

OPPORTUNITY LOST: ORGANIZED ARMED
GROUPS AND THE ICRC “DIRECT
PARTICIPATION IN HOSTILITIES”
INTERPRETIVE GUIDANCE

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I. INTRODUCTION

In May 2009 the International Committee of the Red Cross published a study entitled: “Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law” (“Interpretive Guidance”).¹ Initiated six years earlier in the shadow of the 9/11 transnational

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1. See Int'l Comm. of the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) (*prepared by Nils Melzer*) [hereinafter *Interpretive Guidance*], avail-

attack on the United States by Al Qaeda, the Interpretive Guidance attempts to explain the meaning of taking a “direct part in hostilities” (DPH), a phrase found in the 1977 Additional Protocols of the Geneva Conventions.² The decision in 2003 to attempt to define this 25-year-old phrase was undoubtedly influenced by the significant publicity surrounding the use of air power to conduct targeted killings in Yemen, the Occupied Territories, and Iraq.³ In many ways such “targeted killing,” with its potentially global reach and precision effects, has come to define, rightly or wrongly, the military response to 21st century “terrorist” threats. While contemporary conflicts such as those in Afghanistan, Iraq, and Pakistan involve much broader considerations related to counter-insurgency operations, questions surrounding the targeting of participants in hostilities often dominate the international legal and policy discourse. For example, it formed a significant part of the debate in 2009 within the United States government regarding two possible courses of action for the Afghanistan mission: a counterinsurgency approach or a “counter terrorism” effort, based in part on targeting opponents using Unmanned Aerial Vehicles (UAVs).⁴

able at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf).

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

3. See, e.g., David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16 (describing the missile strike from a Predator drone that killed six suspected members of Al Qaeda in Yemen); Molly Moore, *Israel's Lethal Weapon of Choice*, WASHINGTON POST, June 29, 2003, at A1 (discussing Israel's practice of targeted killings); Rajiv Chandrasekaran & Thomas E. Ricks, *U.S. Opens War with Strikes on Baghdad Aimed at Hussein*, WASHINGTON POST, Mar. 3, 2003, at A1 (reporting on U.S. forces' unsuccessful targeting of Saddam Hussein in one of the war's largest bombing attacks).

4. See CNN Politics.com, *Obama Adviser: Afghanistan in No Immediate Danger of Falling*, <http://www.cnn.com/2009/POLITICS/10/04/us.afghanistan/index.html> (last visited Feb. 12, 2010) (reporting that, in respect of President Obama's decision on how to move forward with regards to the Afghanistan mission, “[s]ome in Obama's inner circle, including Vice President Joe Biden, are advocating for a counterterrorism approach that focuses on com-

The Interpretive Guidance therefore offered a unique opportunity to attain two goals. First, by clarifying the “black letter” legal text associated with the question of who can lawfully be killed in warfare, the analysis could put to an end the long-standing debates surrounding targeting and the bifurcated categorization of participants in hostilities (as lawful “combatants” or “civilians”) set out in the Additional Protocols. Second, the Interpretive Guidance presented an opportunity to comprehensively address the question of targeting in non-international armed conflicts. While such conflicts are the predominant form of warfare in this century, they have not enjoyed the same level of attention from international lawyers as has been applied to international armed conflict. Given the challenges of conducting operations in contemporary “wars amongst the people,”⁵ the Interpretive Guidance would hopefully provide a solid basis for ensuring the protection of uninvolved civilians. Of course, such protection is not simply guaranteed by means of legal definitions. It also requires clear and credible guidance to be provided to those tasked, not just with using violence, but also with protecting uninvolved civilians “against dangers arising from military operations.”⁶

Unfortunately, the Interpretive Guidance falls short of the mark. This is particularly evident in how the Interpretive Guidance handles the issue of “organized armed groups.” The Interpretive Guidance provides such groups a unique status. Their membership is not established in the same manner as regular, state armed forces, and they are also not civilians.⁷ Instead, they form a third category with criteria for membership that are unique and are not found in existing treaty or customary law. This directly calls into question the observation found in the Interpretive Guidance that it “does not purport to

bating al Qaeda through the use of unmanned drones and special forces without involving additional troops. Others, especially McChrystal [the American General commanding ISAF], are advocating a broader counterinsurgency approach that would require a much larger U.S. military footprint in the country”).

5. GENERAL RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* 3–5 (2007).

6. See Additional Protocol I, *supra* note 2, art. 51(1).

7. See *Interpretive Guidance*, *supra* note 1, at 32 (indicating that membership in dissident armed forces, a sub-group of organized armed groups, would be the same as State armed forces so long as the dissident forces remained organized under the structures of State armed forces).

change the law, but provides an interpretation of the notion of direct participation in hostilities within existing parameters.”⁸ Further, the Interpretive Guidance suggests the interpretation that those who perform a “continuous combat function” are members of organized armed groups. Other individuals who may be carrying out substantial and continuing integrated support functions for such 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. Further, the Interpretive Guidance indicates that these supporting civilians only lose their protection if they perform acts falling within a very narrow interpretation of what constitutes direct participation in hostilities. In assessing direct participation in hostilities, the Interpretive Guidance’s focus on the tactical level of war does not match the realities of how warfare is conducted. Further, there is an emphasis placed on the “bearing of arms” which fails to fully recognize how armed groups are organized or how they fight.

The Interpretive Guidance also makes a number of general assumptions. These include the suggestion that membership in an organized group is only reliably determined by means of functional criteria and that it is difficult to establish a civilian participant’s future intent from past practice. These assumptions do not survive critical analysis and, as a result, call into question a number of conclusions in the Interpretive Guidance. Finally, the treatment of a number of issues, such as the status of members of *levées en masse*, the criteria for membership in dissident armed forces, and the status of an organized armed group not belonging to a party to an international armed conflict, lacks both clarity and precision. This in turn undermines the perception that the issue of direct participation in hostilities has been dealt with in a thorough fashion.

This Article will explore the approach adopted in the Interpretive Guidance towards organized armed groups in order to determine what problems are created in its dealing with an area of the law which is admittedly fraught with both historical baggage and significant controversy. The question that ulti-

8. *Id.* at 6.

mately will be addressed is the degree to which the Interpretive Guidance provides workable and practical guidance regarding this longstanding complex problem.

The treatment of “organized armed groups” will be analyzed in four parts. In the first part, the principle of distinction and the need to ensure respect for, as well as provide a credible interpretation of, the law, thereby enhancing compliance with the Rule of Law, is discussed. Second, the conclusions reached in respect of organized armed groups in the Interpretive Guidance will be set out in order to provide a baseline from which to conduct a critical analysis. This includes separate charts for international and non-international armed conflict that summarize the categories of direct participants and the criteria by which they may be targeted. These charts highlight the complexity of the approach suggested in the Interpretive Guidance.

In the third part the analysis will critique the Interpretive Guidance by looking at how well it has assessed the applicable law in respect of contemporary armed conflict and recognized the lingering impact of Just War theory on participation in conflict. It will also look at how armed groups are organized in practice and compare that reality to the approach adopted by the Interpretive Guidance. A critical assessment will then be provided of the functional criteria approach for determining membership in an organized armed group. This is followed by a review of the notion of relying on a revolving-door concept of protection for civilians who participate in combat on a persistently recurring basis. In the fourth part an alternate theory of membership in organized armed groups will be provided which reflects the common attributes of all members in armed forces regardless of whether they are fighting for a State or a non-State actor. In doing so the concept of a unique category of participant in hostilities is avoided and an approach to membership in armed forces is suggested which does not favor non-State actors.

II. THE FUNDAMENTAL PRINCIPLE OF DISTINCTION AND CREDIBILITY

The foreword to the Interpretive Guidance identifies a two-fold goal. The ICRC initiated the Interpretive Guidance “based both on the need to enhance the protection of civilians

in practice for humanitarian reasons and on the international mandate it has been given to work for the better understanding and faithful application of international humanitarian law.”⁹ Therefore, the Interpretive Guidance was not meant to be simply a theoretical or academic exercise. It is its practical effect and the ability to apply its findings which will be key determinants of the success or failure of the document.

At the heart of the question of who can be targeted is the principle of distinction.¹⁰ That principle, which applies equally in international and non-international armed conflict, requires that the parties to the conflict must distinguish at all times between civilians and combatants.¹¹ Attacks must not be directed at civilians or the civilian population. They may only be directed against those persons who do not enjoy the protection against attack afforded to civilians.¹² While the principle of distinction is easy to state, the challenge lies in its practical implementation by soldiers and other fighters.

Having clear guidance on legal rules is particularly important when the goal is to ensure that operations are conducted pursuant to the Rule of Law. Compliance with the distinction principle is required of all participants in warfare regardless of whether they fight for state armed forces or a non-State “organized armed group.” While non-State actor compliance with international humanitarian law presents a significant challenge, there is no basis for State armed forces not to comply with the law with respect to targeting. International humanitarian law not only sets out a framework within which participants in conflict must act, it also seeks to ensure appropri-

9. *Id.*

10. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 82 (2004) (describing the principle of distinction as a “fundamental and ‘intransgressible’ principle of customary international law”). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

11. In Additional Protocol I, *supra* note 2, art. 48, this is referred to as the “basic rule.”

12. *Id.* art. 51(2); *see also* ICRC, *Customary International Humanitarian Law*, at 3 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *Customary International Law Study*] (“Rule 1. The Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”).

ate accountability.¹³ In contemporary operations compliance with the Rule of Law is rightly viewed as an essential element of the successful completion of those operations.¹⁴

The requirement that democracies must operate under constraints when conducting operations in complex security situations is evident in the now-famous phrase of the Israeli High Court of Justice that “[a]t times democracy fights with one hand tied behind her back. Despite that, democracy has the upper hand, since preserving the rule of law and recognition of individual liberties constitutes an important component of her security stance.”¹⁵ At the same time the law, and interpretations of that law, should not incorporate inequalities which inappropriately prejudice one party to a conflict as opposed to another.

An example of where the credibility of an interpretation of the law may be undermined is the question of the value of soldiers’ lives when considering whether it is feasible to capture rather than kill an opponent. Some authors have suggested that combatants are “treated as instruments”¹⁶ or that “the combatant trades his right to life for the right to kill.”¹⁷ Such interpretations have the effect of objectifying participants in warfare and devaluing their lives. In contrast to such an approach, both the Israeli Supreme Court and the ICRC in

13. IAN BROWNLIE, *THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 213–14 (1998) (identifying the elements of the rule of law as: the powers of officials must be based on authority conferred by law; the law must conform to standards of substantial and procedural justice; the powers of the executive, the legislature, and the judicial function must be separated; the judiciary should not be subject to the control of the executive; and all legal persons should be subject to the rules of law).

