed, the Lieber Code was the first comprehensive set of laws governing war. The principle of distinction is codified in Article 22, which provides: "[Civilization requires] the distinction between the private individual belonging to a hostile country…and its men in arms . . . [T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."[20] While the distinction principle had long been recognized, the Lieber Code served as the basis for institutionalizing the protection of noncombatants.

But, progressive national military regulations and the Hague Conventions of 1899 and 1907 proved to be no match for total war. While the major military powers had been keen to sign onto agreements codifying restraints and limitations in war, the conventional view, as reflected by state practice in both World Wars, was that military necessity could trump the law.[21] Prussia had explicitly enumerated this idea in its 1870 military doctrine known as *Kriegraison.* One of the most influential and alarming passages of the Prussian doctrine provides:

> A war conducted with energy cannot be directed merely against the combatant forces of the Enemy State and positions they occupy, but it will and must in like manner seek to destroy the total intellectual and material resources of the latter. Humanitarian claims, such as the protection of men and their goals, can only be taken into consideration in so far as the nature and object of war permit.[22]

In short, *Kriegraison* granted German belligerents the right to do whatever they believed was necessary to secure military victory. While the allied military powers officially rejected the notion that necessity could trump the law, the U.S. firebombing of civilian populated areas, as well as the use of nuclear weapons against Japan clearly reflected an

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[19] THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 3, at 152–54.
[20] SOLIS, *supra* note 7, at 43–44.
[21] Jochnick & Normand, *supra* note 6, at 64.
[22] THE WAR BOOK OF THE GERMAN GENERAL STAFF 68 (J.H. Morgan trans., 1915), *in* Jochnick & Normand, *supra* note 6, at 64.

acceptance of *Kriegraison*. Indeed, while the Axis powers most frequently and systemically violated the law during WWII, both sides were responsible for significant indiscriminate attacks against civilian populations.

The horrors of two world wars generated significant support for strengthening the laws of war and improving enforcement by imposing individual criminal liability for violations. For the first time in history, an absolute prohibition against directly attacking civilians was codified in a binding multilateral treaty. Article 27 of the Fourth Geneva Convention stipulates that "protected persons are entitled, in all circumstances, to respect for their persons," which "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof."[23] Further, Article 3 common to all four Geneva Conventions—which governs non-international conflicts—establishes that "persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely."[24] This article additionally precludes "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."[25]

In 1977, state parties explicitly included the requirement of distinction in Additional Protocol I to the Geneva Conventions. Article 48 of Additional Protocol I to the Geneva Conventions, which covers international conflicts, provides:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[26]

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[23] Geneva Convention Relative to the Protection of Civilians in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[24] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; GC IV, *supra* note 23, art. 3.

[25] *Id.*

[26] Protocol I, *supra* note 1, art. 48.

A similar provision was included in Additional Protocol II to the Geneva Conventions, which covers non-international armed conflicts. Article 13(2) of AP II provides:

> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.[27]

Today, the principle of distinction is regarded as the "most significant battlefield concept a combatant must observe."[28]

B. The Changing Nature of Warfare

While extremely simple on paper, adhering to the principle of distinction has become increasingly difficult in contemporary warfare for several reasons. First, since the end of the Cold War, intra-state conflicts have become the predominant form of warfare.[29] While the overall frequency of armed conflict has declined markedly since the end of the Cold War, the nature of conflict has largely changed from state-to-state military engagements to intra-state warfare.[30]

Increasingly, states fight against armed groups empowered by the political, economic and technological changes of the past twenty years.[31] Improvements in transport technology, the information revolution, and the deregulation of the international economy have enabled NSAGs to

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[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Protocol II].

[28] SOLIS, *supra* note 7, at 251.

[29] For an analysis of global trends in armed conflict since 1946, see Monty G. Marshall & Benjamin R. Cole, *Global Report 2009: Conflict, Governance and State Fragility*, CTR. FOR SYSTEMIC PEACE & CTR. FOR GLOBAL POL'Y, December 7, 2009, http://www.systemicpeace.org/Global%20Report%202009.pdf (last visited December 5, 2011).

[30] *See* Lotta Harbom & Peter Wallensteen, *Armed Conflict and Its International Dimensions, 1946–2004*, 42 J. PEACE RES. 5 (2005); *see also generally* HUM. SECURITY CENTRE, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY (2005), http://www.hsrgroup.org/human-security-reports/2005/text.aspx (last visited Dec. 5, 2011) [hereinafter HUM. SECURITY REPORT 2005].

[31] Richard H. Schultz, Douglas Farah & Itamara V. Lochard, *Armed Groups: A Tier-One Security Priority*, INSS OCCASIONAL PAPER 57, USAF INST. FOR NAT'L SECURITY STUD. 31–34 (2004).

move, communicate and transfer capital faster and more easily.[32] As the forces of globalization have empowered non-state actors, power inside states has become more diffuse. In places like Afghanistan, the Democratic Republic of the Congo, Mexico, and Somalia, NSAGs control parts of the country, and challenge the government's monopoly on violence. As a result of the changes wrought by globalization, the threat of states going to war over territorial claims has receded. Today, security threats emanating from within poorly functioning states constitute the primary threat to international peace and security.[33]

While NSAGs are more powerful than in the past, superior military technology still provides conventional militaries a significant edge. To survive in an asymmetric war against the United States, the European Powers, or Israel, NSAGs often blend in with the civilian population, and force powerful states to fight a war of attrition. Former Deputy Supreme Allied Commander of Europe, Rupert Smith, calls this new form of combat, "War Amongst the People."[34]

"War Amongst the People" may be characterized by six broad trends. First, states fight for fundamentally different ends than in conventional military engagements. While states traditionally went to war to defeat an adversary, states now fight to secure a political outcome or guarantee security in the aftermath of a civil war.[35] Second, states fight amongst the population, rather than on an isolated battlefield away from non-combatants.[36] Third, western militaries are engaging in wars which "tend to be timeless, even unending."[37] Indeed, wars are no longer characterized by decisive battlefield victories resulting in a clear victor.

Fourth, Smith suggests that western militaries "fight to preserve the force rather than risking all to gain the objective."[38] During the 1990's, force protection became the mantra due to debacles in the Balkans and Eastern Africa, involving American and European soldiers dying while

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[32] For analysis of how globalization has empowered non-state armed groups, see John Mackinlay, *Globalization and Insurgency*, ADELPHI PAPERS No. 352, Nov. 2002, at 17–18.
[33] For a broad analysis of changes in the nature of warfare over the last century, see KALEVI J. HOLSTI, THE STATE, WAR AND THE STATE OF WAR 15 (1996).
[34] RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2006).
[35] *Id.* at 271.
[36] *Id.* at 280.
[37] *Id.*
[38] *Id.*

carrying out humanitarian missions. As a result, Western states sought to limit their military engagement in missions not deemed imperative to security interests. NATO's air intervention in Kosovo, which was conducted from 10,000 feet to avoid any casualties, is a classic example of this phenomenon. However, it is becoming increasingly difficult, if not impossible, to reconcile such a high standard of force protection with the political objectives in 21st century conflicts. The new counterinsurgency (COIN) doctrine developed by the United States accepts this conclusion.[39] COIN requires that U.S. soldiers use less force as a means to prevent civilian casualties, a fundamental change, which is both counter-intuitive for the soldier and essential to ensuring U.S. objectives in Afghanistan. While force protection is still important, the U.S. military has seemingly accepted the need for greater risk to its soldiers to secure political objectives in counter-insurgency warfare.

Fifth, Smith contends, western militaries are still largely organized to fight conventional wars, and thus unequipped for this new type of warfare.[40] Finally, Smith concludes, these new wars are predominately between states and NSAGs.[41] However, this does not preclude the involvement of states in supporting NSAGs. Even while the battles in places such as Afghanistan, southern Lebanon and the eastern Congo are principally between states and NSAGs, the direct or tacit support of foreign states is often critical to sustaining these NSAGs. Indeed, states often fight covertly through NSAGs in many contemporary wars.

The ascendancy of asymmetrical wars as the predominant form of conflict in the 21st century has negatively impacted noncombatants. Civilians are increasingly targeted and purposively killed in military operations. Most attacks on civilians are perpetrated by insurgents as part of a strategy not only to coerce and terrorize the civilian population, but also to undermine the state. As Sewall notes, insurgents "kill civilians to show that the government can't protect its own citizens. Insurgents' favorite tactic is to provoke overreaction from counterinsurgent forces, discrediting them before a vocal and increasingly international audience."[42]

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[39] For a discussion of the differences between conventional U.S. military doctrine and the U.S. COIN doctrine, see Sarah Sewall, *Introduction to the University of Chicago Press edition: A Radical Field Manual*, *in* U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MAN. at xxvii (2007).
[40] SMITH, *supra* note 34, at 280.
[41] *Id*.
[42] Sewall, *supra* note 39, at xxv.

Civilians increasingly bear the highest cost in post-cold war conflicts. In 1996, the United Nation's report on the "Impact of Armed Conflict on Children" noted that civilian fatalities in war climbed from 5 percent at the turn of the 20th century to more than 90 per cent during the wars of the 1990's.[43] More recent studies affirm this trend has continued during the wars of the 21st century. Emily Crawford highlights:

> [I]n WWI only 5 per cent of all victims were civilians, by the Korean War, the statistic rose to 60 per cent, with 70 per cent of all victims in the Vietnam War quantified as civilians or noncombatants. Most recently, the number of civilian deaths in the 2003 Iraq War has outnumbered combatant and insurgent deaths by a ratio of 20:1.[44]

Other researchers have claimed this alleged spike in civilian fatalities is an "urban myth."[45] Indeed, the 2005 Human Security Report claims that civilian battlefield deaths have sharply declined.[46] More recently, Adam Roberts has suggested "[t]he entire exercise of seeking universal civilian—military casualty ratios is flawed," due to the unreliability of field statistics.[47]

The position taken by Roberts is the most intellectually honest. But, even if cumulative civilian battlefield deaths have declined, it may still be possible that civilian fatalities relative to combatant deaths have increased, as the majority of scholars posit. Indeed, the contention is that noncombatants bear a higher burden of risk in asymmetric than in conventional warfare as a result of two phenomena. The first is not unique to asymmetric conflicts. As noted, civilians are purposively

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[43] U.N. Secretary General, *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, Note by the Secretary-General*, U.N. Doc. A/51/306, ¶ 24 (Aug. 26, 1996).

[44] EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 15 (2010). Also affirming this trend is MARY KALDOR, NEW WARS AND OLD WARS: ORGANIZED VIOLENCE IN A GLOBAL ERA 100 (2001).

[45] Kristine Eck, *The 'Urban Myth' About Civilian War Deaths*, *in* HUM. SECURITY REPORT 2005, *supra* note 30, pt. II, at 75.

[46] HUM. SECURITY REPORT 2005, *supra* note 30, at 2–4, and 125–26; For another dissenting voice, see Erik Melander, Magnus Oberg & Jonathan Hall, *Are 'New Wars' More Atrocious? Battle Severity, Civilians Killed and Forced Migration Before and After the End of the Cold War*, 15 EUR. J. INT'L RELATIONS 3 (2009).

[47] Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 3, 128 (2010).

attacked, often as part of a political strategy, in asymmetric or unconventional wars. Second, as insurgents blend in with the civilian population, counterinsurgents are faced with the complex task of distinguishing combatant from noncombatant.[48]

As Donald Snow highlights, insurgents "fight in different manners, are organized differently, and often do not wear military uniforms to help identify friend and foe."[49] To stand a chance against highly trained militaries with superior firepower, militant groups in Afghanistan, Iraq, Somalia and elsewhere often melt into the civilian noncombatant population, relying on stealth, secrecy and staying power. As a result, distinguishing combatant from noncombatant is considerably more difficult in many contemporary conflicts, presenting new challenges for protecting civilians from violence. As Eric Talbot Jensen notes, "increased civilian casualties will inevitably result because of the inability to discern who is 'targetable' and who is not."[50]

The problem is two-fold. First, irregular combatants do not distinguish themselves from civilians. Second, civilians increasingly *participate* in 21st century conflicts. In Afghanistan, for instance, "civilians" are often recruited to plant improvised electronic devices (IEDs) or provide intelligence support for armed groups. From the point of view of a U.S. or German soldier in Afghanistan, these are two sides of the same coin. During combat, soldiers may only target persons participating in hostile acts. Outside of hostilities, U.S. soldiers in Afghanistan may only target persons confirmed to be a member of al-Qaeda or the Taliban.

Membership in loosely organized, network oriented terrorist groups, however, is very different from membership in hierarchical militaries. In Afghanistan and Pakistan, the United States relies on "pattern of life" analysis to identify legitimate targets.[51] Combatants are identified through their prior participation in hostilities and interactions with

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[48] For an excellent analysis of these trends, see Andreas Wenger & Simon J. A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L. REV. OF THE RED CROSS 872, 845–50 (2008).
[49] DONALD SNOW, UNCIVIL WARS 110 (1996).
[50] Jensen, *supra* note 10, at 243.
[51] For an explanation of how "pattern of life" analysis is used to support U.S. military operations, see Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add. 6, ¶ 20 (2010).

known insurgents.[52] Indeed, in Afghanistan and other contemporary conflicts, it is rarely feasible for state militaries to distinguish combatant from civilian by relying on formal membership mechanisms. Adapting to changes in how armed groups organize themselves, state militaries resort to a function-based approach for targeting militants, whereby combatants are identified through their DPH.

