

**COMPETING INTERPRETATIONS: THE UNITED STATES DEPARTMENT OF DEFENSE DIRECTLY PARTICIPATES WITH THE ICRC**

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I. Introduction

In a recently established, coalition force office in Petoria,<sup>1</sup> both a U.S. judge advocate (JA) and coalition JA receive a targeting package for a person creating improvised explosive devices (IEDs) for a non-State armed group currently fighting in a non-international armed conflict (NIAC). The coalition force has not yet developed rules of engagement (ROE) addressing civilians who directly participate in hostilities (DPH). The U.S. JA reviews the *Department of Defense (DoD) Law of War Manual (Manual)*.<sup>2</sup> The coalition partner likewise reviews the International Committee for the Red Cross (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretive Guidance)*, because his country has adopted its approach.<sup>3</sup> The U.S. JA performs the legal review of the targeting package and concludes that the bomb-maker is “functionally part of a non-State armed group that is engaged in hostilities” and is therefore

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<sup>1</sup> See *List of Fictional Countries*, WIKIPEDIA, [https://en.wikipedia.org/wiki/List\\_of\\_fictional\\_countries#C](https://en.wikipedia.org/wiki/List_of_fictional_countries#C) (last visited Jan. 26, 2017) (containing a fictional country from the television comedy *Family Guy*).

<sup>2</sup> U.S. DEP’T OF DEF., *DoD LAW OF WAR MANUAL* (12 June 2015) [hereinafter *MANUAL*].

<sup>3</sup> NILS MELZER, INTERNATIONAL COMMITTEE FOR THE RED CROSS, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 32 (May 2009) [hereinafter *INTERPRETIVE GUIDANCE*].

subject to attack.<sup>4</sup> The coalition partner performs the legal review on the same targeting package and determines that the bomb-maker does not serve in a continuous combat function within the non-State organized armed group, and thus is a civilian and not subject to attack until he directly participates in hostilities again.<sup>5</sup>

This simple comparison illustrates the differences in applying the *Manual* and the *Interpretive Guidance* approach to targeting under Paragraph 3, Article 13 of Additional Protocol (AP) II, which states, “[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.”<sup>6</sup> The *Manual* and the *Interpretive Guidance* are consistent on the principle of civilians’ direct participation in hostilities (DPH), but vary significantly in application, requiring U.S. military forces to have a collective understanding of the nuanced differences in order to work with coalition partners.

This article will examine these differences in approach between the *Interpretive Guidance* and the *Manual* in its first part. Additionally, it will analyze issues for JAs to consider when working with coalition force JAs in a specific targeting scenario.<sup>7</sup> However, this paper will not address the mechanics, nor the underlying details of targeting. Next, in Part II the article will discuss the *Interpretive Guidance*’s “constitutive elements of

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<sup>4</sup> MANUAL, *supra* note 2, para. 5.8.3.

<sup>5</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 34.

<sup>6</sup> Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Additional Protocol (AP) II does not define direct participation in hostilities. *See also* Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

<sup>7</sup> Prior to its publication, Pomper had foreseen the friction between the *Manual* and the *Interpretive Guidance* when he stated:

The parallels are there but frequently they are not as tidy as we want them to be, and operators will tell us that if we define categories too rigidly, we will impede their ability to meet the threat they are facing. Yet, if they are too loosely drawn, then there is a risk of sanctioning deprivations of life and liberty that will be criticized as illegitimate and arbitrary.

Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 INT’L L. STUD. 181, 182 (2012).

direct participation in hostilities,” the temporal nature of participation, and “the continuous combat function.” Part III will discuss the newly published *Manual* and its expansion of the *Interpretive Guidance* approach, and how it provides greater flexibility in analyzing the status of civilians who DPH. Specifically, Part III will address: the non-exclusive considerations to determine if a person is DPH; status-based determinations within hostile non-State armed groups and; the rejection of the “revolving door.”<sup>8</sup> Lastly, Part IV will review the need for U.S. JAs to understand the *Manual’s* approach and examine how our coalition partners define, analyze, and apply the notion of civilians who directly participate in hostilities.

## II. The Interpretive Guidance Approach

Over thirty years after Additional Protocols I and II were signed into law in 1977, and with a marked increase in “conduct of hostilities into civilian population centres,”<sup>9</sup> the ICRC published its *Interpretive Guidance*<sup>10</sup> in order to address three questions:

- Who is considered a civilian for the purposes of the principle of distinction?
- What conduct amounts to direct participation in hostilities?
- What modalities govern the loss of protection against direct attack?<sup>11</sup>

In answering those three questions, the *Interpretive Guidance* developed three elements to flesh out the distinctions between those entitled to protection and those who become lawful targets.

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<sup>8</sup> See *infra* section II. B. for more analysis on this topic.

<sup>9</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 11.

<sup>10</sup> The *Interpretive Guidance* emphatically states its recommendations and commentary “do not endeavor to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted.” INTERPRETIVE GUIDANCE, *supra* note 3, at 9. However, courts and countries have cited to and implemented the *Interpretive Guidance’s* recommendations and commentary. See Pub. Comm. Against Torture in Israel v. Gov’t of Israel, HCJ 769/02; FEDERAL REPUBLIC OF GERMANY, FEDERAL MINISTRY OF DEFENCE, A-214/1 JOINT SERVICE REGULATION, LAW OF ARMED CONFLICT (May 2013) [hereinafter GERMAN MANUAL].

<sup>11</sup> *Id.* at 6.