14. See THE U.S. ARMY/MARINE CORPS COUNTERINSURGENCY FIELD MANUAL 276 (2007) [hereinafter COUNTERINSURGENCY MANUAL] (“COIN operations strive to restore order, the rule of law, and civil procedures to the authority of the HN government. All counterinsurgency actions must be those of agents of a legitimate and law-abiding HN government.”).

15. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] ¶ 64, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (citing HCJ 5100/94 Public Committee Against Torture in Israel v. Israel [1999] P.D. 53(4) 817, 845).

16. COLM McKEOGH, *INNOCENT CIVILIANS: THE MORALITY OF KILLING IN WAR* 164 (2002).

17. William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 740, 757 (2005).

the Interpretive Guidance recognize the potential risk to the lives of members of security forces.¹⁸ For the ICRC to have found that soldier's lives were not to be valued to the same degree as civilians, or to have required that soldiers must always risk their lives because it would reduce the risk to civilians, could have called into question the credibility of the legal principle being addressed. The Interpretive Guidance runs the different risk, however, of undermining the credibility of the DPH rule, and the ability to ensure it is applied during the conduct of operations, due to its unwarranted creation of different criteria for membership in organized armed groups than those applied to regular State armed forces.

III. THE DPH INTERPRETIVE GUIDANCE AND ORGANIZED ARMED GROUPS

Resolving the issue of membership in the armed forces lies at the heart of the question of whether the ICRC has adequately addressed direct participation in hostilities. The Interpretive Guidance categorizes membership in armed forces in international and non-international armed conflict; explains the tests established to determine that membership (continuous combat function and direct participation in hostilities); and looks at the time period that such membership lasts. The Interpretive Guidance divides participants in warfare into four categories: civilians, members of regular State armed forces, organized armed groups, and the *levee en masse* (the latter only in the context of international armed conflict). Identification of members of the "enemy" armed force is a foundational aspect of the targeting process. The following outline sets out the formula arrived at in the Interpretive Guidance to determine when a person may be targeted, which is one outcome of being determined to be a member of an armed force. A key aspect of the discussion is "membership" in groups engaged in hostilities. However, as will be demonstrated, the suggested test for membership is not universal. Rather, it is dependent upon whether the person fights for regular State armed forces or for what are termed as irregular armed forces

18. See *Targeted Killings* ¶ 40; *Interpretive Guidance*, *supra* note 1, at 81 ("[I]t 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.").

or organized armed groups, either State or non-State. Further complexity, and a narrowing of the targeting criteria for attacking “irregular” armed groups, is added by introducing the performance requirement of a “continuous combat function” in order to be considered a member of an organized armed group. This continuous combat function requirement is linked to a concept of direct participation requiring specific acts meeting the cumulative criteria of a certain threshold of harm, a direct causal link between the act and the harm likely to result, and a direct belligerent nexus. The practical result is that the scope for attacking regularly constituted armed forces is significantly broader than the military forces of non-state actors under the Guidance.

A. *Civilians and Participants in Armed Conflict*

The question of what constitutes membership in an armed force or organized armed group is impacted by all elements of the three key legal questions posed in the Interpretive Guidance: who is considered a civilian for the purposes of the principle of distinction; what conduct amounts to direct participation in hostilities; and what modalities govern the loss of protection against direct attack?¹⁹ An Additional Protocol I approach to defining who is a “civilian” is adopted in respect of both international and non-international armed conflict. That approach is one of “mutual exclusiveness.” Civilians are defined by what they are not. In respect of an international armed conflict, civilians are “neither members of the armed forces of a party to a conflict nor participants in a levee en masse.”²⁰ For non-international armed conflicts a civilian is a person who is not a member of state armed forces or an organized armed group.²¹

19. *Interpretive Guidance*, *supra* note 1, at 13.

20. *Id.* at 26.

21. *Id.* at 36. This conclusion can be contrasted with the approach taken in the ICRC Customary International Law Study, where it was concluded that “practice is ambiguous as to whether members of armed opposition groups are considered to be members of armed forces or civilians.” *Customary International Law Study*, *supra* note 12, at 17.

1. *International Armed Conflict*

In discussing international armed conflicts, the Interpretive Guidance initially uses a broad, all-encompassing definition of armed forces, indicating that such forces “comprise all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.”²² The Interpretive Guidance specifically rejects the idea that armed forces are limited to the “regular armed forces recognized under domestic law” or that a failure to meet the four criteria for prisoner of war status would disqualify irregular armed forces from the generic “category of armed forces.”²³ It concludes that “all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.”²⁴ Particular emphasis is placed on organized armed groups “belonging to a party to the conflict” at a minimum in a *de facto* sense. In order for an organized armed group to be connected to a party to the conflict, “it appears essential that it conduct hostilities on behalf and with the agreement of that party.”²⁵

If the organized armed group does not “belong to a party to the conflict” in an international armed conflict, then the Interpretive Guidance considers its members to be “civilians” under Additional Protocol I, the Hague Regulations, or the Geneva Conventions.²⁶ Surprisingly, the Interpretive Guidance appears to adopt this view regardless of whether those

22. *Interpretive Guidance*, *supra* note 1, at 21.

23. *Id.* at 22.

24. *Id.*

25. *Id.* at 23.

26. *Id.* (evaluating the concept under Additional Protocol I, *supra* note 2; Hague Convention, Regulations Concerning the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, U.N.T.S. 539 [hereinafter Hague Regulations]; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention No. III]; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. [hereinafter Geneva Convention No. IV]).

persons are performing a combat function or wearing uniforms. While they are viewed as civilians for the purposes of the international armed conflict,²⁷ the Interpretive Guidance does go on to state that “[w]hether the individuals are civilians or members of the armed forces of a party to the conflict would have to be determined under IHL governing non-international armed conflict.”²⁸ The fact that the Interpretive Guidance considers these members of organized armed groups to be civilians during an ongoing international armed conflict and potentially members of the armed forces of a party to non-international armed conflict at the same time is just one of the areas where a lack of clarity creates confusion.

However, while the Interpretive Guidance has a broad definition of what constitutes armed forces it also makes a significant distinction between regular armed forces of the State and “irregular armed forces” such as militias, volunteer corps, or resistance movements belonging to a party to the conflict. For regular armed forces, because “membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment,”²⁹ persons belonging to those forces “are not civilians, regardless of their individual conduct or the function they assume within armed forces.”³⁰ This also applies where “police, border guards, or similar uniformed forces are incorporated into State armed forces.”³¹ Significantly, the Interpretive Guidance suggests that membership in irregular armed forces “generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.”³² The emphasis on “domestic law” to define the international standard for membership in an armed force is particularly problematic, setting the scene for organized armed groups to be treated in a different

27. *Interpretive Guidance*, *supra* note 1, at 23.

28. *Id.* at 24; *see also id.* at 23 n.24 (what is unstated in the Study is that the Israeli court also describes these civilians as “unlawful combatants”) (relying on the *Targeted Killings* case, HCJ 769/02 Pub. Comm. Against Torture in Israel v. Israel [2005] ¶ 26).

29. *Interpretive Guidance*, *supra* note 1, at 25.

30. *Id.*

31. *Id.*

32. *Id.*

and, as it turns out, more advantageous manner than State armed forces. Members of militias, volunteer corps, and organized resistance movements are treated this way regardless of the fact that they may qualify for lawful combatant status by meeting the criteria established in Geneva Convention III.³³

The treatment of militia, volunteer corps, and organized armed groups in the Interpretive Guidance appears to be different than the approach adopted in the ICRC's own 2005 Customary International Law Study. Rule 4 of that study states: "The armed forces of a party to the 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."³⁴ The ICRC took the view that based on the Hague Regulations, "where militia or volunteer corps (so called 'irregular' armed forces) constitute the army, or form part of it, they are also included under the denomination 'army.'³⁵ Further, the Customary International Law Study indicates that "[t]he definition contained in Additional Protocol I does not distinguish between the regular armed forces and other armed groups or units, but defines all armed forces, groups and units . . . as armed forces of that party."³⁶ The Study concludes that "all persons who fight in the name of a party to a conflict . . . are combatants."³⁷ It also indicates that "the definition in Article 43 of Additional Protocol I is now generally applied to all forms of armed groups . . . to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces."³⁸

It appears that the Interpretive Guidance and the Customary International Law Study take quite different approaches towards the composition of armed forces in international armed conflict. The treatment of regular and irregular armed forces as part of the armed forces as a whole rather than as separate categories provides an approach which simpli-

33. Geneva Convention III, *supra* note 26, arts. 4(A)(1), (2).

34. *Customary International Law Study*, *supra* note 12, at 14.

35. *Id.* at 15.

36. *Id.*

37. *Id.* The term "combatant" is used here in a generic sense. *See id.* at 3.

38. *Id.* at 16.

fies the targeting criteria to be applied by participants in armed conflict.

With respect to the *levee en masse*, the Interpretive Guidance indicates such inhabitants of a non-occupied territory are “excluded from the civilian population,” but “lack sufficient organization to qualify as members of the armed forces.”³⁹ Thus, they appear to have a unique status, being neither civilians nor members of the armed forces. Further, the Interpretive Guidance does not state on what basis members of the *levee en masse* can be targeted as there is no indication that functional criteria must be used. This provides a second example of where the Interpretive Guidance lacks clarity and precision in its analysis of the direct participation in hostilities issue. All other persons acting on a spontaneous, sporadic, or unorganized basis are considered to be civilians.⁴⁰

2. *Non-International Armed Conflict*

The treatment which the Interpretive Guidance gives to non-international armed conflict is particularly instructive for two reasons. First, it is the predominant form of warfare. Second, the Interpretive Guidance has linked membership in irregular armed groups during international armed conflict to the test regarding functional criteria which it adopts for organized armed groups in internal armed conflict. In its assessment of the existing treaty law the Interpretive Guidance participants were confronted with a challenge in interpreting what was meant by “armed forces” in common article 3 to the Geneva Conventions and Additional Protocol II.⁴¹ The former

39. See *Interpretive Guidance*, *supra* note 1, at 25. The traditional *levee en masse* may actually have been much more closely associated with irregular armed forces and it even appears to be regulated by domestic law. See J.M. SPAIGHT, *WAR RIGHTS ON LAND* 42 (1911) (noting that the *levee en masse* of 1870 Franco-Prussian War consisted of two groups: National Guards of the Second Levy, who were men under forty who had bought freedom from service in the regular army, and Franc-tireurs, who were further divided into two types—those authorized by the Government who wore uniforms, and others who wore a badge “invisible at a distance and easily removable”).

40. *Interpretive Guidance*, *supra* note 1, at 25.