The Geneva Conventions provide that civilians may not be directly targeted "unless and for such time as they take a direct part in hostilities."[53] What acts fall within the scope of DPH? There is no consensus on the answer to this question. Yet, protecting civilians and ensuring compliance with IHL in contemporary wars requires that the international community develop a consensus. As Wenger and Mason contend, clarifying the notion of "'direct participation in hostilities' is a necessary part of the process of adapting to the changing nature of armed conflict."[54]

III. Direct Participation in Hostilities: Toward Uniform Guidance

A. Treaty Law

The notion of direct or active participation in hostilities was first referenced in Common Article 3 to the Fourth Geneva Convention of 1949, which provides that:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[55]

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[52] For a discussion on how "pattern of life" analysis supports target identification for U.S. drone strikes, see Jane Meyer, *The Predator War*, NEW YORKER, October 29, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true (last visited Dec. 5, 2011).

[53] Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC CUSTOMARY IHL, *supra* note 1, r. 6.

[54] Wenger & Mason, *supra* note 48, at 851.

[55] GC I–IV, *supra* note 24, art. 3.

Common Article 3 precludes direct attack against combatants *hors de combat* or civilians not taking part in hostilities. In other words, this provision affords immunity to those individuals not participating in the conduct of war. While codifying an important precept of warfare, Common Article 3 provides parties to the Geneva Conventions little guidance in determining what acts constitute active participation in hostilities.

Soon after the Geneva Conventions entered into force, non-international conflicts became more frequent, and "civilians" increasingly became participants in insurgencies and rebellions against their colonial occupiers. The increasing prevalence of civilian fighters prompted states to draft new law on the loss of civilian immunity. Provisions were included in the 1977 Additional Protocols to the Geneva Conventions, which provided that civilians are protected "unless and for such time as they take a direct part in hostilities."[56]

While adding a temporal dimension to the notion of DPH, the text in the Additional Protocols remains as unclear as it does in Common Article 3. However, the ICRC's *Commentary* related to this clause provides some helpful guidance. For instance, the ICRC stipulates that, "'[D]irect' 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. It is only during such participation that a civilian loses his immunity and becomes a legitimate target."[57] Therefore, an individual's actions must actually cause harm or be likely to do so in order for those actions to cross the threshold of "direct participation."

The ICRC also explains the temporal dimension, noting that "[o]nce he ceases to participate, the civilian regains his right to protection…and he may no longer be attacked."[58] In short, civilians regain immunity after they cease participating in the conduct of hostilities. Finally, the ICRC's *Commentary* stipulates that, "[t]here should be a clear distinction between direct participation in hostilities and participation in the war

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[56] Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC CUSTOMARY IHL, *supra* note 1, r. 6.

[57] COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS (PROTOCOL I), ¶ 1942, at 619 (Pilloud, Claude; Sandoz, Yves; Swinarski, Christophe; Zimmerman, Bruno, eds., 1987) [hereinafter COMMENTARY TO PROTOCOL I].

[58] *Id.*

effort . . . Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless."[59] Thus, mere participation in the war effort does not rise to the level of "direct participation"; the individual's actions must be directly linked to the conduct of hostilities.

While the ICRC's *Commentary* to the 1977 Additional Protocols provides some guidance, the notion of DPH remains mired in ambiguity. Indeed, as the ICRC contends, "a clear and uniform definition of direct participation in hostilities has not been developed in state practice."[60] Before considering the ICRC's 2009 Guidance on DPH, the next section will briefly describe a number of factors, which will be used to evaluate the efficacy of the ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities."

B. Interpreting Direct Participation in Hostilities: Critical Factors

As noted, the international community is split over how to interpret DPH. As one scholar notes, the lack of a consensus definition of this concept has led to a "degree of latitude in interpretation" leaving international actors with very different agendas to decide what constitutes DPH.[61] In general, views on how to interpret this concept may be divided into two schools of thought: (1) a narrow approach that restricts the activities qualifying as DPH, thus ensuring immunity to more individuals; and (2) a liberal or expansive approach that characterizes a broader range of activities as DPH, thus granting legal protection to fewer individuals.

Professor Antonio Cassese favors a narrow approach, preserving civilian immunity for all except those directly engaged in hostile activities at the time.[62] Importantly, Cassese rejects the existence of unlawful combatants; any individual not wearing a uniform is a civilian

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[59] *Id.*
[60] JEAN-MARIE HENCKAERTS AND LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: BOOK 1, 23 (2006).
[61] Dan Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to Targeting Civilians*, 25 AM. U. INT'L L. REV 885, 893–94 (2010).
[62] ANTONIO CASSESE, INTERNATIONAL LAW 420–23 (2005).

protected from attack unless and for such time as they are DPH.[63] Others advocating a narrow approach, such as the ICRC, believe that an individual can permanently lose immunity *vis-à-vis* continuous and DPH. However, the ICRC urges other sorts of restrictions, arguing that civilians only lose immunity when preparing for or engaging in "specific hostile acts" satisfying certain criteria.[64] Supporters of the restrictive approach contend that linking the loss of immunity to participation in specific hostile activities best reflects treaty IHL, and will result in greater protections for noncombatants. Advocates for restrictive approaches further contend that strictly limiting the scope of activities by which a civilian loses immunity is critical to preserving the distinction between a combatant, whom is never protected, and a civilian, whom is protected when not DPH. In other words, an expansive interpretation of DPH could lead to a blurring of the lines between these two distinct categories of individuals.

Professor Michael Schmitt makes the case for a more liberal interpretation. According to Schmitt, "[g]rey areas should be interpreted liberally, i.e in favor of finding direct participation."[65] A liberal or expansive interpretation of DPH would enable state armed forces to target a broader range of civilians and counter efforts by insurgents to abuse the law. According to Schmitt, civilians whose activities may not satisfy the restrictive DPH test but which remain "intricately involved in a conflict" should be treated like combatants.[66] Although lacking a coherent and official position on this concept, it is generally believed that the U.S. military adheres to a more liberal interpretation of directly participating in hostilities.[67] Indeed, U.S. drone attacks against drug lords and other criminal networks in Afghanistan, which are believed to be

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[63] *See* Antonio Cassese, *Expert Opinion Written at the Request of the Petitioners*, *in* The Public Committee Against Torture et al. v. The Government of Israel et al., *On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law* 5–10 (2006), http://www.stoptorture.org.il/files/cassese.pdf (last visited Dec. 5, 2011).

[64] The ICRC's position will be discussed in more detail below.

[65] Michael N. Schmitt, '*Direct Participation in Hostilities' and the 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FÜR DIETER FLECK 509 (Horst Fischer et al. eds., 2004).

[66] *Id.*

[67] For a brief discussion on U.S. approaches to this concept, see Stigall, *supra* note 61, at 895–98.

financing the insurgency but not engaging directly in combat, is evidence of a more expansive interpretation of DPH.[68]

Professor Schmitt contends that a liberal approach would change the incentive structure. Under the conservative interpretation, the law affords immunity to civilians who do not directly participate in the conduct of hostilities, but whom aid insurgents or support the general war effort in less direct ways. As will be discussed below, the line between direct participation in the conduct of war and mere participation in the war effort is not always clear. According to Schmitt, the liberal approach would clarify the law, while creating "an incentive for civilians to remain as distant from the conflict as possible—in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted."[69] Schmitt and other proponents of a liberal or expansive approach also contend that one hostile act should result in a permanent loss of legal protection for the duration of the conflict,[70] a very expansive interpretation of the temporal element of DPH.

Both of these schools of thought emphasize tenets underpinning IHL. The more liberal or expansive approach emphasizes the principle of military *necessity*, whereas the narrow or restrictive interpretation of DPH places greater emphasis on the principle of *humanity*. IHL is essentially a compromise between these two principles,[71] and thus, any definition of DPH must strike an appropriate balance between them. A consensus definition should not emphasize military needs while shifting the burden of risk to civilians, or establish such a high threshold for the loss of immunity so as to jeopardize the ability of armed forces to secure their military goals. Any definition should also comport with the

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[68] The U.S. military has been known to place drug traffickers financing the insurgency in Afghanistan on the capture or kill list. The legality of this practice is circumspect as most legal experts do not consider such individuals combatants or to be directly participating in hostilities. For an analysis from a U.S. Judge Advocate contending this practice violates international humanitarian law, see Major Edward C. Linneweber, *To Target, or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means,* MIL. L. REV. 207, 155–202 (2011).

[69] *Id.*

[70] *See* Michael Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements,* 42 N.Y.U. J. INT'L L. & POL 697, 737–38 (2010); Kenneth Watkins, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 3, 692–93 (2010).

[71] *See* Christopher Greenwood, *Historical Developments and Legal Basis*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 32 (Dieter Fleck ed., 1999).

positivist sources of IHL, namely the Geneva Conventions and the Additional Protocols. The customary practice of states, especially those fighting counter-insurgency wars, should be considered as well. Lastly, any interpretation must take into consideration the principle of reciprocity, a central tenet underpinning IHL.[72] In sum, any guidance must appropriately balance military necessity against the obligation to protect noncombatants, be consistent with treaty and customary IHL, and be fairly applied to all parties.

C. The ICRC's Interpretive Guidance

In 2009, the ICRC published its "Interpretive Guidance," to clarify the meaning of DPH.[73] According to the ICRC, the report's findings are based on discussions with fifty top legal experts from militaries, governments, international organizations, NGOs and academia. However, the ICRC concedes that the report does not reflect a unanimous or majority opinion of the participating experts, but rather the ICRC's recommended guidance. While the ICRC's guidance has generated some criticism, it is still considered an authoritative analysis of some of the most pressing legal questions facing state militaries conducting counterinsurgency and counterterrorism operations.

This section will begin by reviewing how treaty IHL defines non-state armed groups and combatants before moving to an analysis and critique of the ICRC's recommendations for distinguishing combatants from noncombatants. While concluding that the ICRC's guidance on combatants is under-inclusive, and would impose tighter restrictions than is necessary under treaty IHL, an argument is made that the ICRC's *functional combatant approach* makes sense for states fighting counterinsurgency wars for policy reasons. Next, it will analyze the criteria put forth by the ICRC to determine whether a civilian's acts constitute DPH. After referring and responding to critiques of the ICRC's guidance from preeminent scholars,[74] and comparing the ICRC's

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[72] For an analysis of the relevance of the principle of reciprocity in contemporary warfare, see Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 2 (2009).

[73] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, INT'L COMM. OF THE RED CROSS, Jan. 7, 2009, http://www.icrc.org/eng/resources/documents/publication/p0990.htm (last visited Dec. 5, 2011).

[74] I will refer primarily to critiques made by Kenneth Watkins, Michael N. Schmitt, Bill Boothby, W. Hays Parks published in a forum on this topic. *Forum: The ICRC*

guidance with various U.S. approaches to DPH, the conclusion drawn is that the ICRC's guidance on this issue is the most logical and consistent with treaty IHL.

1. Combatants in the 21st Century

As discussed, today's insurgent groups are often loosely organized networks, rather than hierarchical groups with members that are easily distinguishable from the civilian population. Marc Sageman contends that Salafi jihadi groups are better understood as social movements due to their flat, linear organization.[75] Some argue that because al-Qaeda or other transnational terrorist groups are organized differently than a traditional hierarchical armed group, members of these groups are civilians.[76] Proponents of this argument highlight that certain conditions must be met for Additional Protocol II, which covers non-international armed conflicts, to apply. For instance, Article 1(1) stipulates that Additional Protocol II applies to armed conflicts:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[77]

This provision seems to require that, to be considered an "organized armed group" under Additional Protocol II, a group must have a "responsible command," exercise control over territory, carry out "sustained and concerted military operations," and abide by its obligations under the protocol. Al-Qaeda and many other transnational terror groups simply don't meet these requirements. At best, transnational terrorist groups have a military command, but as Sassóli

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Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 42 N.Y.U. J. INT'L L. & POL. 637–10 (2010).

[75] MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 137–74 (2004).

[76] Marco Sassóli, *Transnational Armed Groups and International Humanitarian Law*, PROGRAM ON HUM. POL'Y & CONFLICT RES. AT HARV. UNIV. 12 (2006), http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf (last visited June 1, 2012).

[77] Protocol II, *supra* note 27, art. 1(1).

highlights, the loose hierarchy and secrecy of many of these groups "mean that many operational decisions (e.g., means and methods to achieve a goal) may be left to those fighting in the field rather than to 'commanders'."[78]

But there is a fundamental problem with regarding members of transnational terror groups as civilians. As the ICRC contends, "this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population."[79] It would enable terrorists to enjoy civilian immunity status outside of hostilities, as civilians can only be targeted "for such time" as they participate in hostile acts. Further, it would be inconsistent with how state parties to the Additional Protocols conceived civilian immunity. As the ICRC's *Commentary* highlights, state parties rejected the "soldier by night and peaceful citizen by day" phenomenon.[80] Finally, granting groups or individuals regularly participating in the conduct of war immunity status outside of hostilities would only incentivize violating the law as a means to secure greater protection than afforded to combatants. Such an approach would turn IHL on its head, penalizing those who follow the law while rewarding those violating it.

a. The Continuous Combatant Function

To balance the integrity of the law against civilian protection concerns, the ICRC recommends that states distinguish combatants from noncombatants by examining the individual's functions or activities. According to the ICRC, individuals fulfilling a continuous combatant function, that is individuals continuously participating in hostile acts, should be regarded as combatants. Importantly, the ICRC contends, persons fulfilling a continuous combat function (CCF) must be distinguished "from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."[81] The difference is slight albeit important. Individuals fulfilling a CCF are

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[78] Sassóli, *supra* note 76, at 30.
[79] Melzer, *supra* note 73, at 28.
[80] Commentary to Protocol I, *supra* note 57, ¶ 1677, at 515.
[81] Melzer, *supra* note 73, at 33–34.