### A. Constitutive Elements of Direct Participation in Hostilities

The *Interpretive Guidance* states that DPH has three elements: threshold of harm, direct causation, and belligerent nexus.<sup>12</sup> The threshold of harm element applies only to acts that adversely affect or harm the enemy, military, or protected persons or objects.<sup>13</sup> This element does not address the advantage the specific act generates for a party to the armed conflict.<sup>14</sup> Critics state that the threshold of harm element is “under-inclusive,” because it does not acknowledge the advantage a military force gains from a civilian’s acts.<sup>15</sup> For example, there is no direct harm to

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<sup>12</sup> *Id.* at 46. The Interpretive Guidance elaborates on the three distinct elements:

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

*Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 719 (2010) (stating, “[c]learly, limitation to harm renders the threshold element under-inclusive”). Professor Schmitt highlights this under-inclusiveness:

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

*Id.* at 720; but see 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. 831, 859 (“[B]uilding defensive positions at a military base certain to be attacked . . . would clearly amount to direct participation in hostilities . . . because it is likely to directly and adversely affect the enemy’s impending attack.”) (internal citations omitted).

enemy military or military capacity when a civilian gathers the necessary components to build IEDs. However the recipient of the gathered components gains a distinct advantage via the capacity to build and use an IED.

The second element, direct causation, “should be understood as meaning that the harm in question must be brought about in one causal step.”<sup>16</sup> This is a relatively simple concept for the marine or soldier on the ground who witnesses a “civilian” digging a hole in the ground and emplacing an IED; there is no doubt that the IED will have deadly consequences on the military operations or capacity of the opposing party. Further, the effect of the IED emplacement—an explosion—would occur without an intervening cause. Yet the individual who gathers the necessary IED components and delivers them to an IED-maker is not directly participating in hostilities under the *Interpretive Guidance*. That is because the causal link between the act of gathering and delivering the specific components and the likely harm of an IED explosion are too remote.<sup>17</sup>

In addition to the threshold of harm and direct causation elements, DPH requires a belligerent nexus.<sup>18</sup> This third element mandates that the “act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another.”<sup>19</sup> The purpose of this element is to distinguish the acts of (1) an unaligned civilian acting in self-defense; (2) those engaging in purely criminal misconduct unrelated to the armed conflict; and (3) those participating in civil unrest, versus a civilian acting in a “manner specifically designed to support one party to the conflict by causing harm to another.”<sup>20</sup> Critics argue this provision is too narrow in its application

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<sup>16</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 53.

<sup>17</sup> However, the *Interpretive Guidance*, through examples, expands the “one causal step” when it notes that “[t]he required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations.” *Id.* at 56. Accordingly, a nineteen-year-old female serving as a lookout for an impending ambush is directly participating in hostilities because she is transmitting immediate actionable information that “constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.” *Id.* at 54–55. Thus, the nineteen-year-old, by radioing in that the convoy passed her position, does not cause any harm on her own. However, the insurgents could not launch their ambush without her initiating the radio transmission detailing the convoy location.

<sup>18</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 58.

<sup>19</sup> *Id.* at 64.

<sup>20</sup> *Id.* at 61.

because it requires the act to “be in support of a party to the armed conflict *and* to the detriment of another.”<sup>21</sup>

### B. Temporal Nature of Participation

In determining when civilians are liable to attack, the *Interpretive Guidance* emphasizes the temporal nature of DPH.<sup>22</sup> Therefore, a civilian’s protected status is “temporarily suspended” for “such time as” they are directly participating in hostilities.<sup>23</sup> This is the prelude to the “revolving door”<sup>24</sup> phenomenon where a “civilian’s protection against direct attack” is restored “each time his or her engagement in a hostile act ends.”<sup>25</sup> According to the *Interpretive Guidance*, as long as a civilian’s hostile acts are “spontaneous, sporadic, or unorganized,” they are protected from attack when not participating in hostilities.<sup>26</sup> Conversely, if the hostile acts are planned, regular, or organized, it becomes difficult to ascertain if or when a civilian’s engagement in a hostile act ends and thus renders him subject to attack.<sup>27</sup> For non-State organized armed group (OAG) members, a “civilian starts *de facto* to assume a continuous combat function for the group” and is liable to attack “until he or she ceases to assume such function.”<sup>28</sup>

### C. Continuous Combat Function

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<sup>21</sup> *Id.* at 58; *but see* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5, 34 (2010) (emphasis added) (“For those who oppose the requirement . . . the belligerent nexus criterion should be framed in the alternative: an act in support or to the detriment of a party.”).

<sup>22</sup> *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 70. Recommendation VII states:

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

*Id.*

<sup>23</sup> *Id.* at 70.

<sup>24</sup> The revolving door allows “civilians [to] lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities.” *Id.* at 70.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 72.

<sup>27</sup> *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 72.

<sup>28</sup> *Id.*

The *Interpretive Guidance* suggests a totality of the circumstances approach when determining when a member of an OAG of a non-State party ceases to assume a continuous combat function.<sup>29</sup> In addition to the conduct that makes a civilian liable to attack (satisfying the three DPH elements), the *Interpretive Guidance* examines when civilians gain a status that make them subject to attack. This status-based approach is for members of a non-State OAG operating in a continuous combat function (CCF).<sup>30</sup> During a NIAC, individual civilians retain their civilian status and are not considered an OAG member so long as they are not serving in a CCF.<sup>31</sup> Additionally, OAG members consist “only of individuals whose continuous function it is to take a direct part in hostilities.”<sup>32</sup> Other individuals associated with the OAG, such as cooks, administrative staff, and water treatment specialists “are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”<sup>33</sup>

Individuals affiliated with an OAG are not OAG members if the “individual[’s] . . . function is limited to the purchasing, smuggling, manufacturing [or] maintaining of weapons and other equipment outside specific military operations.”<sup>34</sup> The *Interpretive Guidance* views these

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<sup>29</sup> See *id.* The *Interpretive Guidance* states the “determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances” and depends on “criteria that may vary with the political, cultural, and military context.” *Id.* at 72–73.