41. See LIESBETH ZEGVELD, *THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW* 134 (2002) (“The confusion surrounding the concept of armed opposition groups is illustrated by the multifarious terminology which international bodies use in denoting them. Apart from the phrase ‘armed opposition groups’, it includes ‘insurgents’, ‘rebels’, ‘ter-

provisions refer generically to “members of armed forces” while the latter makes reference to “armed forces,” “dissident armed forces,” and “other organized armed groups.” The choice made by the ICRC was to divide the categories of armed forces into “State armed forces” and “organized armed groups” with such latter armed groups including the “dissident armed forces” and “other armed groups,”⁴² referred to in Additional Protocol II. A conscious decision was made to divide the armed forces of parties to the conflict into two separate categories and then to treat each of these groups differently. As a result, opposing forces in non-international armed conflict (i.e., State armed forces and organized armed groups) have significantly different criteria applied as to when membership is established in those armed forces. This, in turn, results in the application of different targeting criteria.

This interpretation of the treaty law mirrors the distinction the Interpretive Guidance makes between State armed forces and organized armed groups in international armed conflicts. Again, it is a difference that is based on the view that membership in State armed forces is generally defined by domestic law and by the wearing of uniforms and distinctive signs. The distinction between regular armed forces and other organized armed groups is extended to irregular State armed forces (militia, volunteer, or paramilitary groups) since membership in such groups “generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict.”⁴³ A similar approach is taken towards “organized armed groups,” although in respect of dissident armed forces their membership is governed in the same way as State armed forces “[a]t least to the extent, and for as long as they remain organized under the structures of State armed forces to which they formerly belonged”⁴⁴ What the Interpretive Guidance does not do is explain at what point, or on what basis, dissident armed forces would no longer fall under the same structures as State armed forces.

rorists’, ‘subversive groups’, ‘guerrillas’, ‘criminals’, ‘non-governmental groups’, ‘movements’, and ‘clans’.”).

42. See *Interpretive Guidance*, *supra* note 1, at 30–32.

43. *Id.* at 31.

44. *Id.* at 32.

Further, a lack of consistency is evident where organized armed groups are stated to consist of “both dissident armed forces and other organized armed groups.”⁴⁵ It is then indicated that membership in an organized armed group must depend on the performance of a continuous combat function.⁴⁶ As with international armed conflict, civilians are those “who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis.”⁴⁷

The difference between “regular” State armed forces and “organized armed groups,” whether State or non-State, is not limited to questions of domestic law provisions or the wearing of uniforms. The Interpretive Guidance adopts a further basis for distinction: the “function” criterion, or what is termed as the “continuous combat function.” It is to that concept that the analysis will now turn.

B. *Continuous Combat Function*

After emphasizing its position that membership in “irregularly constituted armed groups” has no basis in domestic law and is not “consistently expressed through uniforms, fixed distinctive signs, or identification cards,” the Interpretive Guidance concludes that “the concept of organized armed group refers to non-State armed forces in a strictly functional sense.”⁴⁸ This conclusion is reached on the basis that integration in such groups is rarely formalized “other than taking up a certain function for the group.”⁴⁹ The performance of this function is directly tied to direct participation in hostilities.⁵⁰

The type of function performed must be continuous. The concept of a continuous combat function is a term which is not found in treaty law. Indeed, it was created in discussions of the expert group. Membership in an organized armed group must correspond to the function “exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.”⁵¹ The Interpretive Guidance indicates that a continuous combat function may be

45. *Id.* at 31.

46. *Id.* at 33.

47. *Id.* at 35.

48. *Id.* at 33.

49. *Id.* at 32.

50. *Id.* at 33, 69.

51. *Id.* at 33.

“openly expressed through the carrying of uniforms, distinctive signs or certain weapons”⁵² but is silent on whether the wearing of a uniform is, as for regular State armed forces, reflective of integration into the membership of an organized armed group. The exercise of a continuous combat function requires such integration. Examples of direct participation include “the preparation, execution, or command of acts or operations amounting to direct participation in hostilities.”⁵³ The Interpretive Guidance also provides examples of activities that do not constitute such a combat function, including those of recruiters, trainers, financiers, and propagandists. While such activity may continuously contribute to the general war effort, it is not viewed as a continuous combat function. These persons are categorized as civilians.⁵⁴

As will be discussed in the context of Improvised Explosive Device (IED) cells, more controversial is the inclusion of individuals who purchase, smuggle, manufacture, and maintain weapons and other equipment “outside specific military operations” in the category of civilians. Similarly, anyone who collects intelligence other than of a tactical nature would not be considered to be a member of an organized armed group under the Guidance.⁵⁵ The Interpretive Guidance suggests these civilians cannot be directly targeted even though they “may accompany organized armed groups and provide substantial support to a party to the conflict.”⁵⁶ Persons assuming

52. *Id.* at 35.

53. *Id.* at 34.

54. *But see* MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 252 (1982) (where military operations, but not “military operations preparatory for an attack” for the purposes of Additional Protocol I, are suggested to include “recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda”).

55. *Interpretive Guidance*, *supra* note 1, at 34–35. Support for the view that only the strategic level analysis of intelligence is not direct participation in hostilities can be found in Michael Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 *CHI. J. INT’L L.* 511, 534 (2004).

56. *Interpretive Guidance*, *supra* note 1, at 35.

this supporting function are equated to private contractors and civilian employees accompanying State armed forces.⁵⁷

In respect of international armed conflict, the Interpretive Guidance treats contractors and civilian employees of a party to the conflict as “civilians” unless they have been incorporated into the armed forces of a party to the conflict by means of a formal process under national law or by *de facto* being assigned a continuous combat function.⁵⁸ In that case they would become members of “an organized armed force, group or unit under a command responsible to a party to the conflict.”⁵⁹ The question remains whether those civilians incorporated by a formal process into the armed forces would be considered to be members of an organized armed group or State armed forces. Again the language of the Interpretive Guidance is not clear, leaving its provisions open to varying interpretations although such a division is likely what is intended.

Understanding the meaning of continuous combat function and the impact which that term has in distinguishing between members of regular and irregular armed forces requires an analysis of the Interpretive Guidance approach towards defining what constitutes direct participation in hostilities. The different criteria for membership in an organized armed group are not only distinguished by function, but also by the narrow interpretation given to direct participation. The Interpretive Guidance indicates “the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”⁶⁰

C. *Direct Participation in Hostilities*

There are three cumulative criteria established to meet the requirement of direct participation in hostilities: threshold of harm, direct causation, and belligerent nexus. The threshold of harm test is met “by causing harm of a specifically mili-

57. *Id.* at 34.

58. *Id.* at 39.

59. *Id.*

60. *Id.* at 33; *see also id.* at 69 (“[T]he latter concept [continuous combat function] is intrinsically linked to the concept of direct participation in hostilities.”).

tary nature or by inflicting death, injury, or destruction on persons or objects protected from direct attack.”⁶¹ The materialization of the harm is based on an objective likelihood or a threshold of harm “which may reasonably be expected to result from an act in the prevailing circumstances.”⁶²

The Interpretive Guidance significantly narrows activities that might constitute direct participation in hostilities based on the requirement of a direct causal link between the specific act and the likelihood of harm. It does this by introducing the concept of “one causal step.”⁶³ Anything that simply builds up the capacity of a party to inflict harm “is excluded from the concept of direct participation in hostilities.”⁶⁴ The Interpretive Guidance excludes the production and transport of weapons and equipment unless that act is carried out as an integral part of a specific military operation specifically designed to directly cross the threshold of harm.

The limited scope of the ICRC’s causal link criterion is highlighted by reference to IED production. An uninterrupted causal chain of events between the production of the IED and the application of violence is insufficient. The Interpretive Guidance states definitively that “the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm . . . but, unlike the planting and detonation of that device, do not cause that harm directly.”⁶⁵ This approach limits action to deal with such attacks to a reactive posture focused on “acts” rather than on the capacity of an opponent to plan and attack in the future. The initiative is therefore surrendered to the enemy force. There is also no discussion of the fact that those assembling and storing the IEDs may be operating within the command structure of the organized armed group. The use of IEDs represents one of the greatest threats to both civilians and security forces in contemporary conflicts such as Afghanistan and Iraq.⁶⁶ A

61. *Id.* at 47.

62. *Id.*

63. *Id.* at 53.

64. *Id.*

65. *Id.* at 54.

66. See CBC News, *Kandahar Hospital Sees Rise in IED Injuries*, Sept. 25, 2009, available at <http://www.cbc.ca/world/story/2009/09/25/kandahar-ied-injuries-on-rise.html> (last visited Feb. 12, 2010) (“About 70 per cent of

failure to properly address this challenge places both groups at risk from a particularly perfidious means of warfare.

The IED example is representative of another trend in the Interpretive Guidance: limiting actions that might constitute direct participation to the tactical level. Examples of acts that constitute an “integral part of a concrete and co-ordinated tactical operation that directly causes harm” include identifying and marking targets, the analysis and transmission of tactical intelligence, and instruction and assistance given to troops executing a specific military operation.⁶⁷ This tactical emphasis is also reflected in the discussion of common article 3 of the Geneva Conventions where it is suggested that civilians comprise those individuals “who do not bear arms” on behalf of a party to the conflict.⁶⁸

The final criterion is the belligerent nexus, where an act must not only be linked to the first two criteria, but also be specifically designed to do so in support of a party to the conflict and to the detriment of another party to the conflict. This element seeks to separate violence used in self-defense and in enforcing law and order as part of governance from that associated with the conduct of hostilities. As the Interpretive Guidance notes, civil unrest, inter-civilian violence, and the commission of violent crimes would not necessarily be part of the conflict.⁶⁹

The narrow definition of direct participation in hostilities found in the Interpretive Guidance impacts directly on the targeting of both civilian participants and members of organized armed groups. Since the continuous combat function test is directly linked to membership in an organized armed group, a narrow concept of direct participation restricts membership in that group and expands the number of persons ac-

people brought to the Role 3 hospital for treatment were the victims of IEDs, according to Col. Danielle Savard. That’s an increase from last year, she said, when about 45 per cent of injuries were IED-related. Savard said most of the patients at the facility are now civilians from the Kandahar area . . .”).

67. *Interpretive Guidance*, *supra* note 1, at 54-55.

68. *Id.* at 28-29.

69. *Id.* at 63 (providing an example of where such violence could be part of the conflict as being “where inter-civilian 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”).

companying the armed force or closely connected to it that cannot be targeted.