"recruited, trained, and equipped . . . to continuously and directly participate in hostilities" on behalf of an armed group, whereas civilians directly participating in hostilities on a spontaneous or sporadic basis are more akin to reservists, who retain civilian immunity status "until and for such time as they are called back to active duty."[82] In other words, individuals fulfilling a CCF are fully integrated into the armed group they serve, whereas civilians with a history of mere sporadic participation in hostilities are called upon for specific and time limited missions.

It is important to note that the ICRC's function based criteria is a departure from treaty IHL, which prescribes a formal *membership-based approach.* The Third Geneva Convention of 1949, which deals with prisoners of war, outlines criteria under which a person is considered a member of an armed group. Article 4(2) of the convention stipulates that members of an irregular armed group include persons under a responsible command; displaying a "fixed distinctive sign"; "carrying arms openly"; and conducting "operations in accordance with the laws and customs of war."[83] Additional Protocol I to the 1949 Geneva Conventions includes a less imposing test. Article 43(1) of the Protocol simply stipulates that irregular forces be responsive to a military command.[84]

As the ICRC highlights, membership in irregular armed groups is "rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards."[85] Moreover, "the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces."[86] As a result, the ICRC stipulates that an individual's participation in combat, and record of sustained and DPH, should remain the decisive criterion for membership in an organized armed group.[87]

Kenneth Watkins, Professor of International Law at the U.S. Naval War College and former participant in discussions led by the ICRC on

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[82] *Id.*
[83] GC III, *supra* note 24, art. 4(2).
[84] Protocol I, *supra* note 1, art. 43(1).
[85] Melzer, *supra* note 73, at 32–33.
[86] *Id.*
[87] *Id.*

this topic, is highly critical of the ICRC's function-based approach. Watkins believes the ICRC erred by adopting membership criteria that are different for irregular armed combatants.[88] Watkins contends that all armed forces—irrespective of whether they belong to a state party or a non-state actor—should be treated the same; all parties should adhere to the traditional membership based approach. According to Watkins, any person carrying out a function involving "combat, combat support and combat service support functions, carrying arms openly, exercising command over the armed group, carrying out planning related to the conduct of hostilities, or other activities indicative of membership" qualifies as a member subject to direct attack.[89] Importantly, Watkins believes that "the combat function is not a definitive determinant of whether a person is a member of an armed group, but rather one of a number of factors that can be taken into consideration. The key factor remains that they are a member of an organization under a command structure."[90]

While the literature on irregular armed groups often identifies differences between these groups and state militaries, Watkins points out that NSAGs still possess many of the attributes of a regular armed force, notably a military command.[91] Indeed, others highlight that while irregular combatants may not adhere to the same organizational model as state militaries, they still maintain an ability to conduct military operations requiring a certain degree of hierarchy, organization and coordination.[92] This conclusion has important implications for the task of identifying irregular combatants by the traditional membership based approach. While the task of identifying irregular combatants may be more difficult, Watkins argues that U.S. and allied soldiers adopted new methods in Iraq and Afghanistan, which were effective and consistent with the traditional membership based approach codified in the Geneva Conventions.[93]

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[88] Watkins, *supra* note 70, at 675 & 690.
[89] *Id,* at 691.
[90] *Id.*
[91] *Id,* at 675.
[92] *See* RICHARD H. SCHULTZ, JR. & ANDREA DEW, INSURGENTS, TERRORISTS AND MILITIAS: THE WARRIORS OF CONTEMPORARY CONFLICT 263 (2006).
[93] Watkins, *supra* note 70, at 679.

b. Analysis

The differences between the two positions are small and not manifest. Watkins believes those providing political support (e.g., combat service support) to insurgent groups can be targeted, whereas the ICRC adopts a more restrictive approach. For instance, according to Watkins, anyone under a command including "cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces."[94] In contrast, the ICRC, considers those fulfilling "political, administrative or other non-combat functions" to be noncombatants entitled to protection.[95] Watkins' approach is most consistent with Additional Protocol I, which treats all persons under a military command of a party, except for medical and religious personnel, as combatants.[96] Indeed, the *Commentary* to Additional Protocol I also support the notion that individuals fulfilling political or noncombat support functions for a party to a conflict are members of its armed forces.[97] Yet, while the conventional approach is

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[94] *Id.* at 692.

[95] Melzer, *supra* note 73, at 33–34.

[96] According to the Geneva Conventions, anyone operating under the "command" of a party to the armed conflict is a member of that party, and may be directly attacked. *See* Protocol I, *supra* note 1, art. 43(1), which provides:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.

[97] *See* COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1677, at 515. The Geneva Conventions affirm that an individual need not fulfill a combat function for a party to a conflict to be considered a member of its armed forces, and thus a combatant. The critical issue is, as Watkins suggests, that the individual be under the chain of command of a party to a conflict. The Commentary to Additional Protocol I further supports this notion:

> [I]n any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. These include auxiliary services, administrative services, the military legal service and others. Whether they actually engage in firing weapons is not important. They are entitled to do so, which does not apply to either medical or religious personnel, despite their status as members of the armed forces, or to civilians, as they are not members of the armed forces. All members of the armed forces are combatants, and only members of the armed forces are combatants.

Id.

most consistent with treaty IHL, problems arise when one considers the feasibility of implementing this approach in contemporary warfare.

Nils Melzer, legal advisor to the ICRC and chief author of the "Interpretive Guidance," contends that the conventional membership based approach is simply not workable in modern day conflicts.[98] Indeed, the practical challenge of distinguishing combatant from noncombatant in modern day conflicts arguably necessitated the ICRC's alternative CCF theory. While Watkins has suggested U.S. and allied forces can still distinguish combatant from noncombatant relying on the membership-based approach, that contention stands in sharp contrast to hundreds of journalistic accounts of attacks on innocent civilians in Iraq and Afghanistan, purportedly based on faulty intelligence. In a field- based study on targeted killings, for instance, U.N. Special Rapporteur Philip Alston confirms that air strikes and raids in Afghanistan resulting in the death of innocent civilians based on faulty intelligence occur far too often.[99] Thus, while Watkins is correct that the ICRC's approach is more restrictive than is required by treaty IHL, implementing the conventional membership based approach may simply be too challenging in contemporary "wars amongst the people." This conclusion has important implications. Even if not legally required, states engaged in counterinsurgencies should adopt the ICRC's guidance in these conflicts for policy reasons. As will be discussed, protecting civilians from violence is an important cornerstone of a successful counterinsurgency campaign.

In his critique, Watkins contends that the ICRC ignores the "lessons of history" regarding the importance of civilian aid to insurgent groups.[100] Indeed, aid and comfort from the civilian population can be critical to sustaining an insurgency, but the host country population can also turn against insurgents. As discussed above, "wars amongst the people" are very different from conventional conflicts, in that armed forces are fighting not to secure a military solution, but rather to consolidate their legitimacy. Securing political support from the civilian population becomes critical, if not necessary to achieving this goal. It logically follows that protecting civilians from violence is essential to

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[98] 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*, 42 N.Y.U. J. INT'L L. & POL. 3, 849 (2010).
[99] Alston, *supra* note 51, ¶¶ 82–83.
[100] Watkins, *supra* note 70, at 684.

defeating an insurgency.[101] This conclusion has important implications for strategy and battlefield tactics.

Indeed, the U.S. military rewrote its doctrine to respond to the changed military and political realities inherent in counterinsurgency warfare. While conventional U.S. military doctrine emphasizes the application of "overwhelming force," the new U.S. COIN doctrine requires that U.S. forces use force more discreetly to avoid civilian casualties, and places greater emphasis on the provision of governance, social services and capacity building. Sarah Sewall, former Assistant Secretary of Defense and director of Harvard's Carr Center on Human Rights Policy, explains the doctrinal difference and the importance of the civilian in the COIN doctrine:

> The field manual [COIN doctrine] directs U.S. forces to make securing the civilian, rather than destroying the enemy, their top priority. The civilian population is the center of gravity—the deciding factor in the struggle . . . . The real battle is for civilian support for, or acquiescence to, the counterinsurgents and host nation government. The population waits to be convinced. Who will help them more, hurt them less, stay the longest, earn their trust? U.S. forces and local authorities therefore must take the civilian perspective into account. Civilian protection becomes *part of* the counterinsurgent's mission, in fact, the most important part. In this context, killing the civilian is no longer just collateral damage . . . The fact or perception of civilian deaths at the hands of their nominal protectors can change popular attitudes from neutrality to anger and active opposition.[102]

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[101] Influential scholars and analysts on counterinsurgency theory all agree on this point. *See* James Dobbins, *Counterinsurgency in Afghanistan*, Testimony before the U.S. Senate Committee on Armed Services (Feb. 26, 2009), *available at* http://armed-services.senate.gov/statemnt/2009/February/Dobbins%2002-26-09.pdf; John Mackinlay & Alison Al–Baddawy, *Rethinking Counterinsurgency*, RAND COUNTERINSURGENCY STUDY: vol. 5, at 52–53 (2008), http://www.rand.org/pubs/monographs/2008/RAND_MG595.5.pdf; David Kilcullen, *Counterinsurgency Redux*, 48 SURVIVAL 4 (2006); Christopher J. Lamb & Martin Cinnamond, *Unity of Effort: Key to Success in Afghanistan*, STRATEGIC FORUM 248 (Oct. 2009), http://www.ndu.edu/inss/docUploaded/SF248_Lamb.pdf.

[102] Sewall, *supra* note 39, at xxv.

Indeed, civilian deaths and the perception of civilian deaths has led to considerable public criticism of the U.S. and allied forces in Iraq and Afghanistan. The difference between conventional war and wars amongst the people is that the perception of the parties to a conflict matters during irregular warfare. Moreover, winning the war turns on the armed forces' ability to provide security, governance and social services to the civilian population.

It follows that counter-insurgents should employ deadly force more discreetly. Attacks likely to result in significant civilian casualties should be avoided to engender and sustain the support of the civilian populace. The lack of clarity over who is a combatant and who is a civilian provides a compelling reason to adopt the ICRC's restrictive criteria, directing attacks outside of hostilities only against those individuals fulfilling a CCF, or those persons that are clearly and unambiguously combatants. Attacking individuals fulfilling a political or non-combatant function in an armed group, who may be perceived to be noncombatants, will likely lead to criticism, undermining public support for counterinsurgents and the host nation.

Importantly, adopting the ICRC's CCF test as a matter of policy in counter insurgencies would not preclude application of the membership model in conventional wars, or conflicts where the enemy distinguishes themselves from the civilian population. Moreover, such an approach would not protect or exclude senior members of armed groups fulfilling political or strategic functions, as planning and organizing rank and file insurgents would certainly qualify as DPH. Indeed, individuals engaged in planning and strategy for an armed group would most likely qualify as combatants under the CCF test.

Rather, the CCF test would only exclude so-called "members" of an armed group that perform political functions not qualifying as DPH. As will be discussed, activities constituting DPH are broader than simply firing a weapon and may include providing intelligence or tactical support to an armed group. As a result, it is very difficult to conceptualize an individual that would: (a) lose legal protection under the membership model; (b) while remaining protected by the CCF test; (c) performing a function that is strategically and tactically important to an armed group. Watkins notes that an armed group's cooks and administrative personnel are targetable under the membership model.[103]

[103] Watkins, *supra* note 70, at 692.

Based on the criteria above, it is difficult to surmise how targeting the Taliban's "head chef" would have any significant tactical value.

D. What Do Acts Constitute Direct Participation in Hostilities?

As discussed, individuals regularly participating in hostilities are combatants, and thus are never protected against direct attack. However, individuals that participate in hostilities sporadically or on an irregular basis are civilians, protected from direct attack when not DPH. For what acts does an individual lose protection under the laws of war, and how should armed forces interpret the temporal element of DPH? This section will answer these questions.

The ICRC's Interpretive Guidance stipulates that the notion of DPH is linked to specific acts and not "a person's status, function, or affiliation."[104] As discussed, civilians that DPH lose their protection temporarily, while participating in the conduct of war. Thus, treaty IHL distinguishes between combatants, whom are never protected, and civilians, whom may lose and regain legal protection. While an important distinction, the international communities' acceptance of the ICRC's CCF theory would mean that guidelines for determining whether an individual is DPH apply to both categories of individuals. Determining whether a person is a combatant or civilian would turn on the frequency of the individual's participation in the conduct of war.

With that in mind, this section will analyze the threshold for which individuals lose legal protection against direct attack, and the duration for which a *civilian* participating in hostilities loses such protection. According to the ICRC, an act must meet three criteria to qualify as direct participation in hostilities: (i) threshold of harm; (ii) direct causation; and (iii) belligerent nexus.[105] This next section will first explain each criterion and then analyze the criteria as a whole.