<sup>30</sup> The continuous combat function (CCF) is a subset within the DPH construct. Describing individuals in a CCF “distinguishes members of the organized fighting forces of a non-State party 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.” *Id.* at 34.

<sup>31</sup> See *id.* at 36. Melzer states,

[I]ndividuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.

*Id.* at 35 (internal citations omitted).

<sup>32</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 36.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 34–35.

individuals as too far removed;<sup>35</sup> consequently, there is no direct causal link between the purchasers, smugglers, and manufacturers of weapons and their eventual use in specific military operations against the opposing party.<sup>36</sup> Along that same line of reasoning, the ICRC finds that truck drivers hauling oil for an OAG are not OAG members, because they are not serving in a CCF, and are not DPH because there is no causal link between oil, its eventual use, and the harm to the opposing military force.<sup>37</sup>

In November 2015, the United States attacked Daesh<sup>38</sup> fuel trucks carrying oil.<sup>39</sup> Prior to deliberately striking the fuel trucks, the United States dropped leaflets warning the drivers that an airstrike was forthcoming.<sup>40</sup> Warning the drivers, rather than specifically targeting them, naturally leads to two possible conclusions.<sup>41</sup> First, under the *Interpretive Guidance*, the United States did not believe that the drivers were members of a hostile non-State OAG—Daesh—in a continuous combat function. Following the *Interpretive Guidance's* view, even if the drivers supported and sporadically directly participated in hostilities on behalf of Daesh, the drivers were not engaged in a continuous combat function. Second, if the drivers were not members of Daesh in a CCF, the

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<sup>35</sup> *Id.* at 56.

<sup>36</sup> *Id.* at 55.

<sup>37</sup> *Id.*

<sup>38</sup> See *Daesh*, DICTIONARY.COM, <http://www.dictionary.com/browse/daesh> (last visited Jan. 26, 2017). Daesh is “a name used to refer to ISIS/ISIL, the radical Sunni Muslim organization: use of this name is said to delegitimize the group’s claim to be an ‘Islamic state.’” *Id.*

<sup>39</sup> Oil is a central funding source for Daesh and has been labeled as a legitimate military target. See Scott Bronstein & Drew Griffin, *Self-funded and Deep-Rooted: How ISIS Makes its Millions*, CNN NEWS (Oct. 7, 2014, 9:54 AM), <http://www.cnn.com/2014/10/06/world/meast/isis-funding/>; see also MANUAL, *supra* note 2, para. 5.7.8.5 (“Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives.”). However, labeling oil refineries and transportation/distribution assets as war-sustaining activities has not been universally recognized as legitimate military objectives. See Aurel Sari, *Trucker’s Hitch: Targeting ISIL Oil Transport Trucks and the Need for Advanced Warnings*, LAWFARE (Dec. 2, 2015, 2:12 PM), <https://www.lawfareblog.com/truckers-hitch-targeting-isil-oil-transport-trucks-and-need-advanced-warnings> (“If the trucks and their cargo . . . were merely travelling to a port to offload their cargo for revenue-generating export, their characterisation as a military objective becomes more contentious.”).

<sup>40</sup> Gordon Lubold & Sam Dagher, *U.S. Airstrikes Target Islamic State Oil Assets*, WALL ST. J. (Nov. 17, 2015, 3:04 AM), <http://www.wsj.com/articles/french-airstrikes-in-syria-may-have-missed-islamic-state-1447685772>.

<sup>41</sup> The United States did not provide a public legal analysis for dropping the leaflets. The author performed this analysis without considering U.S. policy decisions.



United States may have determined that the drivers were not directly participating in hostilities.<sup>42</sup> The drivers were transporting oil, which would likely be converted into a funding source for weapons and ammunition.<sup>43</sup>

The ICRC analysis concluded that the mere act of driving oil from one location to another would not meet the threshold of harm element.<sup>44</sup> It would argue that in order for oil transportation to “reach the threshold of harm required to qualify as direct participation in hostilities, the [oil transportation] must be likely to adversely affect the military operations or military capacity of the [United States],”<sup>45</sup> concluding that the act of transporting oil, without more, in no way affects the military operations of the United States.<sup>46</sup> Further, under the direct causal link requirement, numerous intervening causes must occur in order to convert the oil to currency; using that currency to purchase weapons, and then for the weapons to be used in specific military operations.<sup>47</sup> Additionally, under the belligerent nexus element, one could argue that the drivers were merely minor criminals. Arguably, they were only trying to make money from transporting the oil—not supporting Daesh, and their actions were not to the detriment of the United States.

### III. Department of Defense Law of War Manual

The United States did not review the fuel truck attack under the *Interpretive Guidance* because the DoD has its own law of war manual.<sup>48</sup> In 2015, The DoD General Counsel’s Office promulgated the “all-Services law of war manual to reflect the views of all DoD components . . . . [It provides] not only the black letter rules, but also discussion, examples of

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<sup>42</sup> See Lubold & Dagher, *supra* note 40. It is fair to say that the fuel truck drivers were not delivering oil to the front lines to fuel Daesh as the stated purpose of the attack “was to help cripple ISIL’s oil distribution capabilities, which will reduce their ability to fund their military operations.” *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 55.

<sup>45</sup> *Id.* at 50.

<sup>46</sup> *Id.* at 55.