D. *Duration of Involvement*

The period during which a person can be targeted is dealt with in the Interpretive Guidance by reference to two separate concepts. First, it addresses the question of when direct participation in hostilities begins and ends for civilians in the sense of a deployment to and return from the place where such participation occurs. The second concept more generally relates to the temporal scope of the loss of protection for regular armed forces, organized armed groups, and civilians. In focusing on civilians, the Interpretive Guidance restricts the beginning and end of direct participation to the immediate execution phase, including measures preparatory to the execution of the act as well as the deployment and return of the civilians involved. Again the Interpretive Guidance embraces a tactical focus in its assessment of direct participation, indicating that the “preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities.”⁷⁰ The link between this tactical focus and bearing of arms is further reflected in the example given that by laying down, storing, or hiding weapons or other equipment used and resuming activities separate from the deployment, direct participation ceases.⁷¹ Similarly, emphasis is placed on activities related to the carrying of weapons. An example provided of “direct” participation is “the loading of a gun.”⁷²

There is no reference to the individual involved being engaged in the planning and execution of the next attack or series of attacks (i.e. the campaign) far from the area of operations and whether that would constitute a continuation of involvement or the commencement of a separate “act” of direct participation. The Interpretive Guidance does not reconcile this approach with the position earlier suggested that persons whose continuous function involves “the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat

70. *Id.* at 66.

71. *Id.* at 67.

72. *Id.* at 67 n.182.

function.”⁷³ It appears that either part-time planners or those involved at the strategic or operational levels of war carrying out campaign planning might not be viewed as assuming a continuous combat function. Planning for future attacks can, and often does, occur far from the area of operations.

The Interpretive Guidance outlines three separate standards for the loss of protection as a civilian. For regular armed forces in international and non-international armed conflict, that loss is connected to membership, such as their recruitment, incorporation, discharge, or retirement under domestic law.⁷⁴ The loss of protection for civilians is linked to the wording in article 51(3) of Additional Protocol I and article 13(3) of Additional Protocol II, where it is stated that civilians enjoy protection “unless and for such time” as they take a direct part in hostilities. However, another new concept is introduced, described as the “revolving door” principle. Presumably in anticipation of criticism, the Interpretive Guidance specifically, and somewhat defensively, indicates the principle is “not a malfunction of IHL.”⁷⁵ The theory put forward in the Interpretive Guidance is that direct participation only relates to individual acts, so that civilian protection is restored to the actor each time his or her engagement ends.

What will likely be particularly controversial is the lack of clear guidance on the number of times a civilian can walk back through the “revolving door,” although it is indicated that at some point, when individuals go beyond spontaneous, sporadic, or unorganized direct participation, they become members of an organized armed group. At the same time, it is suggested that a civilian can go through the revolving door on a “persistently recurring basis.”⁷⁶ This must be compared to membership in an organized armed group, which begins when a civilian “starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.”⁷⁷ It is not evident how easily the concepts of “continuous combat function” and a “persistently recurrent basis” can be reconciled either by individuals tasked with con-

73. *Id.* at 34.

74. *Id.* at 69.

75. *Id.* at 70.

76. *Id.* at 44.

77. *Id.* at 72.

ducting operations or by mechanisms of accountability such as courts.

Turning now to the question of how well the Interpretive Guidance provides clear guidance on when persons can be targeted, the following two charts provide a summary of how participants are categorized and the corresponding indicia of membership and duration of hostilities, with appropriate references to the Guidance in parentheses. As these charts reflect the Interpretive Guidance sets out a complex scheme for categorizing participants in hostilities.

The membership criteria for regular and irregular armed forces are different, as are the standards by which their duration of involvement is assessed and the time during which they are considered valid military targets. The question must be asked whether these categories of participants and the different tests impacting targeting can be translated into a format by which soldiers can make split-second decisions regarding the use of deadly force. These charts do not suggest the Interpretive Guidance has provided that level of clarity, or the necessary practical and credible guidance by which participants in hostilities could effectively identify and engage their adversaries. This conclusion is further reinforced when the Interpretive Guidance is assessed against the existing law and how wars are fought in reality.

IV. THE CHALLENGE

In order to understand the challenge presented in attempting to interpret the meaning of direct participation in hostilities, it is important to set out the existing law concerning the categorization of participants in hostilities and to explore some of the unique factors that appear to have influenced the ICRC effort to identify who can be targeted and when. Such influences include the impact of Just War theory, the organization of armed groups engaged in irregular warfare, and the need to apply existing law in the context of insurgencies and internal armed conflicts.

A. *The Law and Contemporary Conflict*

One of the most significant challenges in attempting to explain who can be targeted in armed conflict is the state of the existing “black letter” law and the degree of clarity it

International Armed Conflict		Targeting Criteria	
Category	Membership/Activity	Duration of Involvement	
Armed Forces Belonging to a Party to a Conflict	Regular armed forces of the State (p. 25) (including police, border guards, or similar uniformed forces incorporated into State armed forces)	Individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment (p. 25)	As long as a member of Regular armed forces of the State (p.69)
	Irregular armed forces (organized armed groups) (p. 22) (militia, volunteer corps, and resistance movements)	Direct Participation in Hostilities demonstrated by performance of a continuous combat function (p. 25)	As long as performs a continuous combat function. (p. 72)
Neither a member of an Armed Force nor a Civilian	Contractors and employees who are incorporated into the armed forces of a party to the conflict (p. 39)	Criteria are the same as for regular armed forces of the State (formal procedure under national law) (p. 39)	As long as incorporated into Regular armed forces of the State (p. 69)
	Levee en masse (p. 25)	Direct Participation in Hostilities demonstrated by performance of a continuous combat function (p. 39)	As long as performs a continuous combat function (p. 72)
Civilians		Inhabitants of non-occupied territory who spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect laws and customs of war (p. 25)	Not addressed
	Organized Armed Groups which do not belong to a Party to the Conflict (pp. 23-24)	Direct Participation in Hostilities as individual civilians (p. 24)	As long as and for such time as they directly participate in hostilities. Limited to periods of execution of act, deployment and return. (pp. 67-68) Eligible for the "revolving door" of civilian protection. (pp. 72-73)
	Organized armed group engaged in non-international armed conflict (p. 24)	Direct Participation in Hostilities demonstrated by performance of a continuous combat function (p. 24)	As long as performs a continuous combat function.
Private contractors and employees not incorporated into the regular armed forces of the state (p. 38)		Direct Participation in Hostilities (p. 39)	As long as and for such time as they directly participate in hostilities. Limited to periods of execution of act, deployment, and return. (pp. 67-68) Eligible for the "revolving door" of civilian protection. (pp. 72-73)
	All other persons who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis (p. 25)	Direct Participation in Hostilities	As long as and for such time as they directly participate in hostilities. Limited to periods of execution of act, deployment, and return. (pp. 67-68) Eligible for the "revolving door" of civilian protection. (pp. 72-73)

Non-International Armed Conflict		Targeting Criteria	
Group/Category		Membership/Activity	Duration of Involvement
Armed Forces Belonging to a Party to a Conflict	State Armed Forces (p. 31) (including police, border guards, or similar uniformed forces incorporated into State armed forces)	Individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment (p. 31)	As long as a member of State armed forces (p. 69)
	Contractors and employees who are incorporated into the armed forces of a party to the conflict (p. 39)	Same as for regular armed forces of the State (p. 39)	As long as incorporated into Regular armed forces of the State (p.69)
	Organized Armed Groups (p. 31)	<p>Incorporated into an organized armed group (p. 38)</p> <p>Dissident Armed Forces (p. 32)</p> <p>Other Armed Groups (pp. 31-32)</p>	<p>Direct Participation in Hostilities demonstrated by performance of a continuous combat function (p. 39)</p> <p>Same as State armed forces as long as they remain organized under the same "structures" (p. 32)</p> <p>Direct Participation in Hostilities demonstrated by performance of a continuous combat function (p. 33)</p>
Civilians	Private contractors and civilians not incorporated into the regular armed forces of the state (p. 40)	Direct Participation in Hostilities (p. 40)	As long as and for such time as they directly participate in hostilities. Limited to periods of execution of act, deployment, and return. (pp. 67-68) Eligible for the "revolving door" of civilian protection. (pp. 72-73)
	All other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis (p. 34)	Direct Participation in Hostilities (p. 34)	As long as and for such time as they directly participate in hostilities. Limited to periods of execution of act, deployment, and return. (pp. 67-68) Eligible for the "revolving door" of civilian protection. (pp. 72-73)

brings to the contemporary debate. Certainly, Additional Protocol I appears to adopt a bright line interpretation that establishes two privileged classes: combatants and civilians. A strict reading of article 50(1) of that Protocol suggests that anyone who does not qualify as a “lawful” combatant is a civilian. However, adopting this interpretation at face value creates a number of significant challenges. First, it ignores the rich history and customary legal status of unlawful combatants/belligerents.⁷⁸ Second, it does not necessarily enjoy widespread support among legal scholars.⁷⁹ Third, a careful reading of Additional Protocol I reflects a much more nuanced approach towards describing participants in warfare, referring to them at one point generically as “[a]ny person who has taken part in hostilities” when setting out the protections available to captured fighters who do not qualify for prisoner of war status rather than as combatants or civilians.⁸⁰ Similarly, it can be argued there are five classes of participants who fall within Additional Protocol I: lawful combatants under article 43 of Additional Protocol I; otherwise lawful combatants who fall within

78. See Lester Nunick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT’L L. 563 (1946) [providing an outline of historical precedents of unlawful combatants from wars in the late 19th Century (in Mexico, the United States Civil War, the Franco-German War, and the Philippines Insurrection) and the 20th Century (the Boer War and World War II)]. See also The Nuremberg Tribunal Case, The Hostages Case, Trials of War Criminals (Washington: Government Printing Office 1950), where the court refers to members of armed resistance groups as “unlawful”:

It is evident also that a few partisan bands met the requirements of lawful belligerency. The bands, however, with which we are dealing in this case, were not shown by satisfactory evidence to have met the requirements. This means, of course, that captured members of these *unlawful* groups were not entitled to be treated as prisoners of war.

(emphasis added). See also Richard R. Baxter, *So-called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323 (1951) (providing a definition of the term “unprivileged belligerent” as “persons who are not entitled to treatment as either peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949”). This is the seminal article on “unprivileged belligerency,” published immediately after the development of the 1949 Geneva Conventions.

79. See, e.g., DINSTEIN, *supra* note 10, at 29–32 (discussing the status of unlawful combatants).

80. See Additional Protocol I, *supra* note 2, art. 45(3) (emphasis added).

article 44(4); members of organized armed groups who are not lawful combatants under article 43; civilians who take a direct part in hostilities; and uninvolved civilians.⁸¹

Classifying all participants as civilians because they do not qualify as lawful combatants under Additional Protocol I can place individuals participating in conflict and even organized armed groups under civilian status protection. Indeed, the Interpretive Guidance categorizes organized armed groups who do not belong to a party to the conflict in international armed conflicts as civilians.⁸² Such an approach has the potential to significantly erode the validity of civilian status as a means of protecting those not involved in the conflict. This is particularly evident in the context of “small” or guerrilla wars.