1. Threshold of Harm

According to the ICRC, the threshold of harm requirement is reached by an act "likely to adversely affect the military operations or military

[104] Melzer, *supra* note 73, at 44.
[105] *Id.* at 46.

capacity of a party to an armed conflict, or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack."[106] Importantly, "the qualification of an act as direct participation does not require the materialization of harm . . . but merely the objective likelihood that the act will result in such harm."[107] Killing or wounding military personnel as well as acts resulting in damage to military objects would obviously qualify. But, the threshold of harm requirement could also be reached by acts, which may not immediately result in concrete losses, but adversely affect "the military operations or military capacity of a party to the conflict," including "sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications."[108]

2. Direct Causation

According to the ICRC, there must also be "a direct casual link between a specific 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."[109] The ICRC stipulates, "[f]or a specific act to qualify as 'direct' rather than 'indirect' participation in hostilities there must be a sufficiently close casual relation between the act and the resulting harm."[110] Acts directly resulting in or expected to harm an adversary or protected person would meet the requirement, as would acts such as intelligence collection, transmitting targeting information on enemy positions, electronic interference with enemy computer networks and wiretapping an enemy command.[111] Meanwhile, acts merely contributing to the war effort, such as weapons production, propaganda and food production, would not meet the direct causation requirement, as these activities are not necessarily integral to the execution of specific military operations.

The direct causation requirement is best illustrated through examples. According to the ICRC, the planting and detonation of an improvised explosive device (IED) would meet the requirement while

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[106] *Id.* at 47.
[107] *Id.*
[108] *Id.* at 48.
[109] *Id.* at 51.
[110] *Id.* at 52.
[111] *Id.* at 48–49.

the assembly, storing or purchase of an IED would not.[112] In the context of drone attacks, identifying and marking a target as well as firing the weapon would meet the requirement.[113] Other situations are less clear. According to the ICRC, driving an ammunition truck to the frontlines in a conflict zone would meet the requirement, while the transportation of "ammunition from a factory to a port for further shipping to a storehouse in a conflict zone" is considered "too remote" to qualify.[114] While the "ammunition truck remains a legitimate military objective" in both situations, the ICRC stipulates that a direct attack against the truck in the second scenario would need to take into consideration the death of the driver in the proportionality assessment.[115] Presumably, the IED factory also remains a legitimate target, but the legality of attacking the factory would turn on proportionality considerations as well.

3. Belligerent Nexus

Finally, an individual's act must also "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."[116] Importantly, the ICRC clarifies, the belligerent nexus "should be distinguished from concepts such as subjective intent and hostile intent."[117] The reasons for participation in an act do not matter unless the individual is unaware of his or her participation. For instance, a driver unaware that he is transporting a bomb would remain protected. Any direct attack would need to take his death into proportionality considerations. Thus, while the reasons for the individual's participation in hostilities do not matter, the person's *knowledge* of participation does.

The belligerent nexus is important to distinguish an individual's participation in the conduct of war from criminal activities or acts of vigilantism. Force used in self-defense against "marauding soldiers" should also be distinguished from DPH. Civilians defending themselves against unlawful conduct by the parties to a conflict do not participate in hostilities by virtue of using force to defend themselves. As the ICRC

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[112] *Id.* at 54.
[113] *Id.* at 55.
[114] *Id.* at 56.
[115] *Id.*
[116] *Id.* at 58.
[117] *Id.*

highlights, "this would have the absurd consequence of legitimizing a previously unlawful attack."[118]

Direct attacks on civilians may meet the *belligerent nexus* requirement, provided the "violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specific military nature."[119] Thus, vigilantism, or taking "advantage of a breakdown of law and order to commit violent crimes" or settle scores would not meet the belligerent nexus requirement. The use of deadly force against civilians specifically to harm or undercut another party, however, would meet the requirement.

The ICRC acknowledges the inherent difficulty of "determining the belligerent nexus" in the fog of war, in which criminal groups often intermingle and cross paths with organized armed groups. The decisive question, according to the ICRC's Interpretive Guidance, "should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party."[120]

Analysis

Numerous critics, some of which participated in the ICRC's expert discussions, contend the ICRC's guidance is too narrow, and does not comport with contemporary state practice. As noted previously, the United States has a more expansive or liberal interpretation of DPH than that put forward by the ICRC. For instance, the Law of War Working Group at the Department of Defense (DoD) has claimed that civilians may be directly attacked "if there is: (1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to [the] enemy, (3) temporal relation of support to enemy contact or harm resulting to [the] enemy."[121] According to this group, the act of "[e]ntering the theatre of

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[118] *Id.* at 61.
[119] *Id.* at 63.
[120] *Id.* at 64.
[121] Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 89 (quoting 2 INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY & OPERATIONAL LAW 1–10 (2006)).

operations in support or operation of sensitive, high value equipment, such as a weapon system" constitutes DPH.[122] While only slightly broader than the ICRC's views, this approach de-emphasizes the direct causation element, and in some cases, could blur the line between DPH and mere participation in the war effort.

Others in the U.S. military have advocated for an even more expansive "functionality test," which does not turn on the threshold of harm element, nor does it "measure the geographic or temporal distance from the conflict."[123] Rather, the "functionality test" assesses the strategic importance of the individual based on their function carried out on the battlefield.[124] Theoretically, journalists and propagandists could be stripped of their legal protection under such an expansive test. Perhaps even more alarming is the degree of arbitrariness and unpredictability inherent in the test. For instance, while development and humanitarian workers may not be strategically important to conventional wars between state militaries, these civilians are deemed critical to counterinsurgency warfare. Embracing such an expansive test could place journalists and aid workers in places like Afghanistan and Somalia at even greater risk.

As noted above, while multiple U.S. viewpoints exist, the United States has no official position on the concept of DPH. Nor has the United States responded in any meaningful way to the ICRC's Guidance.[125] Given that the ICRC's view is considered more restrictive than various

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[122] *See* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., LAW OF WAR HANDBOOK 143 (Keith E. Puls ed., 2004), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/law-war-handbook-2004.pdf [hereinafter LAW OF WAR HANDBOOK].

[123] Stigall, *supra* note 61, at 896 (discussing but disagreeing with this viewpoint).

[124] *Id.*

[125] The closest to an official United States response to the ICRC's Interpretive Guidance came from State Department Legal Advisor Harold Koh in May 2010, when he noted that:

> While we [the U.S. government] disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at "functional" membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).

See Harold Hongju Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (May 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

United States approaches and practice, and that state practice and *opinio juris* rather than the ICRC's recommendations, form rules of customary international law, some critics argue that the ICRC's Guidance is merely academic and too restrictive to be of any use to states fighting insurgencies.

Michael Schmitt, Professor of International Law and former participant in the ICRC's expert discussions, contends the ICRC's approach, particularly the "threshold of harm" requirement, is too restrictive.[126] Schmitt believes that "restricting the threshold element to negative consequences for the enemy…risks an overly narrow interpretation."[127] According to Schmitt, actions which both harm the enemy as well as those that benefit a party should constitute DPH.[128] Schmitt discusses the use of IEDs by insurgents in Iraq and Afghanistan to illustrate his point. Schmitt writes, "the development, production, training for use, and fielding of IEDs necessitated costly investment in counter-technologies, hurt the moral of Coalition forces, and negatively affected perceptions as to the benefits of the conflict at home."[129] The implication is that individuals participating at each stage in the process described, that is in the "development, production, training for use, and fielding" of these weapons, are DPH and thus lose their legal protection while engaged in these acts.

There are two problems with Schmitt's criticism. First, as noted previously, the *Commentary* to Additional Protocol I provides that "hostile acts should be understood to be acts which by their nature and purpose are intended to cause *actual harm* to the personnel and equipment of the armed forces" (emphasis added).[130] Thus, the ICRC's guidance is consistent with the *Commentary*, which serves as a guide to interpreting Additional Protocol I.[131] Second, Schmitt's criticism isn't really focused on the threshold of harm criteria, but rather the direct causation element. For instance, the ICRC agrees with Schmitt that the

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[126] Schmitt, *supra* note 70, at 718.
[127] *Id.* at 720.
[128] *Id.*
[129] *Id.* at 719.
[130] COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1942, at 618.
[131] *See* The Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. The VCLT stipulates that treaties are to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." If the original meaning is ambiguous or obscure, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty."

fielding of IEDs amounts to DPH. However, stripping an individual of legal protection for mere development of a weapon would set a dangerous precedent. Indeed, it would eliminate the requirement of direct causation, lowering the threshold for loss of legal protection to mere indirect participation in hostilities. The more difficult question is whether the production and training for use of an IED would constitute DPH. The answer to this question turns on whether such acts sufficiently meet the direct causation requirement.

As noted, the direct causation element requires that an act be integral to a military operation, thus precluding direct attacks on those performing mere war sustaining acts.[132] This requirement is consistent with the *Commentary* to Additional Protocol I, which affirms "a clear distinction between direct participation in hostilities and participation in the war effort."[133] Thus, according to the *Commentary* and the *Interpretive Guidance,* munitions workers as well as those providing general training and weapons to insurgents remain protected, as the ICRC stipulated an individual must execute or play an integral role in a hostile act to lose legal protection.

While the ICRC is correct in noting that the *Commentary* to Additional Protocol I supports distinguishing participation in military operations from mere war sustaining acts, it's not clear this is consistently supported by state practice. Professor Michael Schmitt notes that, among those participating in the ICRC's expert discussions, all the experts with "military experience or who serve governments involved in combat supported the characterization of IED assembly as direct participation."[134] In public documents, the ISAF Command in Afghanistan acknowledges targeting "bomb-making personnel and materials" as part of their strategy to prevent the use of IEDs against NATO soldiers.[135] In an interview, one U.S. Judge Advocate General (JAG) with nearly twenty-five years experience in the military confirmed that he believed directly targeting IED and suicide bomb makers is consistent with IHL.[136] Indeed, if a state received actionable intelligence,

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[132] Melzer, *supra* note 73, at 51.
[133] COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1945, at 618.
[134] Schmitt, *supra* note 70, at 731.
[135] Matthew Millham, *Attacking IED Networks*, INT'L SECURITY ASSISTANCE FORCE (ISAF), Dec. 31, 2010, http://www.isaf.nato.int/article/focus/attacking-ied-networks.html.
[136] Interview with a U.S. Judge Advocate General (requested anonymity) at the Fletcher School of Law and Diplomacy, Tufts University, in Medford, Mass. (Dec. 7, 2010).

Schmitt suggests, "few states would hesitate, on the basis that the action is not 'direct enough,' to attack those in the process of assembling IEDs."[137]

Two arguments can be made for including the production of IED's and suicide bombs in the scope of DPH. First, as Schmitt suggests, "given the clandestine nature by which such devices are emplaced, an immediate attack may be the only option for foiling a later operation employing the device."[138] It would be absurd to require NATO forces in Afghanistan to delay attack until an individual is actually setting the device on the side of the road. Indeed, it would provide insurgents and suicide bombers immunity until the last possible moment, creating an incentive for NSAG's to use these tactics more often while placing an unreasonable burden on state militaries. Second, unlike the munitions workers, IED and suicide bomb makers are often connected to insurgent groups, playing important roles in the planning and execution of specific military operations.[139] While some may just be criminal syndicates, a recent ISAF report highlights that IED bomb-makers are often intimately linked to the insurgency in Afghanistan.[140] Blank and Guiora argue that those making IED's and suicide bomb belts are neither "soldiers nor members of armed groups," but nonetheless should be considered a "permanent target" due to their regular and continuous participation in hostilities.[141] Therefore, while the ICRC believes IED makers are only merely sustaining the war effort, the better view is that these bomb makers actually fulfill a specific combat function, and thus are never protected against direct attack.

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[137] Schmitt, *supra* note 70, at 731.
[138] *Id.* at 731.
[139] Scott Swanson, *Viral Targeting of the IED Social Network System*, 8 SMALL WARS J. 4–7 (2007), http://smallwarsjournal.com/documents/swjmag/v8/swanson-swjvol8-excerpt.pdf.
[140] Michael Flynn, *State of the Insurgency: Trends, Intentions and Objectives*, INT'L SECURITY ASSISTANCE FORCE, December 22, 2009, *available at* http://www.hum.securitygateway.com/documents/ISAF_StateOfTheInsurgency_22December09.pdf.
[141] Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT'L SECURITY J. 74 (2010).

E. "For Such Time": The Temporal Dimension

Treaty and customary IHL provides that a civilian loses protection only "for such time"[142] as he or she is directly participating in hostilities. According to the ICRC, "for such time" should be interpreted as covering "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."[143] Further, the ICRC clarifies, "preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts do not*".[144]

Again, the temporal dimension is best illustrated by examples. Loading bombs onto an airplane in preparation for an attack on military objectives "constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities."[145] Mere transportation of weapons for later use would qualify as a general measure in preparation for war, but not DPH. In short, civilians lose immunity for acts carried out in preparation of the execution of a specific act meeting the *threshold*, *causation* and *belligerent nexus* requirements. Equipping, instructing and transporting combatants would qualify, as would intelligence gathering and the positioning of equipment for a specific military operation.[146]

Importantly, the ICRC maintains that the phrase "unless and for such time" means that civilians may lose and regain immunity from direct attack on numerous occasions. In other words, "for such time" should be interpreted to mean that civilian immunity operates similar to a "revolving door," whereby "civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities."[147] As will be discussed, the "revolving door" concept is hotly contested, and some say a malfunction of IHL, as it enables insurgents to exploit the law to the detriment of law-abiding parties. Still, the ICRC maintains that the revolving door serves to

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[142] *See* Protocol I, *supra* note 1, art. 51(3); Protocol II, *supra* note 27, art. 13(3); ICRC Customary IHL, *supra* note 1, r. 6.
[143] Melzer, *supra* note 73, at 65.
[144] *Id.* at 66 (emphasis in original).
[145] *Id.*
[146] *Id.*
[147] *Id.* at 70.

protect civilians "from erroneous or arbitrary attack" and armed forces must accept it for individuals participating in hostilities infrequently.[148]

Analysis

The ICRC's explanation of the temporal dimension seems consistent with the *Commentary* to Additional Protocol I, which affirms that "'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."[149] The "revolving door" theory is also consistent with the *Commentary* to Additional Protocol I, which stipulates that "[i]t is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection . . . and he may no longer be attacked."[150]

Indeed, the Israeli Supreme Court arrived at the same conclusion. In its *Targeted Killings* decision, the Court affirmed:

> Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless "and for such time" as they are taking a direct part in hostilities. The provisions of Article 51(3) of *The First Protocol* present a time requirement. A civilian taking a part in hostilities loses the protection from attack "for such time" as he is taking part in those hostilities. If "such time" has passed—the protection granted to the civilian returns.[151]

Thus, the ICRC's interpretation is consistent with treaty IHL, the *Commentaries* and the contemporary interpretation of respectable jurists.