<sup>47</sup> First, the drivers would deliver the oil to a storage facility/fueling station. Next, a sale or transaction would have to occur. Next, a purchase of ammunition and weapons would need to occur. Then, Daesh would have to transport the weapons and ammunition into the conflict zone. Lastly, Daesh would have to employ the weapons and ammunition for specific military operations against the United States.

<sup>48</sup> See *infra* Part III.B for a review of the deliberate strikes on fuel trucks under the *Manual*.

State practice and references to past manuals, treatises, and other documents to provide explanation, clarification, and elaboration.”<sup>49</sup> The *Manual*’s purpose is “to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations.”<sup>50</sup> It unequivocally states, “[T]he United States has not accepted the ICRC’s study on customary international humanitarian law nor its ‘interpretive guidance’ on direct participation in hostilities.”<sup>51</sup>

#### A. Non-exclusive Considerations in Determining Direct Participation in Hostilities

The *Manual*, from the outset, declares the United States has not ratified a treaty defining directly participating in hostilities,<sup>52</sup> stating: “Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”<sup>53</sup> The non-exclusive considerations in determining if a civilian’s act equates to directly participating in hostilities include:

- the degree to which the act causes harm to the opposing party’s persons or objects;
- the degree to which the act is connected to the hostilities, the specific purpose underlying the act;
- the military significance of the activity to the party’s war effort; and
- the degree to which the activity is viewed inherently or traditionally as a military one.<sup>54</sup>

A full reading of the first consideration states:

[T]he degree to which the act causes harm to the opposing party’s persons or objects, such as whether the act is the

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<sup>49</sup> MANUAL, *supra* note 2, at v.

<sup>50</sup> *Id.* para. 1.1.1.

<sup>51</sup> *Id.* para. 4.26.3.

<sup>52</sup> *Id.* para. 5.9.3 (“The United States is not a Party to a treaty with a comparable provision defining ‘taking a direct part in hostilities’ for the purpose of assessing what conduct renders civilians liable to being made the object of attack.”).

<sup>53</sup> MANUAL, *supra* note 2, para. 5.9.3.

<sup>54</sup> *Id.*

proximate or “but for” cause of death, injury, or damage to persons or objects belonging to the opposing party; or the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party[.]<sup>55</sup>

This is nearly identical to the *Interpretive Guidance*'s threshold of harm and direct causation elements.<sup>56</sup>

The second consideration enlarges the causal link within the *Interpretive Guidance*,<sup>57</sup> stating “the degree to which the act is connected to the hostilities, such as the degree to which the act is temporally or geographically near the fighting; or the degree to which the act is connected to military operations.”<sup>58</sup> The nature of the second consideration enlarges the ICRC's causal link because it allows the decision-maker to establish the casual link if the act is temporally or geographically near the fighting *or* if the act is connected to the military operations.<sup>59</sup>

The third consideration, “the specific purpose underlying the act, such as whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party,”<sup>60</sup> is analogous to the *Interpretive Guidance*'s belligerent nexus element.<sup>61</sup> On its face, the *Manual*'s fourth consideration expands the ICRC's threshold of harm analysis by adding the following:

[T]he military significance of the activity to the party's war effort, such as the degree to which the act contributes to a party's military action against the opposing party; whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded

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<sup>55</sup> *Id.*

<sup>56</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 46.

<sup>57</sup> *Id.* at 61 (“[T]he element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation.”).

<sup>58</sup> MANUAL, *supra* note 2, para. 5.9.3.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 61 (“In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another.”).

as taking a direct part in hostilities; whether the act poses a significant threat to the opposing party[.]<sup>62</sup>

The fourth consideration's expansion of the ICRC's threshold of harm element addresses under-inclusiveness concerns,<sup>63</sup> raised by Professor Schmitt above, because it specifically considers the distinct military advantage gained by the supported military force, as opposed to solely focusing on the likely harm to result on the opposing force.<sup>64</sup> Also, it seems to allow "indirect participation" activities, which the *Interpretive Guidance* eschews.<sup>65</sup>

Lastly, the *Manual's* final consideration in determining direct

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<sup>62</sup> MANUAL, *supra* note 2, para. 5.9.3 (internal citation omitted).

<sup>63</sup> See Schmitt, *supra* note 15, at 697.

<sup>64</sup> See MANUAL, *supra* note 2, para. 5.9.3..

<sup>65</sup> See INTERPRETIVE GUIDANCE, *supra* note 3, at 51. Melzer states:

[T]here can also be "indirect" participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.

*Id.* at 51; *but see* MANUAL, *supra* note 2, para. 5.9.3, n.232 (quoting W. Hays Parks).

Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation's war effort than that person's service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation's national security or war aims. Thus, more than 900 of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.

Memorandum from W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, subject: Executive Order 12333 and Assassination (Nov. 2, 1989), <https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf> (last visited Mar. 21, 2017).

participation in hostilities is:

[T]he degree to which the activity is viewed inherently or traditionally as a military one, such as whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.<sup>66</sup>

The *Manual's* consideration addresses another criticism of the *Interpretive Guidance* by treating civilians who execute duties in combat support or combat service support roles within an OAG similarly to service members in State armed forces executing the same duties.<sup>67</sup>

The method for determining whether a person is DPH under the *Manual* is permissive and flexible. First, the *Manual* states that the determination of DPH is highly contextual.<sup>68</sup> It constructs the DPH test by first suggesting “[t]he following considerations may be relevant,”<sup>69</sup> which is followed by the five considerations discussed above. Using qualifying language provides flexibility to the decision-maker, rather than constraining him to the listed considerations. Additionally, the individual considerations have their own qualifying language, further providing the

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<sup>66</sup> MANUAL, *supra* note 2, para. 5.9.3.