Described by one author as “primitive warfare,” guerrilla wars are marked by ambush, raid, and occasional face-to-face battle.⁸³ Such warfare has continued through the ancient, medieval, imperialist, post-World War II revolutionary, and Cold War periods up to the present day.⁸⁴ It is a method of warfare used by regular armed forces as well as groups fighting against occupying forces in international armed conflict. It is often the predominant form of warfare in internal conflicts ranging from civil wars to groups operating on the edge of banditry and brigandage.⁸⁵

81. See Kenneth Watkin, *21st Century Conflict and International Humanitarian Law: Status Quo or Change?*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 265, 286 (Michael Schmitt & Jelena Pejic eds., 2007) (noting that, “[a]long this continuum, the second, third and fourth categories could be viewed as ‘unlawful combatants’ rather than simply ‘civilians’”).

82. *Interpretive Guidance*, *supra* note 1, at 23–24.

83. AZAR GAT, *WAR IN HUMAN CIVILIZATION* 116–117 (2006); see also WALTER LAQUER, *GUERRILLA WARFARE: A HISTORICAL AND CRITICAL STUDY* xvi (2006) (“The tactics of guerrilla warfare are not very complicated, nor are they shrouded in mystery—they have been more or less the same, with slight variations, since time immemorial. Typical guerrilla operations include harassment of the enemy, evasion of decisive battles, cutting lines of communications, carrying out surprise attacks.”).

84. For histories on guerrilla warfare, see generally *id.*; IAN F. W. BECKETT, *MODERN INSURGENCIES AND COUNTER-INSURGENCIES: GUERRILLAS AND THEIR OPPONENTS SINCE 1750* (2001); JOHN ELLIS, *FROM THE BARREL OF A GUN: A HISTORY OF GUERRILLA, REVOLUTIONARY, AND COUNTER-REVOLUTIONARY WARFARE, FROM ROMANS TO THE PRESENT* (1995).

85. See BECKETT, *supra* note 84, at 2 (“It is usually assumed that banditry is a ‘pre-political’ phenomenon and, therefore, unlikely to lead to any sus-

As has been noted, the term commonly used to describe such conflict is a “war among the people.” While not all such warfare is conducted in close proximity to civilians, out of uniform, or even independently of a conventional campaign, it can be an enduring part of such conflict, which makes applying the principle of distinction even more challenging. Much of the Interpretive Guidance appears focused on non-international armed conflict and the possible integration of participants in conflict within the civilian population. However, this type of warfare is actually not new. The reality that those participating in guerrilla warfare hide among the people does not justify creating criteria that in effect reward those who choose this means of warfare.

It is not simply a matter, as the Interpretive Guidance states, of “mak[ing] it more difficult for the opposing armed forces or organized armed group to respond effectively.”⁸⁶ Adopting a narrow concept of what constitutes direct participation in hostilities in order to limit the effects of combat on a civilian population, particularly in an era where intelligence can be exploited to separate participants from non-participants, does not appear necessary or even effective. Attacks against insurgents, even in buildup areas, cannot and should not all be categorized as “erroneous or arbitrary attack[s],” as appears to be suggested by the Interpretive Guidance.⁸⁷ It is difficult to see how allowing those providing direct support within an organized armed group to be protected by civilian status will actually operate to limit the conflict. Indeed, a valid argument can be made that offering this form of impunity can operate to prolong conflict.

B. *Just War Theory*

The question of who can participate in warfare has long troubled international lawyers. The notion of a privileged class of warriors can be traced back to the Codes of Chivalry in

tained or organized campaign of national resistance. In some situations, however, in conjunction with peasant or tribal social protest, banditry might assume a revolutionary aspect, albeit limited to a particular region.”).

86. See *Interpretive Guidance*, *supra* note 1, at 71.

87. *Id.*

the Middle Ages.⁸⁸ It continued as a part of Just War theory, where fighting for the “right authority,” the State, was one of the defining principles of belligerent or combatant status.⁸⁹ Under both the 1907 Hague Regulations and the Geneva Conventions, it is lawful belligerents who are provided prisoner of war status and combatant immunity. Other participants in armed conflict act unlawfully and therefore are subject to the sanction of the domestic law of a capturing State. The long-standing historical resistance to recognizing irregularly constituted armed groups as legitimate was reflected in the post-World War II debate regarding the status of organized resistance movements. Despite the Allied powers having encouraged and supported such activity during the Second World War, the Geneva Conventions required such movements to meet the six conditions of combatancy established for members of militia and other volunteer corps: being organized, being under responsible command, belonging to a party to the conflict, wearing a fixed distinctive sign, carrying weapons openly, and complying with the customs and law of war.⁹⁰

The treaty law reflects this State bias, with an emphasis being placed on the wearing of uniforms or some other distinctive sign and the carrying of weapons. Even under the more relaxed criteria found in Additional Protocol I, carrying arms openly for a period of time is required in order to distinguish combatants from civilians.⁹¹ These criteria have been integrally linked to the issue of legitimacy and operating on be-

88. See Colonel G.I.A.D. Draper, *Combatant Status: An Historical Perspective*, 11 MIL. L. & L. OF WAR REV. 135, 137 (1972) (arguing that the medieval “Law of Arms” governed certain classes of Christian men and that war-making was not open to the non-military class).

89. See Roda Mushkat, *Who May Wage War? An Examination of an Old/New Question*, 2 AM. U. J. INT’L L. & POL’Y 97, 101 (1987) (arguing that when a legitimate authority justifies a war, it creates a presupposition for that authority’s populace and soldiers that the proper procedures have been followed, thereby obligating them to fight).

90. Geneva Convention No. III, *supra* note 26, art. 4(A)(2); see also DINSTEIN, *supra* note 10, at 40-41 (suggesting a seventh condition for POW status: non-allegiance to the Detaining Power).

91. See Additional Protocol I, *supra* note 2, art. 44(3) (requiring a combatant to carry his arms openly “[d]uring each military engagement” and “[d]uring such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack”).

half of the “right authority.” There has long been a preference for armed forces and other armed groups to organize themselves and dress like regular armed forces in order to be legitimate participants in the conduct of warfare. This reality was evident from the first attempts at regulating armed conflict at the beginning of the 20th century: powerful States saw service in regular armed forces as “not only a national, but a humane duty; for the more the war is conducted on both sides by regular and disciplined troops the less will humanity suffer.”⁹² It is also reflected in the Additional Protocol I, article 44(7), where it is indicated that the more relaxed criteria regarding combatancy in that Protocol “[are] not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.” As the ICRC Commentary notes, while members of regular armed forces were not precluded from applying the more relaxed rules found in article 44, those rules were “primarily aimed at guerrilla fighters.”⁹³

Additional Protocol I expanded the notion of combatant. Even if members of an armed group could not meet the conditions set out for militia, volunteer corps, or organized resistance movements, combatant status was still provided if arms were carried openly during each military engagement and while “engaged in a military deployment preceding the launching of an attack,” regardless of whether such members met the visible signs of being part of an armed force.⁹⁴ It has been this very loosening of the criteria for combatancy which has provided a stumbling block in attaining universal acceptance of the Protocol. The idea of legitimizing non-State forces or forces which do not wear uniforms like traditional regular armed forces has been seen as exceedingly problematic by a number of States, particularly since Additional Protocol I also sought to extend the provisions of international humanitarian law applicable to international armed conflict to “wars of national liberation.” Just War theory and the concept of “right

92. Spaight, *supra* note 39, at 48 (quoting M. Rolin-Jacquemyns, whose phrasing was adopted by Baron Jomini as “expressing his opinion exactly”).

93. ICRC, *Additional Protocol I Commentary* ¶ 1723, June 8, 1977, available at <http://www.icrc.org/ihl.nsf/COM/470-750054?OpenDocument>.

94. Additional Protocol I, *supra* note 2, art. 44(3)(b).

authority” emphasize that States are the only legitimate participants in armed conflict. This view is even more forcefully established in respect of non-international armed conflict, where participation on behalf of insurgent groups is seen as being contrary to the domestic law of the State. Despite attempts to interpret international humanitarian law (*jus in bello*) independently of *jus ad bellum* (recourse to war) principles, this is one area where the latter still has a significant impact on the interpretation of the law as it affects participants in hostilities.⁹⁵

Given this reality, the question remains as to how well the Interpretive Guidance deals with this issue. The Interpretive Guidance makes a significant effort to separate itself from the Just War issue of legitimacy. It minimizes use of the term “combatant,” with references to the term largely made in the context of combatant privilege, and it does not overtly adopt the approach taken in the Customary International Law Study of using the term combatant in a generic sense rather than a legal one.⁹⁶ The introduction to the Interpretive Guidance indicates that the ICRC looks at direct participation in hostilities only for the purposes of the conduct of hostilities and “[i]ts conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty.”⁹⁷

Had the ICRC stopped at stating that “all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces,”⁹⁸ the Interpretive Guidance would have been on very solid ground. This approach clearly avoids adopting a very formalistic interpretation of article 50(1) of

95. See KENNETH WATKIN, WARRIORS WITHOUT RIGHTS? COMBATANTS, UN-PRIVILEGED BELLIGERENTS, AND THE STRUGGLE OVER LEGITIMACY 13-16 (Harvard University Program on Humanitarian Policy and Conflict Research Occasional Paper Series 2005), available at <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf> (“[T]he connection between legitimate fighters and a party to a conflict provides perhaps one of the most interesting and undoubtedly controversial aspects of combatant status since it exposes a continuing link between *jus ad bellum* and *jus in bello* principles.”).

96. *Customary International Law Study*, *supra* note 12, at 3.

97. See *Interpretive Guidance*, *supra* note 1, at 11.

98. *Id.* at 22.

Additional Protocol I that lumps anyone who is not a lawful combatant into the civilian category regardless of their degree of participation in hostilities. In fact, the Interpretive Guidance acknowledges that “it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective regime afforded to the civilian population.”⁹⁹ As has been indicated, customary international law and a nuanced interpretation of Additional Protocol I support this approach. However, the Interpretive Guidance then goes on to apply significantly different criteria to “regular” armed forces than it does to organized armed groups. Those groups, which are described as “irregular armed groups,” include “militias, volunteer corps, or resistance movements.”¹⁰⁰ What the Interpretive Guidance does not do is make a distinction between those members of militias or volunteer corps forming part of the armed forces referred to in article 4A(1) and such groups referred to in article 4A(2) of the Geneva Conventions, which focuses on occupied territories. The former militia and volunteer corps have historically been aligned with regular armed forces.¹⁰¹ This provides another example of a lack of precision, and appears to be at odds with the 2005 Customary International Law study approach that sought to avoid distinguishing between regular and irregular armed forces.