However, the "revolving door" theory is so imprecise that it is fundamentally problematic. How many times may an individual

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[148] *Id.* at 71.
[149] *See* COMMENTARY TO PROTOCOL I, *supra* note 57, ¶ 1943, at 618–19.
[150] *Id.* ¶ 1944, at 619.
[151] The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 38 (Dec. 11, 2005).

participate in hostile acts and remain protected outside of hostilities? When does infrequent participation in the conduct of war become regular and continuous? In other words, when does the "revolving door" stop revolving? There are no clear answers to these questions. The ICRC simply provides, "where individuals go beyond, spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group."[152]

By endorsing the "revolving door" theory, the ICRC has essentially placed the burden on states to demonstrate that the target of an attack outside of hostilities is a combatant, rather than a civilian with a sporadic history of participating in violence. Professor Watkins contends the burden should be shifted from counter-insurgents to the civilian. After the first act of participating in hostilities, Watkins contends an "affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities. A determination of disengagement would be based on concrete, objectively verifiable facts and on standards of good faith and reasonableness in the prevailing circumstances."[153] Theoretically, this could reinforce the distinction principle, as civilians wishing to remain protected would have a greater incentive to distance themselves from the belligerents.

The problem with this approach is that it shifts the entire burden of risk onto the civilian, and thus fails to strike an appropriate balance between military necessity and humanity. As the Israeli Court determined, the lack of precision requires that states deal with this problem on a case-by-case basis.[154] Unfortunately, while manifestly imprecise, the revolving door theory does serve an important purpose; it requires counterinsurgents overcome the burden of doubt, as the target of deadly force outside of hostilities must have participated in hostilities sufficiently enough to be considered a combatant *vis-à-vis* the CCF test.

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[152] Melzer, *supra* note 73, at 72.
[153] Watkins, *supra* note 70, at 692–93.
[154] *Public Committee,* Case No. HCJ 769/02, ¶ 39.

F. The Requirement of Precautions

As discussed above, distinguishing between these various categories of persons is incredibly challenging in contemporary wars amongst the people. As the ICRC highlights, counterinsurgents are faced with the complex task of distinguishing between "members of organized armed groups . . civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities."[155]

The principle of precautions, which is codified in Additional Protocol I and considered a rule of customary international law, requires that those planning attacks must take all feasible measures "to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives."[156] Abiding by this principle in "wars among the people" requires that armed forces possess solid intelligence confirming that the individual to be attacked outside of hostilities is a bona fide combatant.[157] As the ICRC submits, in situations of doubt, combatants must assume a person is a civilian, protected against direct attack unless DPH.[158] This section of the ICRC's guidance is sound from both a legal and policy perspective, as it requires that counter-insurgents assume the burden of proof so as to protect noncombatants from arbitrary attacks. Armed forces must have solid and verifiable intelligence that, outside of active hostilities, the target of a direct attack has directly participated in hostilities so frequently that the individual qualifies as a combatant under the CCF test.

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[155] Melzer, *supra* note 73, at 74.
[156] Protocol I, *supra* note 1, art. 57(2)(a)(i); ICRC Customary IHL, *supra* note 1, r. 15; Melzer, *supra* note 73, at 74.
[157] For an excellent analysis of the application of the principle of precautions to targeted killings and counterterrorism operations, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 E.J.I.L. 2, 201 (2005).
[158] Melzer, *supra* note 73, at 74–76.

IV. Restraints on the Use of Force in Contemporary Warfare

A. The ICRC's Targeting Guidance

The final section of the ICRC's Interpretive Guidance, entitled "Restraints on the use of force in direct attack," has elicited significant criticism. According to the ICRC, "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."[159] The requirement of necessity, the ICRC contends, imposes an obligation to capture rather than kill a combatant or civilian DPH if and when reasonably possible.

The ICRC begins its complex argument by noting that, "the right of belligerents to adopt means of injuring the enemy is not unlimited."[160] Indeed, consistent with the principle of unnecessary suffering, the international community has developed numerous conventions proscribing indiscriminate weapons and inhumane conduct. While the international community has developed all sorts of proscriptions, however, the ICRC highlights that treaty IHL does not expressly regulate "the kind and degree of force permissible against legitimate targets."[161] Rather, the ICRC suggests, force is regulated by the principles of military necessity and humanity, which "underlie and inform the normative framework of IHL, and therefore shape the context in which its rules must be interpreted."[162]

To support this argument, the ICRC points to the "Marten's Clause," a provision in both *Additional Protocols* to the Geneva Conventions, which stipulates:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[163]

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[159] *Id.* at 77 (emphasis added).
[160] This is codified in two provisions: GC IV, *supra* note 23, art. 22; Protocol I, *supra* note 1, art. 35(1).
[161] Melzer, *supra* note 73, at 78.
[162] *Id.*
[163] Protocol I, *supra* note 1, art. 2; Protocol II, *supra* note 27, pmbls.

As a result of this provision, the ICRC contends, the use of lethal force in combat is to be regulated by balancing military necessity against the principle of humanity. According to the ICRC, "considerations of military necessity and humanity" do not "override the specific provisions of IHL."[164] Rather, these principles should shape the decisions of military lawyers, commanders and soldiers where the law is vague or unclear. In other words, where IHL lacks precision, any interpretation of what is permissible must strike a balance between the principles of military necessity and humanity.

Next, the ICRC turns to definitions. How should one interpret military necessity? Humanity? According to the United States, military necessity permits "measures not forbidden by international law, which are indispensable for securing the complete submission of the enemy."[165] The United Kingdom's doctrine suggests the principle of military necessity permits "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources."[166] In the *Nuclear Weapons* case, the International Court of Justice (ICJ) suggested that military necessity should be interpreted to mean that states are precluded from inflicting "harm greater than that unavoidable to achieve legitimate military objectives."[167]

Meanwhile, the principle of humanity, according to the United Kingdom, "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes."[168] According to the ICRC, a proper interpretation of the balance between military necessity and humanity neither grants combatants an unfettered right to kill nor imposes "a legal obligation to capture rather than kill regardless of the circumstances."[169] In other

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[164] Melzer, *supra* note 73, at 79.
[165] U.S. DEP'T OF ARMY, FIELD MANUAL 27 -10, THE LAW OF LAND WARFARE ¶ 3a (1956) [hereinafter FM 27-10].
[166] UNITED KINGDOM MINISTRY OF DEFENSE, THE MANUAL OF THE LAW OF ARMED CONFLICT sec. 2.2, ¶ 3a (2004) [hereinafter UK MANUAL OF THE LAW OF ARMED CONFLICT] (military necessity).
[167] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 I.C.J. ¶78 (July 8) [hereinafter Nuclear Weapons].
[168] UK MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 166, sec. 2.4 (Humanity).
[169] Melzer, *supra* note 73, at 78.

words, decisions to kill or capture a target should be driven by context, or what is reasonable in the prevailing circumstances. The question is, in what circumstances *may* a combatant use deadly force, and when *must* combatants attempt to capture and detain a target?

According to the ICRC, the combatant's obligations turn on the intensity of the war. In armed conflicts between two relatively well-armed and trained parties, the ICRC contends, "the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL."[170] But, restraints on the use of lethal force may increase with the parties' ability to stabilize and control territory. For instance, the ICRC contends, the restraining function "may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing," which will most often occur where a party occupies territory either in a formal state of occupation or an asymmetrical non-international armed conflict.[171] In other words, restraints on the use of force are not hard and fast, but rather change based on the circumstances – namely the intensity of the conflict, the parties' ability to project power and ultimately, what is reasonable in a given situation.

An example best illustrates the ICRC's guidance. Suppose ISAF forces in Afghanistan had verifiable intelligence confirming an unarmed individual in a restaurant was using a cell phone to transmit tactical intelligence to the Taliban. The act in question would fall within the scope of DPH, and thus the individual would lose protection. However, if the restaurant was situated within an area firmly controlled by ISAF forces, the ICRC suggests that, "it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population."[172] If this were true, the ICRC contends, "it would defy basic notions of humanity to kill an adversary or to refrain from giving him an opportunity to surrender where there manifestly is no necessity for the use of lethal force."[173]

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[170] *Id.* at 80–81.
[171] *Id*.
[172] *Id*.
[173] *Id.* at 82.

Understandably, this section of the report has elicited some of the harshest criticism. W Hays Parks, former senior associate deputy general counsel at the U.S. Department of Defense and former participant in the ICRC's expert discussions, claims this section of the report imposes rules of law enforcement, ignoring the fact that IHL is considered to be *lex specialis* in armed conflict.[174] Indeed, the ICJ has confirmed on numerous occasions that while IHRL does apply during war, the principle of *lex specialis* means that IHL trumps human rights norms when the two legal regimes conflict.[175] According to Parks, the ICRC's argument that states use no more force than is "reasonably necessary" injects "human rights arguments as a substitute for law that courts consistently have ruled is *lex specialis*."[176] As a result, Parks contends that the ICRC's targeting guidance simply doesn't reflect *opinio juris*, and thus is not a reflection of customary international law.

Ultimately, however, the ICRC's conclusion regarding the hypothetical scenario makes perfect sense. It would defy logic to conclude that, notwithstanding the transmission of tactical intelligence to an adversary, an unarmed individual in an area firmly controlled by NATO forces in Afghanistan or Israeli forces in the West Bank could be lawfully targeted if capture was a reasonable option. But, the question is—does IHL impose an obligation to capture rather than kill? Is the ICRC's interpretation of military necessity consistent with the practice of leading militaries? Hays Parks claims "[t]here is no 'military necessity' determination requirement for an individual soldier to engage an enemy combatant or a civilian determined to be taking a direct part in hostilities, any more than there is for a soldier to attack an enemy tank."[177] A.P.V Rogers, a retired major general in the British Army and current Senior Fellow at the University of Cambridge, similarly contends "there is no such restraint in the law of armed conflict as that advocated in recommendation IX."[178] Indeed, Harvard Law Professor Gabriella Blum, a supporter of the ICRC's argument for policy reasons nevertheless

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[174] *See* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 770, 796–97 (2010).

[175] *See* FM 27-10, *supra* note 165, ¶ 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter Wall Opinion].

[176] Parks, *supra* note 174, at 799.

[177] *Id.* at 804.

[178] A.P.V. Rogers, *Direct Participation in Hostilities: Some Personal Reflections*, 48 MIL. L. & L. WAR REV. 144, 158 (2009); *see also* Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 147 (2010).

concludes it would require "a re-reading of the principle of military necessity."[179]

B. A Preferred Approach: Distinguishing Between IHL and IHRL

The problem with the ICRC's approach is not the conclusion reached, but rather the methodology. The ICRC's contention that IHL imposes a legal obligation to capture rather than kill is simply not a belief shared by most governments. Moreover, it confuses norms and principles of IHL with those of IHRL. Rather than clarifying and reinforcing IHL, acceptance of the ICRC's approach would risk creating a confusing and unpredictable legal regime, increasing the potential for unlawful activity, and ultimately undermining the law.

The better approach is the following: IHL is *lex specialis* in international and high intensity armed conflicts. Meanwhile, norms of IHRL should govern the use of force in military occupations, low—intensity asymmetric conflicts and more generally in situations where armed forces exercise "effective control" over territory. This approach finds support among scholars, judicial opinions and some state practice. Further, it firmly delineates a combatant's obligations under IHL from requirements imposed by IHRL. To support this argument, it is necessary to first briefly discuss the notion of extraterritorial human rights obligations. Second, this section will examine the relationship between IHL and IHRL during armed conflict. Third, this section discuss the "right to life," codified in the International Covenant on Civil and Political Rights (ICCPR), and explain what restraints are required on the use of force under IHRL. Finally, this section suggests that there is a lack of clarity over what law governs the use of force in situations where armed forces exercise considerable control over territory, such as a formal occupation or a non-international armed conflict where a party is largely policing and stabilizing territory. Conventional wisdom suggests that IHL governs the use of force in these situations. Yet, there is growing support, among scholars and international judicial bodies, for the notion that IHRL should, and in fact does govern lethal force in these situations. While a minority view, this section will demonstrate why IHRL should govern force in these situations and discuss how it would change combat operations.

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[179] Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 69, 74 (2010).

1. The Extraterritorial Application of Human Rights Obligations

A significant amount of literature has been devoted to discussing whether the ICCPR applies to a state party's actions beyond the confines of its borders.[180] The prevailing view is that the ICCPR may apply extraterritorially in certain circumstances. The provision at issue is Article 2(1), according to which, states parties have an obligation "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[181] Whether or not the ICCPR applies beyond the confines of a state party's borders turns on how one interprets this clause, and more specifically whether (1) "territory" and "jurisdiction" are disjunctive or; (2) an individual must be *both* within the territory of a state and subject to that state's jurisdiction to enjoy the protections of the ICCPR.