<sup>67</sup> See Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010). Watkin explains:

Other individuals who may be carrying out substantial and continuing integrated support functions for such [organized armed] groups are considered to be civilians even though the functions they perform are the same ones for which members of state armed forces can be attacked. As “civilians” these support personnel are protected from attack. In this sense they enjoy a form of impunity from attack not provided to similarly situated persons serving on behalf of regular state armed forces.

*Id.* at 644; see MANUAL, *supra* note 2, para. 4.18.4.1 (“[I]ndividuals may be regarded as constructively part of the [organized armed] group” if they “participate sufficiently in the activities of the group or support its operations substantially . . .”).

<sup>68</sup> MANUAL, *supra* note 2, para. 5.9.3 (“Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context . . .”).

<sup>69</sup> *Id.*

decision-maker flexibility in applying the DPH test.<sup>70</sup>

It also appears by the DPH test's construction that not one consideration is dispositive to the analysis. In contrast to the *Interpretive Guidance*, where all three elements are necessary for finding DPH,<sup>71</sup> there is no such mandate within the *Manual*, allowing for a more expansive view of directly participating in hostilities. In addition to this expansive view, the *Manual* extends the ability to engage OAG members who not in a CFF.

#### B. Status-Based Determinations Within Hostile Non-State Armed Groups

Unlike the *Interpretive Guidance*, the *Manual* does not distinguish, for the purposes of being subject to attack, between OAG members in a CCF, and persons affiliated with an OAG in sustainment roles.<sup>72</sup> The *Manual* states, "Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent."<sup>73</sup>

Similar to the *Interpretive Guidance's* approach, formal membership within a non-State Armed group may include: "using a rank, title . . . ; taking an oath of loyalty . . . ; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents issued or belonging to the group that identify the person as a member . . . ."<sup>74</sup> Less conspicuous "information that might indicate that a

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<sup>70</sup> Three of the five considerations are flexible in their own right because they have an implied scale marked by the language: "the degree to which." *Id.*

<sup>71</sup> See INTERPRETIVE GUIDANCE, *supra* note 3, at 64 ("Applied in conjunction, the three requirements of threshold of harm, direct causation and belligerent nexus permit a reliable distinction between activities amounting to direct participation in hostilities and activities . . . [that] are not part of the conduct of hostilities . . .").

<sup>72</sup> MANUAL, *supra* note 2, para. 5.9.3, explaining:

The following may indicate that a person is functionally a member of a non-State armed group: following directions issued by the group or its leaders; taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.

*Id.* (internal citations omitted).

<sup>73</sup> *Id.* para. 5.8.3.

<sup>74</sup> *Id.* para. 5.8.3.1.

person is a member of a non-State armed group” includes:

[A]cting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State’s armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; traveling with members of the group in remote locations or while the group conducts operations.<sup>75</sup>

The *Manual* imputes the OAG’s hostile intent to the members, regardless of formal or functional membership and irrespective of individual duties within a non-State OAG.<sup>76</sup> This is in stark contrast to the *Interpretive Guidance*, which “distinguishes members of the organized fighting forces of a non-State party 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.”<sup>77</sup>

Distinguishing civilian contractors from OAG members is a criticism of the *Manual*.<sup>78</sup> Unlike State armed forces, contractors often do not wear the same servicemember uniforms, insignia, or other identifiers that help distinguish them on the battlefield as civilians. Conversely, OAG members who purposely manifest their outward appearance to mirror the civilian population may be indistinguishable from the civilian contractors who provide services to the OAG. When civilian contractors take on a

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<sup>75</sup> *Id.*

<sup>76</sup> *See id.* para. 5.8.1.

Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities. This is because the organization’s hostile intent may be imputed to an individual through his or her association with the organization.

*Id.*

<sup>77</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 33-34.

<sup>78</sup> *See Melzer, supra* note 15, at 849.

quasi-military role, such as transporting fuel, it further compounds the opposing party's inability to distinguish the contractor from an OAG member.<sup>79</sup>

Returning to the fuel transportation example in Part II.B., under the *Manual's* approach, the United States may have the legal authority to target drivers under its non-exclusive considerations in determining direct participation in hostilities.<sup>80</sup> In examining the first consideration, transporting oil does not cause direct harm to the United States. The act of driving oil is not the proximate cause for death, injury, or damage to the United States. If the drivers were a part of the conversion of oil to weapons—which would likely adversely affect military operations of the United States—it would indicate that drivers were more likely directly participating in hostilities. Reviewing the second consideration, the degree to which the act is connected to the hostilities,<sup>81</sup> transporting oil is limited in its connection to the hostilities, even though it is temporally and geographically near the fighting. Drivers were transporting oil away from fighting so Daesh could generate revenue to fund their military operations. In analyzing the third consideration (“the specific purpose underlying the act”),<sup>82</sup> there is no doubt the underlying purpose of transporting oil is to convert it to money or materials to advance Daesh's war aims, to the detriment of the United States. In examining the fourth consideration (“the military significance of the activity to the party's war effort”),<sup>83</sup> there is indisputable military significance in transporting oil for sustaining Daesh's warfighting capability.

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<sup>79</sup> See Melzer, *supra* note 15, at 849. Melzer clarifies:

Certainly, as far as regular State armed forces are concerned, the distinction between “non-combatant” members (e.g., administrative personnel or cooks) and civilian contractors or employees assuming the same function generally does not pose a conceptual or practical problem. However, the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups make it not only practically impossible, but also conceptually meaningless to distinguish between “non-combatant” members of such groups and civilian supporters accompanying them without taking a direct part in the hostilities. (internal citations omitted).