The Interpretive Guidance adopts the viewpoint that all members of regular State armed forces can be targeted because such membership is regulated by domestic law. The function those personnel perform is irrelevant. It is not clear at all why domestic law should be determinative of whether a person should be able to be targeted. Further, it is not evident how someone targeting an opponent would know the domes-

99. *Id.*

100. *Id.* at 25.

101. The reference to militia and volunteer corps forming part of the armed force in article 4(A)(1) of Geneva Convention No. III was meant to reflect the Hague Land Warfare Regulations, inclusion of such groups, as “certain countries still had militias and volunteer corps which, although part of the armed forces, were quite distinct from the army as such. The mention of militias and volunteer corps was therefore maintained as it appears in the Hague Regulations, although strictly speaking it was probably not essential.” The reference to such militias and corps in article 4A(2) focused on the presence of such armed groups in occupied territory. ICRC, *Convention (III) Relative to the Treatment of Prisoners of War Commentary* 44-45, Aug. 12, 1949, available at <http://www.icrc.org/ihl.nsf/COM/375-590007?OpenDocument>.

tic legal basis upon which that person enrolled in the armed forces. Likely because of these difficulties the Interpretive Guidance falls back on the historic criteria of “uniforms, insignia, and equipment” as markers of formal integration into permanent units.¹⁰²

The Interpretive Guidance thereby creates two problems. First, it applies the criteria developed by States to reinforce that their armed forces fight for the “right authority,” a State, as the basis for targeting members of those forces. At the same time, the Interpretive Guidance indicates that the concept linked to being a “right authority,” belonging to a party to the conflict, is broader than States. Ironically, the Interpretive Guidance suggests that while the wearing of a uniform or insignia is the basis for targeting members of regular State armed forces, it does not appear they would actually have to be wearing a uniform for the attack against them to be lawful. In contrast, irregular or guerrilla forces, including those fighting on behalf of States, are targeted on the basis of criteria that may have only a limited connection, if any, to uniforms and insignia. It would have been easy to have stated that any member of an organized armed group wearing a uniform can be targeted in the same manner as regular State armed forces. Instead the Interpretive Guidance appears to view warfare as State armed forces versus the “others,” and then applies different criteria to each.

A second problem is thus created. Regular State armed forces are placed in a different and more disadvantageous position than other armed groups. The armed forces of the different parties have dramatically different rules regarding when their forces can be targeted. This may occur even if the irregular armed forces belonging to a State are operating in support of their regularly constituted counterparts. The interpretation treating militia and volunteer corps as organized armed groups even if they meet the combatancy criteria of the Geneva Conventions is somewhat surprising.¹⁰³ A cursory inspec-

102. *Interpretive Guidance*, *supra* note 1, at 25.

103. *Id.* As is set out in Geneva Convention III, art. 4.A.(1), members of militias or volunteer corps forming part of the armed force of a Party to the conflict qualify for POW status. Similarly, pursuant to art. 4.A.(2) of that Convention, members of other militia and volunteer corps and members of organized resistance movements also qualify as POWs if they meet the conditions of being under command, having a fixed distinctive recognizable sign,

tion of history establishes that States have often incorporated “irregular” armed forces into their war efforts, sometimes directly in support of conventional forces. The genesis for modern-day special forces can be found in partisans performing irregular warfare in support of conventional State forces.¹⁰⁴

It also cannot be assumed that all regular State armed forces fit a common profile, or that it will necessarily be evident when an insurgent armed group becomes a State armed force. In this respect it is not clear what standard the Interpretive Guidance would have applied to the armed forces of the Taliban regime in Afghanistan in 2001, as there has been considerable debate over whether they were the *de jure* or even *de facto* power.¹⁰⁵ The Taliban armed forces had a rudimentary military structure, including tanks, artillery, and support weapons, although it is also evident that they were not structured like a conventional armed force. As a result, “bombing fixed targets such as supply depots, vehicle repair facilities, and rear-area military installations would have little or no impact on the Taliban forces. . . .”¹⁰⁶ Finally, an organized armed group may

carrying arms openly, and conducting their operations lawfully. However, the Interpretive Guidance focuses on whether there is domestic law regulating the armed group in determining criteria for membership in the group.

104. See BECKETT, *supra* note 84, at 9, 55 (discussing the role and implications of guerilla and partisan warfare during World War II).

105. Compare W. Hays Parks, *Combatants*, 85 INT’L L. STUD. 247, 261 (2009) (“The facts on the ground and international law do not support a conclusion that the Taliban was the *de facto*, much less *de jure*, government of Afghanistan at any time from its emergence in 1994 to October 20, 2001”), with George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 894 (2002) (suggesting that the Taliban was in effective control of Afghanistan), and Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law* 23 (Am. Soc. Int’l L. Task Force on Terrorism, 2002), available at <http://www.asil.org/taskforce/goldman.pdf> (suggesting the Taliban was in effective control of Afghanistan).

106. See GARY C. SCHROEN, *FIRST IN: AN INSIDER’S ACCOUNT OF HOW THE CIA SPEARHEADED THE WAR ON TERROR IN AFGHANISTAN* 146 (2005). As a result, plans being considered in Washington for a strategic bombing campaign were viewed as problematic. See also JOHN K. COOLEY, *UNHOLY WARS* 148 (2d ed. 2000) (documenting that the Taliban, while fighting to gain control of Afghanistan in 1996, “fielded an army of 25,000 men, complete with tanks, armored vehicles and fighter aircraft; mainly old MIGs held over from captured Afghan government stocks recycled in part through Pakistan’s ISI”).

actually consist of dissident armed forces that are wearing uniforms. The potential for confusion is manifest and is compounded when the nature of organized armed groups is considered.

C. *Organization of Armed Groups*

A key consideration in ensuring that an opponent is effectively engaged while limiting the risk to uninvolved civilians is understanding how groups are organized to fight. This is a factor absent from the interpretation provided in the Interpretive Guidance. In respect of both international and non-international armed conflict, the Guidance relies on domestic law and visible insignia as indicia of membership in regular State armed forces, while for organized armed groups such membership is made dependent upon the performance of a continuous combat function. As problematic is the view that the armed forces of a party to a conflict which is not a State, or for that matter any “irregular” armed forces, are necessarily always organized differently than State armed forces.

Groups fighting State authorities include a diverse range of organizations that reflect the broad scope of potential insurgent activity. This can include conflicts at the civil war end of the spectrum down to groups also engaged in “banditry,” “narco-terrorism,” and other criminal acts. In 2006 in Iraq there were at one point 18 groups divided into three groupings in respect of their secular or tribal nature, nationalist and religious elements, and religious tendencies. Those groups reflected a wide range of professionalism, specialization, and skill. They also involved differing numbers of personnel.¹⁰⁷ Additional Protocol II recognizes that such groups can include dissident armed forces, although the status of those armed forces has not been clearly addressed in the Interpretive Guidance. Organized armed groups may be armed, dressed, and constituted in exactly the same manner as government armed forces. This is something that the Interpretive Guidance fails to address in any substantive way, beyond stating that a “continuous combat function may be openly expressed through

107. See AHMED S. HASHIM, *INSURGENCY AND COUNTER-INSURGENCY IN IRAQ* 170-76 (2006) (describing the different skill levels, functional specialization, professionalism, number of personnel, modus operandi, targeting, and longevity of the different Iraqi insurgent organizations).

the carrying of uniforms.”¹⁰⁸ Applying the test of continuous combat function in the Interpretive Guidance, a significant number of supporting personnel (logistics, intelligence, etc.) would not be valid targets. Rather, they would be considered to be civilians. A significant danger is presented to uninvolved civilians by an interpretation that would grant protected civilian status to persons who are an integral part of the combat effectiveness of an organized armed group when their regular force counterparts performing exactly the same function can be targeted. This presents an unbalanced approach which appears to be at odds with the traditional view of international humanitarian law.

In separating regular armed forces from all organized armed groups engaged in armed conflict, the Interpretive Guidance does not fully account for insurgent forces organized and dressed exactly like their State-based counterparts. Although the Interpretive Guidance recognizes that dissident armed forces may be involved in internal conflict, it does not carry through and assess exactly what that means. In reality, organized armed groups may mirror their regular force adversaries. In that situation, it is difficult to see why they should be treated any differently for the purposes of considering membership. Similarly, guerrilla or irregular forces may engage in unconventional operations, but still have the character of a regular armed force. Such forces may also be organized and operate like conventional forces,¹⁰⁹ and engage in conventional operations. The classic description of the mix of irregular and regular armed forces fighting as insurgents is provided by Mao Tse-tung: he indicates that guerrilla units may originate from the masses of the people, regular army units, local militia, the ranks of the enemy, and even bandit groups.¹¹⁰ Using a term which does not fit particularly well with the theory proposed in the Interpretive Guidance, Mao indicated that “[r]egular combatant guerrillas” are organized into platoons or

108. *Interpretive Guidance*, *supra* note 1, at 35.

109. See, e.g., BERNARD B. FALL, *STREET WITHOUT JOY* 380 (4th ed. 1964) (charting the organizational structure for the Vietnamese People’s Army infantry division, the “heavy” division, and the command in 1955).

110. MAO TSE-TUNG, *ON GUERRILLA WARFARE* 71-72 (Samuel B. Griffith trans., University of Illinois Press 2000) (1961).

companies, battalions, or regiments.¹¹¹ He even provides a Table of Organization for an independent Brigade or Division.¹¹² The Table of Organization for a guerrilla regiment suggested in *On Guerrilla Warfare* and set out below illustrates the conventional or regular nature of what the Interpretive Guidance would classify as an organized armed group:¹¹³

In this model administrative personnel are armed and integrated into the military unit. This also includes cooks and other support personnel. The Interpretive Guidance states that operating as a cook or performing another administrative role is not a combat function.¹¹⁴ In contrast, not only are cooks included in the fighting organization (i.e. not as independent contractors) in Mao's scheme, but the Notes for the Table of Organization of an independent guerrilla company indicate that "[i]f there is an insufficient number of cooks, any member of the company may be designated to prepare food."¹¹⁵ It is not clear how the Interpretive Guidance would treat fighters who are performing what it considers to be the non-combat function of cooking, since they "remain members by virtue of their continuous combat function"¹¹⁶ and only cease to be members once they "cease [] to assume such [a] function."¹¹⁷ Further, what if the cook is wearing a uniform?