Engaging in a lengthy analysis of this issue, however, is unnecessary for the purposes of this article. Some human rights obligations, such as norms concerning the security and protection of individuals, have attained the status of customary international law. As the ICJ has posited, basic human rights norms are considered rights *erga omnes*, requiring that all states respect and help secure their protection.[182] In other words, customary human rights obligations, such as the prohibition on arbitrary killings, apply always and everywhere; application of these norms does not turn on whether the ICCPR applies to the territory or individual in question.[183]

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[180] For a lengthy analysis of this issue, see NOAM LUBELL, EXTRA-TERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 193–232 (2010); *see also* Orna Ben–Naftali, *The Extraterritorial Application of Human Rights to Occupied Territories*, 100 A.S.I.L PROC. 90 (2006); Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 100 A.S.I.L PROC. 86 (2006); John Cerone, *The Application of Regional Human Rights Law Beyond Regional Frontiers: The Inter-American Commission on Human Rights and US activities in Iraq*, ASIL INSIGHTS, October 25, 2005, *available at* http://www.asil.org/insights051025.cfm; Kevin Jon Heller, *Does the ICCPR Apply Extraterritorially?*, OPINIO JURIS, July 18, 2006, http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/.

[181] International Covenant on Civil and Political Rights art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

[182] Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 I.C.J. ¶ 33 (Feb. 5).

[183] This view is widely supported by state practice. Even the United States, which has

As discussed briefly above, the argument is that IHRL should govern the use of lethal force in some circumstances during armed conflict. Restrictions on lethal force imposed by IHRL flow from the "right to life" provision in the ICCPR, which is also considered to have attained the status of customary international law. Therefore, due to the limited scope of my argument, resolving whether or not the ICCPR applies extraterritorially and in what circumstances is unnecessary. The "right to life" and subsequent prohibition on arbitrary killings applies everywhere and in all circumstances.

2. The Application of IHRL during Armed Conflict

The United States and Israel have at times claimed that IHRL is irrelevant during war.[184] However, the prevailing view is that "human rights law continues to apply during armed conflict."[185] Support for this approach is widespread. First, IHL instruments affirm support for the application of "other applicable rules of international law relating to the protection of fundamental human rights" during armed conflict.[186] The *Commentary* to Additional Protocol I stipulates that these "other applicable rules of international law" refer to IHRL conventions.[187] A similar paragraph in the ICRC's *Commentary* to Additional Protocol II explains reference to "international instruments relating to human rights."[188] Second, the application of human rights norms during armed conflict is also consistent with human rights conventions, which preclude derogation of certain fundamental norms, such as the "right to life," even

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officially rejected extraterritorial application of the ICCPR, agrees that customary international human rights law applies everywhere and always. *See* THE U.S. OPERATIONAL LAW HANDBOOK 43, pt. I.B (2011), which notes:

> IHRL based on CIL binds all States, in all circumstances, and is thus obligatory. For official U.S. personnel (i.e., "State actors" in the language of IHRL) dealing with civilians outside the territory of the United States, it is CIL that establishes the human rights considered fundamental, and therefore obligatory.

[184] *See* NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 79–80 (2008).
[185] *See* LUBELL *supra* note 180, at 237.
[186] Protocol I, *supra* note 1, art. 72; Protocol II, *supra* note 27, pmbls.
[187] COMMENTARY TO PROTOCOL I, *supra* note 57, at 842–43.
[188] COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) ¶¶ 4428–29, at 1339–40 (Pilloud, Claude; Sandoz, Yves; Swinarski, Christophe; Zimmerman, Bruno, eds., 1987).

during a public emergency or armed conflict.[189] The ICJ has also repeatedly affirmed that both IHL and IHRL apply during armed conflict.[190] Indeed, it is also the opinion of numerous commentators.[191]

The application of IHRL during armed conflict is also consistent with the rules of treaty interpretation. For instance, Article 31(3)(a) of the Vienna Convention on the Law of Treaties provides that state parties shall take into consideration "any relevant rules of international law applicable in the relations between the parties."[192] Human rights norms, which provided the legal foundation for the Geneva Conventions and customary norms of IHL,[193] would seem relevant to interpreting what is permissible in war.

The true question is not whether IHRL applies during armed conflict, but how does IHRL apply? While IHL and IHRL coincide and may mutually reinforce each other on some issues, under different circumstances, the two legal constructs conflict with one another. For example, during war, the use of deadly force is authorized. Outside of war, deadly force is permissible only in rare instances. This section examines the relationship between IHRL and IHL and illustrates how IHRL can be applied successfully during armed conflict.

3. The Principle of Lex Specialis

The ICJ clarified the relationship between IHL and IHRL in its *Nuclear Weapons* advisory opinion. In the context of the use of deadly

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[189] *See* ICCPR, *supra* note 181, art. 4; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Sept. 3, 1953, 213 U.N.T.S. 222 [hereinafter ECHR]; American Convention on Human Rights art. 27, Nov. 22, 1969, 1144 U.N.T.S. 123.

[190] *See* FM 27-10, *supra* note 165, ¶ 25; Wall Opinion, *supra* note 175, ¶ 106; Armed Activities in the Territory of the Congo (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. ¶ 216 (Dec. 19) [hereinafter Armed Activities].

[191] For just a few prominent legal scholars that support this position, see LUBELL, *supra* note 180, at 236–47; R. PROVOST, INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW (2002); Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 2 (2007); CRAWFORD, *supra* note 44, at 118–52.

[192] VCLT, *supra* note 131, art. 31(3)(a).

[193] Vera Gowland–Debbas, *The Right to Life and the Relationship Between Human Rights and Humanitarian Law*, *in* THE RIGHT TO LIFE 126 (Christian Tomuschat, Evelyne Lagrange and Stefan Oeter eds., 2010).

force, the ICJ affirmed:

> The test of what is an arbitrary deprivation of life . . . is] 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 [International Covenant on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[194]

Similarly, Ian Bronwlie, a former U.N. Special Rapporteur, has concluded, "the application of . . . treaties concerning human rights . . . continues in times of armed conflict, but their application is determined by reference to the applicable *lex specialis*, namely, the law applicable in armed conflict."[195] Therefore, while human rights protections always exist, the principle of *lex specialis* stipulates that such rights are to be interpreted through the more permissive IHL regime during armed conflict. The two legal regimes may co-exist during war, but according to the *lex specialis* principle, IHL trumps IHRL in the event of a conflict of laws.

4. Complementarity

The *lex specialis* principle is often referenced to advance the argument that IHRL may apply, but is in effect irrelevant during armed conflict. The correct interpretation is that IHL may prevail in some instances, namely the use of deadly force, but IHRL may be the controlling body of law in other instances.[196] Humanitarian law instruments have nothing to say about the freedom of religion, for instance, and thus human rights conventions are referred to on that issue.

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[194] FM 27-10, *supra* note 165, ¶ 25.
[195] United Nations, *International Law Commission, Third Report on the Effects of Armed Conflict on Treaties, Ian Brownlie, Special Rapporteur*, ¶ 29, U.N. Doc. A/CN.4/578 (2007).
[196] Gowlland–Debbas, *supra* note 193, at 139.

As a result, the theory of complementarity provides a more nuanced method of interpreting the relationship between these two legal regimes. Complementarity suggests that IHL does not supersede IHRL, but rather the two legal regimes operate in parallel. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and the *Armed Activities* case,[197] the ICJ endorsed this theory of interpretation. For instance, in the *Wall* opinion, the ICJ explains its view:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[198]

The U.N. Human Rights Committee has also referred to complementarity in explaining its view of the relationship between IHL and IHRL.[199] Importantly, complementarity presumes that IHL and IHRL are not exclusionary regimes, but rather buttress or complement each other. As Droege highlights, the principle of complementarity "sees international law as a regime in which different sets of rules cohabit in harmony."[200] In this sense, "human rights can be interpreted in light of international humanitarian law and *vice versa*."[201]

The theory of complementarity supports a fluid relationship between IHL and IHRL, whereby each regime fills gaps in the other. The principle of *lex specialis* exists alongside the theory of complementarity to determine the "test" in the event of a conflict of norms. Pursuant to this theory, IHL still governs the use of lethal force, but IHRL serves to fill gaps where IHL is silent. As a result, complementarity provides a more nuanced understanding of the relationship between the two legal regimes when there is not a conflict of laws. It may also help fill gaps in the law that develop as a result of the changing nature of international conflict.

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[197] Armed Activities, *supra* note 190, ¶¶ 215–16.
[198] Wall Opinion, *supra* note 175, ¶ 106.
[199] United Nations Human Rights Committee, *General Comment 31, Nature of the legal obligation imposed on State Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) [hereinafter UNHRC *General Comment 31*].
[200] Droege, *supra* note 191, at 337.
[201] *Id.*

C. The "Right to Life": Human Rights Restrictions on the Use of Force

As previously discussed, the conventional view is that IHL prevails in governing the use of force in armed conflict, whilst IHRL norms control force outside of war. As prominent IHL expert Jean Pictet once noted, "humanitarian law is valid only in the case of armed conflict while human rights are essentially applicable in peacetime."[202] Recent scholarship and judicial opinions have challenged that viewpoint. As noted previously, IHRL restraints on the use of force should control in asymmetrical low-intensity conflicts, or where the state has "effective control" even during an armed conflict. Preceding that discussion will be an explanation of the customary norm of the "right to life" as enshrined in the ICCPR, and the specific restraints imposed by this norm, to help the reader understand how subjecting force to IHRL in the described circumstances would change combat operations.

1. The Prohibition on Arbitrary Killings in Treaty and Customary Law

The international community first made reference to an individual "right to life" in the Universal Declaration on Human Rights (UDHR), a non-binding instrument adopted by the United Nations General Assembly in 1948. Although non-binding, the UDHR constituted an expression of basic rights to which U.N. member states believed all humans were entitled. Since its adoption, the UDHR has been referenced in numerous international human rights treaties, served as inspiration for constitutional development and national legislation pertaining to human rights, been cited in judicial decisions by the ICJ and been invoked in countless U.N. resolutions.[203] As a result, most of its provisions, including the right to life clause, are considered to reflect customary international law.[204]

The "right to life" norm is also codified in the ICCPR, which is regarded as the principal international human rights treaty. As of November 2011, 167 states were party to the ICCPR. Even while the treaty cannot be regarded as truly universal, most of its provisions are

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[202] JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 15 (1975).
[203] MELZER, *supra* note 184, at 190–95.
[204] SIMON CHESTERMAN, THOMAS FRANCK & DAVID MALONE, LAW AND PRACTICE OF THE UNITED NATIONS: DOCUMENTS AND COMMENTARY 451 (2008).

considered to have attained the status of customary international law. Article 6.1, the "right to life" clause, stipulates: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[205]

Reference to the "right to life" and the subsequent obligation to refrain from arbitrary killings has been widely affirmed in human rights treaties, national laws, international and national judicial decisions, and in non-binding statements by international organizations and governments around the world.[206] As a result, the prohibition against the arbitrary deprivation of life is widely considered to have attained the status of a *jus cogen*, or a fundamental principle of international law to which no derogation is permitted.[207] While the international community has at times been split over how to react to arbitrary killings, most states do not consider the use of deadly force acceptable, outside of an armed conflict, except in a narrow set of circumstances. This next section will discuss use of force restraints imposed by IHRL that flow from the customary "right to life" norm codified in the ICCPR.

2. Human Rights Law Restraints on the Use of Lethal Force

Similar to IHL instruments, the ICCPR does not expressly dictate how and when force can be employed consistent with the "right to life" provision. Rather, the precise restraints that customary IHRL imposes on lethal force have largely developed through interpreting the spirit of the UDHR and the ICCPR.[208] Today, the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990),[209] which was developed by law enforcement practitioners, academics and civil society groups from around the world, is widely considered to be the universal

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[205] ICCPR, *supra* note 181, art. 6.

[206] For a review of state practice and international judicial opinions referencing the prohibition of arbitrary killings, see MELZER, *supra* note 184, at 184–89.

[207] Discussion of the non-derogable nature of the "right to life" is widespread. *See* UNHRC, *General Comment 31*, *supra* note 199, ¶ 2; FM 27-10, *supra* note 165, ¶ 78; RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(f), (n) (1987).

[208] *See* MELZER, *supra* note 184, at 184–96.

[209] Office of the United Nations High Commissioner for Human Rights, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders* (Sept. 7, 1990), *available at* http://www2.ohchr.org/english/law/firearms.htm [hereinafter *U.N. Basic Principles on the Use of Force*].

standard for the use of force consistent with the "right to life" and IHRL more generally.[210] In 1996, the U.N. Secretary General (UNSG) conducted a survey to assess compliance with these principles, and concluded that countries that responded[211] largely followed these standards or reported enacting reforms necessary to comply with these principles.[212] The UNSG further noted that these principles have served as a basis for national legislation and for developing international policies to combat national and transnational crime, and thus embody an international consensus on the restraints IHRL imposes on lethal force.[213]

Under IHRL, the use of lethal force must comply with four requirements. First, the requirement of sufficient legal basis, which is reflected in Articles 1 and 11 of the U.N. Basic Principles, stipulates that states should develop national regulations, outlining the circumstances under which lethal force may be employed. Second, according to the requirement of proportionality, which is codified in Article 9 of the of the U.N. Basic Principles, lethal force may only be employed in three circumstances: (1) "self-defence or defence of others against the imminent threat of death or serious injury"; (2) "to prevent the perpetration of a particularly serious crime involving grave threat to life"; or (3) "to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape."[214] Therefore, the principle of proportionality requires that force be used *only* to protect life or impose order; the killing of an individual may not "be the *sole*

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[210] *See* MELZER, *supra* note 184, at 199–200.