*Id.* at 849.

<sup>80</sup> MANUAL, *supra* note 2, para. 5.9.3.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*



As previously noted,<sup>84</sup> illicit sales of oil fund Daesh's operations.<sup>85</sup> Without transporting the oil, Daesh would lack the ability to pay for food, salaries, and would significantly be limited. However, the death of the truck drivers cannot be considered as important as the destruction of oil or fuel trucks.<sup>86</sup> However, from a targeting standpoint, the destruction of the fuel trucks was the primary target, and the death of the drivers was seen as collateral. Concerning the last listed consideration—the degree to which the activity is viewed inherently or traditionally as a military one<sup>87</sup>—transporting oil could be viewed traditionally as a military function if the oil was transported to the front lines, or to a storage depot for redistribution (i.e., consumed for military operations), but civilian contractors can be hired to fulfill that role.<sup>88</sup>

The news article covering the U.S. airstrikes on the Daesh oil trucks was silent on driver membership in Daesh.<sup>89</sup> Gathering intelligence on the drivers in order to determine membership in Daesh may have been impossible. However, if there was knowledge of membership for each driver, Daesh's hostile intent would have been imputed to the truck drivers and the drivers would have been legitimate targets like the fuel trucks.<sup>90</sup> Even if the drivers were not Daesh members, but directly participated in hostilities consistently, they would have been subject to attack, because

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<sup>84</sup> See *infra* section II.C. of this article.

<sup>85</sup> Bobby Shields, *ISIS Has the Capacity to Strike U.S. Critical Infrastructure*, INT'L AFF. REV. (Feb. 19, 2016), <http://www.iar-gwu.org/content/isis-has-capacity-strike-us-critical-infrastructure>.

<sup>86</sup> This is wholly distinguishable from the Manhattan Project scientists or the German rocket scientists in Peenemunde. The drivers transporting oil were not of such importance as to have made them liable to legitimate attack. Driving a truck is not as advanced or rare as building an atomic bomb or developing rockets at Peenemunde. See *supra* note 65 (quoting W. Hays Parks).

<sup>87</sup> MANUAL, *supra* note 2, para. 5.9.3.

<sup>88</sup> See U.S. MARINE CORPS, MCWP 4-11.3, TRANSPORTATION OPERATIONS para. 2-5 (5 Sept. 2001) (describing that one of the tasks assigned to a Motor Transport Company is to “[p]rovide line haul and distribution of bulk water (Class I) and bulk fuel (Class III and III[A]) for the [Combat Service Support Element].”). However, “The commander may use organic, attached, *contracted* or supporting motor transport assets to support operations.” (emphasis added). *Id.* para. 1-1.

<sup>89</sup> Lubold & Dagher, *supra* note 40.

<sup>90</sup> The trucks and oil were legitimate targets. See MANUAL, *supra* note 2, para. 5.7.8.5. Presumably, the U.S. government viewed the drivers as civilians, and were therefore concerned about collateral damage. Even if the drivers were viewed as collateral damage, the noncombatant and civilian casualty cutoff value may have been too high for the rules of engagement (ROE) to permit attacking the trucks with the drivers inside of them. See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01B, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY App. E to Encl. E, para. 2.a.(3) (11 Dec. 2015).

the *Manual* does not support the *Interpretive Guidance's* “revolving door.”

### C. Rejecting the “Revolving Door”

The *Manual* states, “Persons who take a direct part in hostilities, however, do not benefit from a ‘revolving door’ of protection” and are liable to attack until “they have permanently ceased their participation.”<sup>91</sup> In adopting both Watkin’s critique<sup>92</sup> of the ICRC’s interpretation that the “revolving door of civilian protection is an integral part, not a malfunction, of IHL [(International Humanitarian Law)]”<sup>93</sup> the *Manual's* plain language:

[G]ives no revolving door protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time.<sup>94</sup>

The *Manual* also rejects the revolving door notion because it “would operate to give the so-called ‘farmer by day, guerilla by night’ greater protections than lawful combatants [and] adoption of such a rule would risk diminishing the protection of the civilian population.”<sup>95</sup> The Israeli Supreme Court rejected the revolving door proposition when it stated:

On the other hand, a civilian who has joined a terrorist organization which has become his “home,” and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.<sup>96</sup>

It is vitally important then, for the decision-maker to analyze “whether the

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<sup>91</sup> MANUAL, *supra* note 2, para. 5.9.4.

<sup>92</sup> See *supra* note 67 and accompanying text.

<sup>93</sup> INTERPRETIVE GUIDANCE, *supra* note 3, at 70 (internal quotations omitted).

<sup>94</sup> MANUAL, *supra* note 2, para. 5.9.4.2 (internal citation omitted).

<sup>95</sup> *Id.*

<sup>96</sup> Pub. Comm. Against Torture in Israel v. Gov’t of Israel, H CJ 769/02 ¶ 39.

nature and frequency of the direct participation is such that the loss of protection lasts only for the duration of specific acts, or is sufficiently persistent that the individual is liable for attack for a wider period, including the periods between the specific acts.”<sup>97</sup>

With the noted differences between the *Interpretive Guidance* and the *Manual*, it is of paramount importance for the U.S. judge advocate to understand how its coalition partners determine if, when, and for how long civilians or OAG members are directly participating in hostilities, are targetable, or are subject to capture. The following section will more thoroughly discuss this issue.