111. *Id.* at 78-79 (emphasis added); see FRANK KITSON, *LOW INTENSITY OPERATIONS: SUBVERSION, INSURGENCY AND PEACEKEEPING* 40 (1971) (noting that in 1947 during the Greek Civil War, the Democratic Army was organized into battalions 200-500 strong and brigades of 1000-2000 strong; in Algeria the basic unit was a battalion of 350 men, while in Malaysia "insurgents lived and operated as companies 100 strong but within two or three years they broke up into platoons of 20-30 strong"); TODD GREENTREE, *CROSSROADS OF INTERVENTION: INSURGENCY AND COUNTERINSURGENCY LESSONS FROM CENTRAL AMERICA* 94 (2008) (noting that the Salvadoran FMLN guerrilla organization in the 1980s included "mobile forces, organized into columns, battalions, and brigades consisting of as many as 800 experienced, full-time troops capable of conducting major combat operations throughout the country.").

112. MAO TSE-TUNG, *supra* note 110, app., tbl.4.

113. *Id.* app., tbl.3.

114. *Interpretive Guidance*, *supra* note 1, at 33 n.52.

115. MAO TSE-TUNG, *supra* note 110, app., tbl.1, n.4.

116. *Interpretive Guidance*, *supra* note 1, at 71.

117. *Id.* at 72. *But see id.* at 34 (indicating that recruiters, trainers, financiers, and propagandists are not members of an organized armed group "unless their function additionally includes activities amounting to direct participation"). As a result the Guidance suggests that someone can be a member and perform a non-combat function at the same time.

TABLE OF ORGANIZATION, GUERRILLA REGIMENT

RANK	PERSONNEL	ARM
Regimental Commander	1	Pistol
Political Officer	1	Pistol
Chief of Staff	1	Pistol
Operations Section		
Operations Officer	1	Pistol
Clerks	15	
Intelligence Section		
Intelligence Officer	1	Pistol
Personnel	36	Pistols
Public-Relations Section		
Public-Relations Officer	1	Pistol
Personnel	36	Carbines
Administrative Section		
Administrative Officer	1	Pistol
Clerks	15	Pistol
Runner	1	
Transport Section		
Chief of Section	1	Pistol
Finance	1	
Traffic Manager	1	Pistol
Supply	1	
Drivers	5	
Medical Section		
Chief of Section	1	
Doctors	2	
Nurses	15	
Total, Regimental Headquarters	137	60 Pistols 36 Carbines
Three Battalions (441 each)	1323	124 Pistols 900 Rifles
TOTAL	1460	184 Pistols 936 Rifles

While it is difficult to see how, in the words of the Interpretive Guidance, the “carrying of uniforms” is indicative of a “function,”¹¹⁸ it certainly could be a visible sign of membership. Does the simple wearing of a uniform change the nature of the function being performed under the ICRC Interpretive Guidance? How would the wearing of a uniform constitute a “continuous combat function” at all? These questions highlight the problem with basing membership solely on function. If a person can switch from being a member to being a non-member based on changing functions, then the difference between members of organized armed groups and civilians claiming a “revolving door” of protection is blurred.

An argument could be made that the example provided by Mao Tse Tung is now over 70 years old, and was uniquely connected to rural-based revolutionary warfare in the 20th

118. *Id.* at 35.

century. However, his writings continue to have influence on the discourse surrounding guerrilla warfare¹¹⁹ and accurately reflect the diversity of forces that may fight against State armed forces. It has not been uncommon for non-State armed forces to wear uniforms, be organized, and in a number of ways act like regular armed forces, whether in Vietnam, Colombia, Lebanon, Rwanda, Bosnia, Kosovo, or Sri Lanka.¹²⁰ Groups that have demonstrated the significant organizational sophistication needed to develop maritime attack capabilities include “the Palestinian Hamas, the Lebanese Hezbollah, the Abu Sayaf group (ASG), the Free Aceh Movement, the Moro Islamic Liberation Front, Al Qaeda, and the Liberation Tigers of Tamil Eelam (LTTE).”¹²¹ The LTTE even developed “a state-of-the-art blue-, brown-, and green-water capability, both for support and attack operations.”¹²² Such sophistication is not reflective of a group with a low level of organization.

119. See STEVE COLL, *GHOST WARS* 116 (2004) (relating how during the Russian invasion of Afghanistan the Afghan Tajik guerrilla leader, Ahmed Shah Massoud, who was later assassinated in 2001, “had become a serious, deeply read student of Mao Zedong, Che Guevara and French revolutionary strategist Regis Debray. Following their precepts he did not try to face the Soviets and stop them”); GREENTREE, *supra* note 111, at 96 (where he assesses the conflict in El Salvador as follows: “[t]o put it in Maoist terms, the FMLN came very close during 1982 and 1983 to achieving the third phase of revolutionary warfare by threatening to defeat the ESAF in a sustained near-conventional offensive.”).

120. REX A. HUDSON, *THE SOCIOLOGY AND PSYCHOLOGY OF TERRORISM: WHO BECOMES A TERRORIST AND WHY?* 62 (1999), available at http://www.loc.gov/fr/frd/pdf-files/Soc_Psych_of_Terrorism.pdf (“This need to appear like a normal citizen would also apply to the FARC, the LTTE, the PKK, and other guerrilla organizations, whenever they use commandos to carry out urban terrorist operations. It should be noted that regular FARC, LTTE, and PKK members wear uniforms and operate in rural areas. These three groups do, however, also engage in occasional acts of urban terrorism, the LTTE more than the FARC and PKK. On those occasions, the LTTE and PKK terrorists wear civilian clothes. FARC guerrillas are more likely to wear uniforms when carrying out their acts of terrorism, such as kidnappings and murders, in small towns.”); see also *THE MANUAL OF THE LAW OF ARMED CONFLICT: UK MINISTRY OF DEFENCE* 143 n.25 (2004) (“During the Kosovo Conflict 1999, members of the Kosovo Liberation Army (KLA) were frequently depicted in the media wearing combat fatigues with the KLA patch.”).

121. Rohan Gunaratna, *The Threat to the Maritime Domain: How Real is the Terrorist Threat*, in *ARMED GROUPS: STUDIES IN NATIONAL SECURITY, COUNTERTERRORISM AND COUNTERINSURGENCY* 75, 77 (Jeffrey H. Norwitz ed., 2008).

122. *Id.*

It has been suggested that in order to win, “even a guerrilla struggle must eventually face the fact that the object of war is the destruction of the enemy. Guerrilla tactics are necessary to hold him off until one can build a *regularized army of one’s own*, but at some stage one must create such a force, and it must face the enemy in open battle.”¹²³ To do so one must build up the “organizational machinery capable of handling the training, disciplining, equipping, and strategic and tactical direction of such an army.”¹²⁴ This does not mean that all insurgent forces seek or need to look or act like regular armed forces. Contemporary insurgent groups and terrorist organizations can be organized in either a hierarchical or decentralized fashion, or can be a mixture of the two types.¹²⁵ However, it has also been noted that “you simply cannot be a wholly decentralized insurgent group and continue to exist for long or be able to carry out more than very limited operations in a limited geographical locale.”¹²⁶ Such groups may be based on clan or tribal units organized along geographical lines, and “although non-state armed groups may not wear uniforms or drill in formation, they do maintain the ability to mobilize rapidly for war and adapt their traditional tactics to fight modern foes.”¹²⁷ The development of “flatter, more linear and more organizationally networked” groups such as Al Qaeda can present significant challenges in identifying who is a member of the “organized armed group.”¹²⁸ Yet, operations in Afghanistan and Iraq demonstrate that these challenges are not insurmountable.

123. ELLIS, *supra* note 84, at 242; *see also* FALL, *supra* note 109, at 33 (In Vietnam, “[t]he guerrilla groups of 1946-1949 had transformed themselves into battalions, then into regiments, and now began to take their final shape as 10,000-man divisions.”). *But see* KRITSON, *supra* note 111, at 41 (noting that the Mao Tse-Tung approach of challenging government forces in open warfare “often backfires as it did in Greece and Algeria”).

124. ELLIS, *supra* note 84, at 242.

125. *See* HASHIM, *supra* note 107, at 154 (noting that most groups are hybrids of the two organizational types).

126. *Id.*

127. RICHARD H. SHULTZ, JR. & ANDREA J. DEW, *INSURGENTS, TERRORISTS, AND MILITIAS: THE WARRIORS OF CONTEMPORARY COMBAT* 263 (2006).

128. *See* BRUCE HOFFMAN, *INSIDE TERRORISM* 285-88 (2006) (explaining Al Qaeda’s structure and how it differs from the “pyramidal structure that typified terrorist groups of the past”).

However diverse the types of insurgent forces are, there is a commonality to fighting wars that requires an organization to consist of commanders, planners, intelligence personnel, and fighters to carry out the military action. There is also a requirement to provide logistical support. In State armed forces, the functions of those integrated as members of an armed force are reflected in the basic military structure (with division into personnel, intelligence, operations, logistics, civil-military relations, and signals). This framework for the support functions of an armed force is reflected in Ahmed Hashim's description of the five specialized cells that existed to support insurgent combatant cells in Iraq ("technical and bomb-making, logistics, suicide-bomber support or facilitator cells, reconnaissance, and operational security").¹²⁹ There is a difference between someone who controls the staffing of supplies and regularly provides such supplies in a manner which means they are an integral part of the organization, and a civilian contractor who provides supplies on an independent contractual basis.¹³⁰ The Interpretive Guidance does not adequately recognize this reality.

A serious weakness in the Interpretive Guidance's approach in respect of organized armed groups is evident in its discussion of IEDs. Although acknowledging that activities such as production, storage, purchase, or smuggling are connected through an uninterrupted causal chain of events, the Interpretive Guidance concludes such activity does not cause direct "causal" harm and therefore would not constitute direct participation in hostilities.¹³¹ This approach does not adequately address the reality of how this major threat to both civilians and security forces is organized and operates. For example in Iraq, it has been noted, "IED and suicide-bomber

129. HASHIM, *supra* note 107, at 160.

130. See Kenneth Watkin, *Humans in the Cross-hairs: Targeting and Assassination in Contemporary Armed Conflict*, in *NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 137, 153-154 (David Wippman & Matthew Evangelista eds., 2005) (outlining how the basic military staff structure (personnel, intelligence, operations, logistics, civil-military relations, and signals) can be applied in assessing direct participation in hostilities). While more challenging in respect of non-state actors, this framework provides a structured approach for separating someone providing an integral supply function from a civilian contractor.