[211] The Secretary General, *United Nations Standards and Norms in the Field of Crime Prevention and Criminal Justice: Report of the Secretary–General*, E/CN.15/1996/16 (Apr. 11, 1996) [hereinafter *U.N. Standards and Norms in the Field of Crime Prevention and Criminal Justice*]. Responses from the following sixty-five states were reflected in this report: Argentina, Australia, Austria, Barbados, Belarus, Belgium, Chile, China, Colombia, Costa Rica, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Haiti, Holy See, Hungary, Iran, Ireland, Israel, Jamaica, Japan, Jordan, Lebanon, Liechtenstein, Luxemburg, Malawi, Maldives, Marshall Islands, Mauritius, Mexico, Mongolia, Morocco, Nepal, New Zealand, Niger, Oman, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, San Marino, Saudi Arabia, Singapore, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Tonga, Trinidad and Tobago, Turkey, United Kingdom of Great Britain and Northern Ireland, Tanzania, United States of America, and Vanuatu.

[212] *Id.* ¶ 12. The report examines compliance with a broader set of human rights norms and principles, but paragraph 12 reports on compliance with use of force principles.

[213] *Id.* ¶ 4.

[214] *U.N. Basic Principles on the Use of Force*, *supra* note 209, art. 9.

objective of an operation."[215]

Third, the requirement of necessity, which is codified in Article 4 of the U.N. Basic Principles, requires that "law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result."[216] Thus, as Nils Melzer contends, necessity requires that "the lawful use of force may not exceed what is 'absolutely' or 'strictly' necessary" to meet the objectives enumerated in the proportionality requirement.[217] Non-lethal measures, including capture, must be exhausted or considered insufficient before lethal force may be employed. Finally, the requirement of precaution, which is codified in Articles 2, 3, 5, 10 of the U.N. Basic Principles, stipulates that law enforcement officials should take every precaution so as to avoid the use of deadly force. Should force be employed, law enforcement officials should make every attempt to avoid fatalities.[218]

In contrast, the rules of IHL are far more permissive. While IHRL precludes killing an individual unless a last resort to protect life or impose order, IHL nearly always permits the use of deadly force against a combatant or civilian DPH, unless prohibited by a specific rule, or force would result in a disproportionate amount of civilian casualties.[219] Some will argue that requiring combatants to subject force to the more restrictive rules of IHRL, even if only in select circumstances where armed forces control territory, would essentially make war un-wageable. Such an approach could unfairly restrict armed forces, as IHRL may not provide combatants the necessary latitude to accomplish their military objectives and defend themselves.

That argument is not persuasive for two reasons. First, IHRL should govern the use of force only in a narrow set of circumstances, namely when armed forces establish firm control over territory and thus can effectively manage security pursuant to IHRL norms. Second, contrary to

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[215] *See* Alston, *supra* note 51, ¶¶ 29, 33.
[216] *U.N. Basic Principles on the Use of Force*, *supra* note 209, art. 4.
[217] Melzer, *supra* note 98, at 227–28.
[218] *Id.* at 203.
[219] Article 57 of Additional Protocol I to the Geneva Conventions enumerates the proportionality rule, which requires that states, "refrain from deciding to launch any attack which may be expected to cause [civilian damage] excessive in relation to the concrete and direct military advantage anticipated." *See* Protocol I, *supra* note 1, art. 57.

popular belief, IHRL does provide those bound by its requirements a significant amount of latitude. A brief discussion of *McCann and Others v. United Kingdom (1995)*,[220] a case heard by the European Court of Human Rights (ECtHR), will demonstrate that IHRL would provide military forces the necessary latitude to protect themselves and the public where such forces have established their authority. Importantly, while the ECtHR is interpreting the European Convention in this case, the "right to life" provision in the European Convention is extraordinarily similar to the prohibition on arbitrary killings in the ICCPR and customary international law. Thus, it provides a useful illustration of the restraints on the use of force under customary IHRL.

In 1988, three British operatives were given the task of arresting three individuals suspected to be members of the Irish Republican Army (IRA) on the strait of Gibraltar. The British operatives were told that the suspects had in their possession a bomb, which any of them could detonate via a concealed device, and that the suspects would likely detonate this weapon if challenged, thus resulting in a significant loss of life and injuries to nearby civilians. Further, the British operatives believed the IRA suspects were armed and would likely resist arrest.[221]

When confronted by the British operatives, the suspects made movements, which were "interpreted as a possible attempt to operate a radio-control device to detonate the bombs."[222] The British operatives opened fire, killing all three suspects. While it was later discovered that the suspects did not possess any weapons, explosives or detonation devices, the operatives convinced the ECtHR that it was reasonable to believe the suspects were about to detonate an explosive, threatening both the operatives and public safety.[223] In short, the British operatives, who had orders to take the men into custody, resorted to lethal force when they believed their actions were "absolutely necessary in order to safeguard innocent lives."[224] As a result, the ECtHR concluded that force was lawful in those circumstances.

In this instance, customary IHRL required that the British agents attempt to arrest the suspects and only resort to force when absolutely

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[220] McCann et al. v. United Kingdom, App. no. 18984/91, 21 Eur. Ct. H.R. 97 (1995).
[221] *Id.* at ¶ 195.
[222] Melzer, *supra* note 98, at 436.
[223] McCann v. United Kingdom, App. No. 18984/91, ¶ 200.
[224] *Id.*

necessary to defend themselves, the public or prevent the suspects from escaping. Applying these restraints to the conflict in Afghanistan, international forces would be required to attempt to capture combatants or civilians DPH when and if such individuals are found in areas firmly under their control. Resort to lethal force would be lawful if absolutely necessary to protect the lives of international forces, the public or if the suspect attempted escape. The legality of the use of force in these situations would still be judged by whether it was reasonable from the point of view of the commander or the soldier.

Importantly, this approach would still refer to IHL to determine whether an individual is a combatant, civilian DPH or a noncombatant. The approach put forth in this article would simply require that combatants abide by IHRL restrictions when using force in select circumstances, namely when such forces control territory. Given that such situations will likely only occur after periods of combat, and hostilities may reignite during periods of relative stability, the rules of IHL should continue to remain the primary legal regime and the one to refer to when determining an individual's status during an armed conflict. This approach would merely replace the restraints on lethal force imposed by IHL with those of IHRL for armed forces effectively engaged in policing and stabilization operations.

As will be demonstrated in the next section, this approach would be workable and result in fewer civilian casualties in contemporary conflicts. This suggested approach is feasible because IHRL would control lethal force only in areas where armed forces firmly control territory, where conditions make it more realistic to abide by such restraints without imposing significantly greater risk to the soldier. The approach I suggest would also result in fewer civilian casualties. As discussed previously, distinguishing between combatants and noncombatants is enormously difficult in contemporary wars. Noncombatants have often been killed or injured in these conflicts because of erroneous targeting and faulty intelligence. Requiring that armed forces abide by more restrictive rules on the use of lethal force where possible would go a long way towards reducing civilian casualties. The next section explains the notion of "effective control," and when IHRL should govern the use of lethal force during armed conflict.

D. "Effective Control": When Human Rights Law Should Govern the Use of Force

According to the 1907 *Convention Respecting the Laws and Customs of War on Land*, the law of belligerent occupation applies when territory is "actually placed under the authority of the hostile army" and "extends only to the territory where such authority has been established and can be exercised."[225] Even if not operating pursuant to a formal military occupation, the same rules of belligerent occupation apply when armed forces are considered to have "effective control."[226] As the European Court has opined, "effective control" occurs at the moment the state "exercises control of the territory and its inhabitants."[227] Importantly, the occupying power need not control every part of the territory to be considered to exercise effective control.[228]

Treaty IHL imposes law enforcement obligations on armed forces exercising control over territory. According to the *Convention Respecting the Laws and Customs of War on Land,* for instance, occupying powers "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[229] In other words, as the *de facto* power, occupying forces have both a right and legal obligation to enforce public safety, law and order.[230] The imposition of public security obligations has important implications for the occupying power's rules of engagement. When a party to a conflict assumes "effective control" of territory, the occupier's aim is arguably no longer defeating an enemy, but rather ensuring public order and safety. Indeed, the rules of engagement in these situations may look more akin to robust peacekeeping than warfare.

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[225] Hague Convention IV Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2227, 75 U.N.T.S. 287 [hereinafter Hague Convention IV].
[226] Melzer, *supra* note 98, at 156.
[227] *See* Bankovic and Others v. Belgium and Others, App. No. 52207/99, Eur. Ct. H.R., Judgment, ¶ 71 (Dec. 19, 2001).
[228] The European Court of Human Rights has developed a great deal of case law on the application of European Union (EU) law to military operations conducted by EU members outside of the Union. *See* Loizidou v. Turkey, App. No. 15318/89, Eur. Ct. H.R., Judgment, ¶ 52 (Nov. 28, 1996); Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R., Judgment, ¶ 77 (May 10, 2001); Ilaşcu and Others v. Moldova and Russia, App. No. 48787/99, Eur. Ct. H.R., Judgment, ¶ 434, 442, 453, 464 & 481 (July 8, 2004).
[229] Hague Convention IV, *supra* note 225, art. 43.
[230] For more analysis of the legal obligations incumbent upon occupying powers, see Melzer, *supra* note 98, at 158.

What does this mean for restraints on the use of force? Neither of the IHL instruments governing belligerent occupation explicitly enumerates restraints on the use of force during an occupation or when armed forces exercise control over territory.[231] However, the imposition of a positive obligation to safeguard public security must correspond with tighter restraints on the use of force. Armed forces cannot be obliged to safeguard the peace and protect the public while also possessing the legal right to use lethal force as freely as in war. Indeed, numerous legal scholars agree: absent significant hostilities, the use of force by occupying powers or armed forces exercising control over territory is or should be subject to law enforcement or IHRL norms.[232]

This conclusion is supported by a number of scholars and influential case law. In an analysis of Israeli targeted killings in the Palestinian territories, for instance, Professor Kretzmer contends that occupation law, complemented by human rights law, is the applicable legal model.[233] Further, Kretzmer writes, "[u]nder this model force may only be used in the case of an imminent attack that cannot be halted by arresting the suspected terrorist."[234] The United Nations Human Rights Committee took the same view. In its report on Israel's targeted killings policy, the Committee argued that "[b]efore resorting to the use of deadly force, all measures to arrest a person suspected of being in the process of committing acts of terror must be exhausted."[235] Thus, according to Professor Kretzmer and the UNHRC, non-lethal options must be exhausted in the Palestinian territories because IHRL governs the use of force during an occupation.

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[231] The two relevant conventions include GC IV, *supra* note 23, and the Hague Convention IV, *supra* note 225.

[232] *See* Univ. Centre for Int'l Hum. Law, Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation 22 (Sept. 1–2, 2005), http://www.adh-geneva.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf (last visited Dec. 5, 2011) [hereinafter Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation]; Louise Doswald–Beck, *The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers?*, 88 INT'L REV. OF THE RED CROSS 864, 892 (2006); Charles Garraway, *"To Kill or Not to Kill"—Dilemmas on the Use of Force*, 14 J. CONFLICT & SECURITY L. 3, 509 (2010).

[233] Kretzmer, *supra* note 157, at 206.

[234] *Id*.

[235] United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Israel*, U.N. Doc. CCPR/CO/78/ISR ¶ 15 (Aug. 21, 2003), *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument.

In 2005, the Israeli Supreme Court came to a similar conclusion, when a public interest organization, *The Public Committee Against Torture in Israel*, brought a suit protesting Israel's targeted killings policy.[236] In its opinion, the court first established that Israel and Palestinian armed groups had been in "a continuous situation of armed conflict . . . since the first *intifada*."[237] According to the court, the existence of an armed conflict triggered the application of the "law regarding international armed conflict," the "laws of belligerent occupation" and human rights law.[238] To provide further clarification as to how it would apply the law, the court affirmed, "humanitarian law is the *lex specialis* which applies in the case of an armed conflict. When there is a gap (*lacuna*) in that law, it can be supplemented by human rights law."[239] Thus, while affirming that IHRL is applicable during an armed conflict, the court indicated it would first and foremost apply IHL, consistent with the *lex specialis* approach discussed previously.

Notably, the court refused to decide the legality of Israel's policy of targeted killings. Rather, the court provided the state with a legal framework to guide lethal force, but concluded that it could not "determine that a preventive strike is always legal" or "always illegal."[240] Interestingly, notwithstanding the fact that the court had proclaimed IHL to be *lex specialis,* the court imposed a law enforcement framework. For instance, the court affirmed that:

> [A] civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed.[241]

Again, the obligation to capture rather than kill is not a restraint imposed

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[236] Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 38 (Dec. 11, 2005).
[237] *Id*. ¶ 16.
[238] *Id.* ¶ 18.
[239] *Id*.
[240] *Id.* ¶ 60.
[241] *Id.* ¶ 40.

by IHL, but rather IHRL. The court has either misinterpreted IHL norms, or applied IHRL principles. Indeed, it seems the latter occurred, given the panel's reference to "domestic law."

While Israel is considered to be engaged in an "armed conflict," the court seemed uncomfortable with applying IHL principles given Israel's status as an occupying power, the relatively low level of violence, and Israel's ability to accomplish its security objectives through peacetime tactics, notably arrest and detainment. However, what happens if violence intensifies as it did in 2007, after Palestinian militants fired over 200 Qassam rockets into Israeli territory?[242] It makes little sense to hold a state facing a serious public security threat to a law enforcement framework if its adversary resorts to wartime tactics.