#### IV. Understanding How U.S. Coalition Partners Define, Analyze, and Apply the Notion of Civilians Directly Participating in Hostilities

##### A. The United Kingdom

The United Kingdom Ministry of Defence’s *Joint Service Manual on Law of Armed Conflict (UK Manual)* publication pre-dated the ICRC’s *Interpretive Guidance*, and contains no comprehensive analysis of paragraph 3, Article 13, AP II.<sup>98</sup> The *UK Manual* briefly states, “A civilian is a non-combatant. He is protected from direct attack and is to be protected against dangers arising from military operations. He has no right to participate directly in hostilities. If he does so he loses his immunity.”<sup>99</sup> Similar to the *Interpretive Guidance* and the *Manual*, the *UK Manual* analyzes DPH on a case-by-case basis. The *UK Manual* provides two DPH examples that are too simple to determine if a civilian’s conduct is an “integral part of a combat operation.”<sup>100</sup> The *UK Manual* states,

Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not, but they are at risk from attacks on those

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<sup>97</sup> Pomper, *supra* note 7, at 190.

<sup>98</sup> U.K. MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL].

<sup>99</sup> *Id.* para. 5.3.2.

<sup>100</sup> MANUAL, *supra* note 2, para. 5.9.3.

objectives since military objectives may be attacked whether or not civilians are present.<sup>101</sup>

Because the *UK Manual* is devoid of a particular test—and vague, such as the text within paragraph 3, Article 13, AP II—the United Kingdom could theoretically implement the *Interpretive Guidance* or the *Manual* when examining a factual scenario involving a civilian directly participating in hostilities. The definition of CCF or a functional equivalent within an OAG is similarly absent within the *UK Manual*.<sup>102</sup> This is where the U.S. judge advocate could effectively advocate to a UK counterpart to adopt the more expansive *Manual* approach to the DPH issue. Implementing the *Manual* approach would offer the United Kingdom greater operational flexibility to determine if a civilian is DPH or an OAG member. However, given the pressure on the application of the law of armed conflict on the United Kingdom by the European Court of Human Rights in areas such as detention, it may be that the United Kingdom would take a less aggressive approach in applying the U.S. views of DPH in targeting analyses.<sup>103</sup>

## B. Germany

Whereas the *UK Manual* pre-dated the Interpretive Guidance, the Federal Ministry of Defence of the Federal Republic of Germany published its *Joint Service Regulation on the Law of Armed Conflict (German Manual)* in May 2013, nearly four years after the appearance of

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<sup>101</sup> U.K. MANUAL, *supra* note 98, para. 5.3.3 (internal citations omitted). The *UK Manual's* Internal Armed Conflict (also referred as a NIAC) chapter, also discusses civilians directly participating in hostilities, but it refers the reader back to previously cited materials within the Conduct of Hostilities chapter. *See id.* para. 15.49.c.

<sup>102</sup> It would be beneficial to remind a U.K. counterpart that the original commentary to AP II, stated, “Those who belong to armed forces or armed groups may be attacked at any time.” Int’l Comm. for the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, § 4789 (Yves Sandoz et al. eds., 1987). *See* U.K. MANUAL, *supra* note 98, para. 15.34 (“Additional Protocol II applies to all armed conflicts which meet the threshold [armed conflicts within a state between its armed forces and dissident armed forces or other organized armed groups] but fall outside Additional Protocol I.”).

<sup>103</sup> *See* Wells Bennett, *The Extraterritorial Effect of Human Rights: The ECHR’s Al-Skeini Decision*, LAWFARE (July 12, 2011, 10:33 AM), <https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision>. This pressure may very well transfer to targeting decisions if the United Kingdom does not formally adopt a detailed methodology for determining DPH.

the *Interpretive Guidance*.<sup>104</sup> Similar to the *UK Manual*, the *German Manual* states, “civilians lose their special protection when and for such time as they take a direct part in hostilities.”<sup>105</sup> In NIACs, “[a]s long as persons on the side of a nongovernmental party to a conflict participate directly in hostilities, they lose their protection as civilians and may be attacked by military means.”<sup>106</sup> Absent a manifest adoption of the *Interpretive Guidance*, the *German Manual* seems similar to the *Interpretive Guidance*, because it specifically cites to the CCF terminology within its test.<sup>107</sup> Additionally, as a possible expression of state practice, the German Federal Prosecutor General has adopted additional *Interpretive Guidance* language in a decision regarding drone attacks.<sup>108</sup> This does not necessarily mean that Germany has adopted the *Interpretive Guidance* in its entirety, but it does suggest that an executive department within Germany has embraced portions of the *Interpretive Guidance*, validating the ICRC’s ability to shape and interpret how nations

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<sup>104</sup> GERMAN MANUAL, *supra* note 10.

<sup>105</sup> *Id.* para. 518 (internal citations omitted). The *German Manual* uses inflexible language when it explains,

[C]ivilians who perform *concrete* actions that constitute direct participation in hostilities (e.g. conducting military operations, transporting weapons and ammunition to combat units, operating weapon systems, transmitting target data that leads immediately to the engagement of a military objective, etc.) can be engaged as military objectives while performing such actions.

*Id.* (emphasis added). Using the term “concrete” suggests that the *German Manual* favors a non-expansive view on conduct that equates to DPH.

<sup>106</sup> *Id.* para. 1308.

<sup>107</sup> *See id.* The *German Manual* explains:

It is thus decisive when, how, and up to what point in time a person is directly participating in hostilities and is as a consequence a legitimate target of direct military force. This applies to persons for the duration of their participation in specific acts which can be considered participation in the hostilities. It also applies to persons who, as a result of their role and function within the enemy forces, are continuously participating in hostilities (continuous combat function) and thus are a legitimate military target, even outside of their participation in specific acts of hostility.