Indeed, legal scholars and experts agree that, "when there is a situation of armed hostilities in an occupied territory, the IHL rules relating to the conduct of hostilities apply."[243] Importantly, such hostile action must result from groups challenging the occupying power.[244] In other words, an occupying power cannot simply resort to the more permissive rules of IHL on its own volition. Armed groups must undermine the peace in such a way that the occupying power cannot manage the threat without resorting to the more permissive rules of IHL. Once security is restored, the occupying power must again use force consistent with IHRL norms. Thus, occupation law is a dynamic set of rules, which provides greater latitude than IHRL when necessary, while redefining the goals from military victory to public security.

In recent years, international courts have applied the same principles of occupation law to asymmetric non-international armed conflicts, where armed forces exercise a considerable degree of control. In *Ozkan v Turkey*, for instance, the ECtHR applied an "absolute necessity" test for the use of deadly force by Turkish security forces, even after affirming the existence of an "armed conflict between the security forces and members of the PKK," an armed insurgent group operating in Turkey, Syria, and Northern Iraq.[245] In 1993, while

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[242] *See* Isabel Kershner, *Israel Fires on Militants Planting Bomb, Killing One*, N.Y. TIMES, April 8, 2007, *available at* http://www.nytimes.com/2007/04/08/world/middleeast.html.

[243] Doswald–Beck, *supra* note 232, at 893.

[244] Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, *supra* note 232, at 26.

[245] Ozkan v Turkey, App. No. 47165/99, Eur. Ct. H.R., Judgment, ¶ 178 (Apr. 4, 2004).

searching a village for PKK members, Turkish security forces saw two men running toward the village. The Turkish soldiers fired two warning shots, which were met by gunshots fired from the village. The security forces responded by firing in the direction from which the shots emanated. As a result of the exchange, a girl named Abide Ekin was fatally wounded. The court determined that the decision by Turkish security forces to return fire "in response to shots fired at them from the village was 'absolutely necessary' for the purpose of protecting life. It follows that there has been no violation of Article 2 [of the ECHR] in this respect."[246] Again, there is no obligation to meet an "absolute necessity" test under IHL, which according to the conventional view, is *lex specialis* during an armed conflict. Rather than interpreting the "right to life" clause in the European Convention *vis-à-vis* IHL, the ECtHR directly applied IHRL to the use of deadly force.

In the case of *Isayeva et al. v Russia* (2005), the ECtHR took the same approach. The court examined whether the use of force by Russian fighter pilots, resulting in the death of more than a dozen civilians, violated Article 2 of the European Convention. While *en route* to another mission, the fighter pilots reported coming under attack from Chechen rebels in a ground convoy. The fighter pilots returned fire, destroying the convoy, killing sixteen civilians, and wounding eleven more. No affirmative witness could be found to corroborate the pilot's claims. Nevertheless, the court held that force by Russian pilots was justified under Article 2 of the European Convention. The court noted that it was "necessary to examine whether the operation was planned and controlled by the authorities so as to minimize, to the greatest extent possible, *recourse to lethal force*."[247] Of course, lethal force against combatants is nearly always permitted under IHL. If the ECtHR were applying the rules of IHL, there should have been no need to discuss whether or not the authorities effectively planned the operation so as to minimize "recourse to lethal force." However, under IHRL, the principle of precaution requires that authorities plan operations so as to prevent or minimize the effects of deadly force. It seems clear that the ECtHR was discussing the precaution principle in the case of *Isayeva et al v Russia* even though it was widely acknowledged that Russia was engaged in an armed conflict with rebels in Chechnya.

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[246] *Id.* ¶ 179.

[247] Isayeva et al. v. Russia, App. No. 57947/00, Eur. Ct. H.R. Judgment, ¶ 171 (Feb. 24, 2005) (emphasis added).

These judicial decisions provide support for the notion that IHRL principles should control the use of force by a state fighting an asymmetrical conflict against a NSAG until insurgents escalate violence to a point that it seriously threatens the lives of soldiers or the state's ability to maintain control over the territory in question. Admittedly, this tipping point will remain subjective and based more on the armed forces' capabilities than the actual level of violence. After insurgents have escalated the conflict beyond the tipping point, the state's response should be guided by the more permissive regime of IHL.

Importantly, these court cases reflect support for the "use-of-force" continuum first proposed by Jean Pictet.[248] In short, Pictet posited that IHL required that states only resort to deadly force against combatants if non-lethal measures had been exhausted.[249] As Parks highlights, governments flatly rejected this assertion, which was put forward by Pictet in the late 1970s.[250] Indeed, unless an enemy combatant voluntary offers to surrender, nothing in treaty or customary IHL requires that armed forces attempt capture even if feasible at the time. But, the Israeli Supreme Court and the ECtHR both seem to accept the view that, outside of active hostilities, IHRL norms, which do impose such a restraint, should govern targeting decisions in conflicts where the state exercises a considerable degree of control.

A number of scholars have come to the same conclusion. A report from an expert meeting on "The Right to Life in Armed Conflicts and Situations of Occupation," which was organized by the Center for International Humanitarian Law at Geneva University, confirms that some representatives from governments fighting counterinsurgency wars, prominent human rights organizations and scholars believe IHRL governs a state's offensive operations outside of hostilities in non-international armed conflicts.[251] While not a unanimous view, most of the individuals in attendance, according to the report, believed that a state's forces were required to "effect an arrest where possible, as well as to plan their operations in such a way as to maximize the opportunity of

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[248] PICTET, *supra* note 202, at 32.
[249] *Id.*
[250] Parks, *supra* note 174, at 787.
[251] *See* Expert Meeting on the Right to Life in Armed Conflicts and Situations of Occupation, *supra* note 232, at 37–38. Individuals participating in this meeting included representatives from: the U.S. Mission in Geneva, the U.K. Army Legal Services, the Russian Mission in Geneva, the ICRC, Human Rights Watch, International Commission of Jurists, and several respected and influential academics.

being able to effect an arrest. One expert remarked that this rule of HRL provides greater clarity than does the IHL of NIAC" [non-international armed conflict].[252]

But, court decisions and scholarly views are one thing. What about the practice of states fighting these conflicts? The rules of engagement for U.S. soldiers in Afghanistan are classified. However, as noted above, the COIN doctrine, which was recently developed to guide U.S. counter-insurgency operations, imposes far greater restrictions on the use of force than in conventional warfare. According to U.S. Counterinsurgency Manual, "[i]n situations where civil security exists, even tenuously, Soldiers and Marines should pursue nonlethal means first, using lethal force only when necessary."[253] While the manual stops short of imposing a "least harmful means" or "last resort" test, the over-riding purpose of the doctrine is to limit the use of lethal force. Importantly, even if the manual required that U.S. Soldiers pursue nonlethal means first, the U.S. COIN manual is not a legal document. Rather, it provides guidelines and principles for counterinsurgency operations. As a result, the COIN manual is only a reflection of U.S. practice, and not *opinio juris*, or the belief that such action is required by law, which combined with state practice may constitute binding customary international law.

What has been COIN's effect on U.S. operations in Afghanistan? One U.S. special operations officer who had served four tours in Afghanistan and six tours in Iraq confirmed that the implementation of the COIN doctrine had resulted in significantly narrowing the U.S. rules of engagement (ROE), imposing far tighter restrictions on the use of force.[254] Indeed, the officer confirmed both the existence of an escalation of force matrix and that the current ROE requires U.S. forces to capture rather than kill when the circumstances permit. Even if U.S. soldiers had solid information on the location of a member of the Taliban, which under IHL could be targeted at any time, the officer confirmed that U.S. forces would be required to attempt to capture the insurgent so long as it did not pose excessive risk to U.S. forces.

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[252] *Id.* at 38.

[253] U.S. DEP'T OF ARMY /MARINE CORPS, COUNTERINSURGENCY FIELD MANUAL 3-24 sec. 7-36 (15 Dec.Dec. 2006), *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf.

[254] Telephone Interview with a Global Operations Officer with the U.S. Special Forces (requested anonymity) (Jan. 26, 2011); *see also* Anna Mulrine, *How Afghanistan Civilian Deaths Have Changed the Way the US Military Fights*, CHRISTIAN SCI. MONITOR, July 27, 2011, http://www.csmonitor.com/USA/Military/2011/0727/How-Afghanistan-civilian-deaths-have-changed-the-way-the-US-military-fights.

Does this example represent a perceived legal obligation to capture rather than kill? Does it suggest the U.S. Government believes the use of force is subject to IHRL norms where U.S. or NATO forces have established "effective control" over territory? Not necessarily. Increased restrictions on the use of force stemming from the COIN doctrine are likely driven by policy. As discussed, compelling policy reasons dictate the adoption of restrictive ROE in Afghanistan. According to contemporary counterinsurgency theory, armed forces combating an insurgency must reduce civilian fatalities, arguably through both policing and more discriminate offensive operations. Limiting violence to targeted operations against individuals, which are unambiguously combatants, will likely reduce the number of noncombatant deaths.

Interestingly, the Israeli government claims that its targeted killings adhere to more restrictive restraints than those imposed by IHL. In the *Targeted Killings* case in 2005, the Israeli government noted that "[t]argeted killings are performed only as an exceptional step, when there is no alternative to them . . . [i]n cases in which security officials are of the opinion that alternatives to targeted killing exist, such alternatives are implemented to the extent possible."[255] Gabriella Blum, former senior legal advisor to the Israeli Military Advocate General's Corps, confirms that Israeli "targeted killing operations will not be carried out where there is a reasonable possibility of capturing the terrorist alive."[256] Of course, whether or not the Israeli military follows this stated policy in practice merits debate. But, it is noteworthy that the Israeli government claims to abide by the customary IHRL obligation requiring that authorities exhaust non-lethal options. Importantly, while the stated policy of the Israeli government may be regarded as state practice, an official policy does not necessarily constitute *opinio juris*.

By and large, states engaging in counterinsurgency and counterterrorist operations have adopted more conservative rules of engagement in these conflicts, severely restricting when soldiers may employ lethal force in some instances. Yet, policy objectives and public scrutiny, rather than a perceived legal obligation, are more likely the driving factors behind greater restraints on the use of force. In recent years, however, numerous courts and scholars have contended that IHRL may already govern the use of force in occupations and non-international

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[255] Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment, ¶ 13 (Dec. 11, 2005).
[256] Blum & Heymann, *supra* note 178, at 152.

armed conflicts more akin to robust peacekeeping than conventional wars. Indeed, the ECtHR has consistently looked to IHRL to determine the legality of lethal operations by member states engaged in internal conflicts. As a result, one scholar contends the Court "considers the principles of human rights law as *lex specialis* in right to life cases arising out of internal armed conflicts."[257] Further, the U.N. Human Rights Committee and the Israeli Supreme Court have also claimed Israeli targeted killings are subject to an "absolute necessity" test. While still a minority view, these actors are challenging the *status quo ante*, and the normative impact of these actors cannot be underestimated. Indeed, judiciaries and influential scholars shape the opinions of those in governments and the military. Given the trend toward more conservative or restrictive rules of engagement, complying with the restraints imposed by IHRL in the use of force could soon be regarded as a binding rule of customary international law.

V. Conclusion

In places such as Afghanistan, the Palestinian territories and Somalia, states fight against adversaries not easily distinguishable from the civilian population. The fact that NSAG have everything to lose and little to gain in distinguishing themselves from the civilian population suggests that state militaries will only continue to face difficulties in distinguishing between combatants and noncombatants when at war. Military lawyers seeking criteria for distinguishing between combatants and noncombatants in these conflicts should look to the ICRC's guidance on direct participation in hostilities, a sensible approach that adequately balances the needs of militaries with civilian protection concerns. Indeed, the ICRC's approach is the most feasible for distinguishing combatants from noncombatants in the types of wars fought today.

Given the challenge of adhering to the principle of distinction, this article considered whether the conventional targeting rules established by the permissive IHL regime make sense in asymmetric conflicts. This article suggested an alternative approach – specifically, that IHRL should govern the use of lethal force where parties to a conflict have either established effective control or are an occupying power at the time of

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[257] Juliet Chevalier–Watts, *Has Human Rights Law Become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?*, 14 INT'L J. HUM. RTS. 4 (2010).

armed conflict. This approach makes sense for important policy reasons. The underlying purpose of IHL is to provide belligerents with a set of rules to effectively accomplish their military objectives while limiting harm and suffering to combatants and noncombatants alike. With territory firmly within their grasp, armed forces should be able to maintain security through the resort to non-lethal measures first. Indeed, it would be contrary to the spirit of the rule of law to conclude that armed forces may resort to lethal force first in a situation where arrest and detainment is a reasonable option. An obligation to attempt capture in these situations would also help prevent arbitrary attacks based on faulty intelligence.

As David Kennedy notes, the "boundary between law enforcement, limited by human rights law, and military action, limited by the laws of armed conflict, seems ever less tenable."[258] Increasingly, IHRL is becoming more important to the regulation of force during armed conflicts. Rather than determining whether a state of violence constitutes an armed conflict or merely internal disturbances, the armed forces' degree of control and the intensity of violence should determine which legal regime governs the use of force. Scholars and courts have supported a move in this direction. Indeed, these actors may play a key role in shaping a new norm requiring that state armed forces use force consistent with IHRL principles in areas under their control—even when the situation may be legally characterized as an armed conflict.

[258] DAVID KENNEDY, OF LAW AND WAR 113 (2006).