*Id.*

<sup>108</sup> *See* DER GENERALBUNDESANWALT BEIM BUNDESGERICHTSH, OFFENE VERSION [Decision of the German Federal Prosecutor] (June 20, 2013), [www.generalbundesanwalt.de/docs/drohneneinsatz\\_vom\\_04oktober2010\\_mir\\_ali\\_pakistan.pdf](http://www.generalbundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf) (translation on file with author).

apply international humanitarian law. More importantly, it implicitly requires U.S. judge advocates to understand and apply the tests within the *Interpretive Guidance* when working with Germany on targeting scenarios. Thus, when working with the German military in a NIAC involving OAG members, the U.S. judge advocate would apply the conduct-based DPH and the status-based CCF tests under the *Interpretive Guidance*. Additionally, the U.S. judge advocate would have to apply the status-based test under the *Manual* to properly interact with his German counterpart on whether an individual is directly participating in hostilities.<sup>109</sup>

## B. NATO

The North Atlantic Treaty Organization (NATO), consisting of twenty-eight member States from Europe and North America, exists in order to cooperate in defense and security.<sup>110</sup> Notably, NATO has been involved in numerous IACs/NIACs in recent years in Iraq, Afghanistan, and Libya.<sup>111</sup> Civilian DPH remains a prominent issue within the Afghanistan and Iraq conflicts.<sup>112</sup> Nonetheless, NATO has not issued formal guidance or interpretation regarding civilians directly participating

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<sup>109</sup> See *MANUAL*, *supra* note 2, para. 5.9.2.1. The *Manual* explains:

The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities. Either approach may yield the same result: members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*. However, practitioners, especially when working with coalition partners, should understand that different legal reasoning is sometimes applied in reaching that result.

*Id.* (internal citations omitted) (emphasis added).

<sup>110</sup> *What is NATO*, NATO (Apr. 29, 2015, 11:06 AM), [http://www.nato.int/cps/en/natohq/topics\\_82686.htm?](http://www.nato.int/cps/en/natohq/topics_82686.htm?)

<sup>111</sup> See *NATO and Afghanistan*, NATO (Dec. 8, 2015, 10:00 AM), [http://www.nato.int/cps/en/natohq/topics\\_8189.htm](http://www.nato.int/cps/en/natohq/topics_8189.htm); *NATO's Relations with Iraq*, NATO (Oct. 26, 2015, 3:26 PM), [http://www.nato.int/cps/en/natolive/topics\\_88247.htm](http://www.nato.int/cps/en/natolive/topics_88247.htm); *NATO and Libya (Archived)*, NATO (Nov. 9, 2015, 11:22 AM), [http://www.nato.int/cps/en/natolive/topics\\_71652.htm](http://www.nato.int/cps/en/natolive/topics_71652.htm).

<sup>112</sup> See Michael N. Schmitt, "Direct Participation in Hostilities" and 21st Century Armed Conflict, *FESTSCHRIFT FÜR DIETER FLECK* 505 (Horst Fischer et al. eds., 2004), [http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt\\_direct\\_participation\\_in\\_hostilities.pdf](http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilities.pdf).

in hostilities.<sup>113</sup> Absent formal NATO guidance or interpretation, “a NATO member nation’s commanding officer has an obligation to adhere to his state’s national laws.”<sup>114</sup> Thus, a NATO member nation’s commanding officer, within his specific area of operations, will make deliberate targeting decisions based on his nation’s interpretation of civilians directly participating in hostilities.<sup>115</sup> Without NATO consensus on civilians directly participating in hostilities, and given significant U.S. involvement in NATO operations, a U.S. judge advocate must understand not only the U.S. view, but also the ICRC view, which at least one member nation—Germany—has partially implemented.

## V. Conclusion

Even though the essential and temporal boundaries of DPH are not in total agreement, the *Manual* and the *Interpretive Guidance* methodologies share the same principal concept of a civilian directly participating in hostilities; if you DPH, you are liable to attack. However, the differences between the analytical tools of the two vary widely in scope and application. The U.S. judge advocate must be able to analyze targeting scenarios under both approaches when working with a coalition JA who provides advice using the *Interpretive Guidance*. If the restrictive and rigid *Interpretive Guidance* allows a State to target a civilian under its conduct-based, three-part DPH test (threshold of harm, direct causation, and belligerent nexus), or under the status-based CCF analysis, then that civilian would certainly qualify as a legitimate military target under the more expansive *Manual* framework. When it appears that the *Interpretive Guidance* may limit the ability to target the individual, the analysis under the *Manual* may in fact render the civilian subject to targeting. Thus, the lingering question does not become *which* DPH test is better, but how can both analyses coexist in a multinational military operations?

As multinational military operations increase, understanding the analytical tools will enable JAs to effectively advocate for the *Manual’s* methodology, or at least adequately rebut findings in an analysis under the

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<sup>113</sup> Interview with Mr. Jan Bartels, Operational Law Attorney (Multinational Operations), Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, Exchange Officer Legal Service German Armed Forces (former Assistant Legal Advisor at the Supreme Headquarters, Allied Powers Europe) in Charlottesville, Va. (Feb. 16, 2016) (notes on file with author).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

*Interpretive Guidance.* Failure to understand a coalition force's "organizational and national culture" differences will likewise cause a failure to understand their methodology and analytical tools, which will undermine the "overall operational effectiveness of the multinational force."<sup>116</sup> This failure is both costly and avoidable.

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<sup>116</sup> Angela R. Febbraro et al., *Multinational Military Operations and Intercultural Factors*, ES-1, N.A.T.O. Doc. RTO-TR-HFM-120 AC/323(HFM-120)TP/225 (Nov. 2008), <https://www.cso.nato.int/pubs/rdp.asp?RDP=RTO-TR-HFM-120>.