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

cells are essentially combatant units themselves,”¹³² where the most technically skilled bomb builder “also doubles as a training instructor.”¹³³ Further, “bombers do not ‘just turn up to their target’. They need a logistical infrastructure, which consists of individuals . . . who provide everything from reconnaissance of the potential target . . . to the provision of a safe house and food, and the explosives-laden vehicle or suicide belt.”¹³⁴ In this respect IED and bombing organizations in Iraq do not appear to be significantly different from the bombing cells that operated in Algeria some 50 years ago.¹³⁵

There are documented IED cells that consist of independent operators who hire themselves out to insurgent groups.¹³⁶ What is not evident is why those operators would not be treated as a form of “mercenary” operating as part of the armed group, rather than being provided, as is suggested in the Interpretive Guidance, the automatic protection of civilian status. Again, the Interpretive Guidance treats these participants in warfare as a form of general contractor or private industrial arms producer. To limit direct participation to persons who place or detonate explosives is an artificial division of what is fundamentally a group activity. For security forces tasked with countering this threat, being told they can only legally target “foot soldiers” at the end of the causal chain is both unrealistic and dangerous, particularly for the uninvolved civilians who are often the targets of such attacks. The person who is key in planning and facilitating such deadly attacks must be a valid target as a direct participant in hostilities if the Interpretive Guidance is to resonate with an objective observer. To conclude otherwise permits the continued planning and conduct of such operations under an umbrella of immunity based on civilian status. To suggest that

132. HASHIM, *supra* note 107, at 160.

133. *Id.* at 161.

134. *Id.* at 162; *see also* JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 51 (2003) (paraphrasing Ariel Merari’s lecture on suicide bombing: “The most important factor is the organization: almost nobody does this as an individual; candidates are almost always trained. An organization provides logistics and planning”).

135. *See* ROGER TRINQUIER, MODERN WARFARE: A FRENCH VIEW OF COUNTERINSURGENCY 11-13 (Daniel Lee trans., 2006) (1961) (describing the organization of Algerian bombing cells).

136. HASHIM, *supra* note 107, at 161.

facilitators and planners integral to a bombing campaign be dealt with by law enforcement officials is very often unrealistic, particularly where the State attempting to enforce the law does not control the territory where such operations, focused on arrest and detention, would have to be conducted.¹³⁷

D. *Functional Criteria and Revolving Doors*

Another problem with the Interpretive Guidance is that it significantly alters two analytical approaches that have been applied regarding the nature of direct participation in hostilities. Those are combatant function and the concept of a revolving door of protection. In respect of combat function, the ICRC adopts a narrower interpretation of what constitutes such activity than has been accepted to date. The Interpretive Guidance approach to the concept of a revolving door of protection takes what was first used as a pejorative term and seeks to have it apply as a form of shield to allow civilians to repeatedly claim the protection associated with that status. As will be discussed, both approaches adopted in the Interpretive Guidance are problematic.

137. See, e.g., Steven R. David, *Fatal Choices: Israel's Policy of Targeted Killing*, in *DEMOCRACIES AND SMALL WARS* 135, 153 (Efraim Inbar ed., 2003) ("The Palestinian Authority is unwilling or unable to arrest the perpetrators. . ."). Cf. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel (*Targeted Killings*) [2005] ¶ 40, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (suggesting that arrest under domestic law "is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities (see §5 of *The Fourth Geneva Convention*). Of course, given the circumstances of a certain case, that possibility might not exist."); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L. L. 1, 18 (2004) ("[T]he ability to seize an individual and to bring that person to justice requires a law enforcement focus with a high level of physical control over the situation, as well as a well-developed judicial process to deal with the offender.").

1. *Functional Criteria*

As Nils Melzer, the author of the Interpretive Guidance, notes in his book *Targeted Killing in International Law*,¹³⁸ the idea of using a functional approach to determine the nature of involvement in hostilities has been suggested by the present author elsewhere¹³⁹ and was adopted in the Israeli *Targeted Killing* case.¹⁴⁰ However in both academic writing and the case law, combat function involves a much broader range of activity than has been adopted in the Interpretive Guidance. Most obviously, it includes the performance of a logistics function as an integral part of an organized armed group. As Nils Melzer indicates in his book, some participants in the Interpretive Guidance tended to favor a narrower concept of a limited “fighting members” approach, corresponding with what he terms as functional combatants. While functions such as command, actual war-fighting, logistics, and intelligence were included, the approach would not characterize the ubiquitous cook as performing a combat function.¹⁴¹ However, in the final version of the Interpretive Guidance, the actual scope of the logistics function integral to the conduct of military operations was not reflected in the concept of continuous combat function. Even the transport of weapons and equipment is considered in the Interpretive Guidance to be indirect participation in hostilities, unless carried out as an integral part of a

138. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 339-340 (2008) (discussing the functional perspective and noting the present author’s approach).

139. See Watkin, *supra* note 137, at 17 (“To the extent that civilians fulfill the same function as combatants, either in the armed forces or as part of the organization of an ‘illegitimate’ non-state actor, they are logically subject to targeting under the same provisions of international humanitarian law.”); Watkin, *supra* note 130, at 145-46 (noting that historically, as military forces became more professional, they took over the logistics and other administrative functions that had been performed by civilians, and that while initially treated as a form of military “non-combatant,” this special status “(other than for medical personnel and chaplains) did not survive the realities of 20th Century Warfare”]; *id.* at 153-154 (discussing how the functional approach can be applied to a non-state actor); see also ICRC, *supra* note 93, ¶ 1694 n.35 (referencing the function that combatants perform) (citing F.A. von der Heydte, 2 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 56 (1969)).

140. *Targeted Killings* ¶ 35 (explaining that a civilian driving ammunition to the place of its use should be considered an actor in the hostilities).

141. MELZER, *supra* note 138, at 352.

specific military operation designed to *directly cause* the required threshold of harm.¹⁴² Given the approach adopted in the Interpretive Guidance with respect to the assembly and storage of IEDs, it is clear that the role of logistics or the scope of such a function in a military sense has not been properly recognized. This is also evident when the Interpretive Guidance determines that the delivery or preparation of food for combatant forces, even at the same place and time as the fighting, would not provide a sufficient causal link to constitute direct participation.¹⁴³

The Interpretive Guidance ignores the lessons of history regarding the importance of logistics to the conduct of military operations. The role of logistics is even evident in the writings of the ancient Chinese scholar Sun Tzu.¹⁴⁴ The degree to which the Interpretive Guidance position appears to be at odds with prior ICRC statements on the issue can be found in the Commentaries to Additional Protocol I, where it is indicated that the functions of “unarmed combatants” demonstrating their combatant status include “carrying out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla forces”¹⁴⁵—though the ICRC Commentary indicates that such combatants “should be taken under fire only if there is no other way of neutralizing them.”¹⁴⁶ The Interpretive Guidance does recognize that the delivery of ammunition by a civilian truck driver to an “active firing position” constitutes direct participation in hostilities.¹⁴⁷ However, at no time does the Interpretive Guidance clearly state that someone employed to perform a logistics function on a full-time basis within an organized armed group would

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

143. *Id.* at 55.

144. See SUN TZU, *THE ART OF WAR* 72-84 (Samuel B. Griffith trans., 1963) (discussing waging war and offensive strategy, and noting the different logistical issues).

145. See ICRC, *supra* note 93, ¶ 1694 n.35 (citing F.A. von der Heydte, 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 56 (1969)).

146. *Id.* ¶ 1694.

147. *Interpretive Guidance*, *supra* note 1, at 56.

perform a continuous combat function and therefore be a member of that group.¹⁴⁸

There is one further limitation on membership in an organized armed group. The Interpretive Guidance states that a significant difference between members of organized armed groups and civilians who take a direct part in hostilities is that membership in the armed group “begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group and lasts until he or she ceases to assume that function.”¹⁴⁹ While this seems to place members of armed groups in a position at least similar to that of their regular armed forces counterparts, a closer look at the link between continuous combat function and the test for direct participation reveals otherwise. The decisive criterion for membership in an organized armed group is the performance of a continuous combat function, which itself is defined by direct participation in hostilities.¹⁵⁰ However, direct participation is restricted to the immediate execution phase of a specific act meeting the three criteria of threshold of harm, direct causation, and belligerent nexus. Further, it only includes preparatory measures and the deployment to and return from the location of the act where they constitute an “integral part” of that act or operation.¹⁵¹ This is likely not the interpretation intended by many of the Interpretive Guidance participants. However, *Targeted Killing in International Law* indicates that such an approach may be applied.¹⁵² The book suggests that those who are members by virtue of the function they perform, “who have in some way differentiated or geographically separated from the group, for instance by returning home in between military operations, could be targeted only based on the ‘specific acts approach’ [the same criteria as for civilians].”¹⁵³

148. See *id.* at 55 (explaining that with respect to support activities such as delivering or preparing food, even where it occurs “in the same place and time as the fighting, the causal link between such support activities and the causation of the required threshold of harm to the opposing party to a conflict remains indirect”).

149. *Id.* at 72.

150. *Id.* at 33.

151. *Id.* at 65.

152. See MELZER, *supra* note 138, at 344.

153. *Id.* at 352.

It is difficult to see why the Interpretive Guidance would have aligned the members of an organized armed group closer to civilians and farther away from regular State armed forces. Adding to this confusing test is the approach taken in the Interpretive Guidance of providing the repeated opportunity for civilians to commit a hostile act and claim the protection of a “revolving door” of civilian status. It is that issue which will now be discussed.

2. *The “Revolving Door”: When Does it Stop? Nobody Knows.*

One part of the Interpretive Guidance which is likely to attract significant criticism is the use of the concept of the “revolving door” as a form of shield behind which repeated direct participants in hostilities can hide. In this regard, the ICRC has chosen to adopt a term which carries with it a particularly negative connotation. It is terminology which will undoubtedly cause problems for any military force should they decide to adopt Interpretive Guidance principles in instructing members of armed forces on their legal obligations.

The term “revolving door” first appears to have been used by Hays Parks in his 1990 article *Air War and the Law of War*.¹⁵⁴ In commenting negatively on the direct participation provisions of Additional Protocol I, he stated that an “initial problem with establishment of combatant or civilian status lies in the new revolving door provided for by Protocol I for certain ‘civilians.’”¹⁵⁵ The reference in the Interpretive Guidance to the “revolving door” issue having given rise to “controversy”¹⁵⁶ is accurate. Notwithstanding, the Interpretive Guidance adopts the term. In effect, it suggests that civilians are to be provided an undetermined number of opportunities to walk back and forth through a conceptual revolving door of protection. The Interpretive Guidance does indicate there are limits to claiming the protection of the revolving door that apply when civilians “go beyond spontaneous, sporadic, or unorganized direct participation . . . and become members of an organized armed group.”¹⁵⁷ However, this unclear statement on

154. W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 118 (1990).

155. *Id.*

156. Interpretive Guidance, *supra* note 1, at 71 n.192.

157. *Id.* at 72.

the scope of protection must also be read with the concept in mind that civilians are able to claim protection from being targeted even when they “engage in hostile acts on a persistently recurrent basis.”¹⁵⁸ The lack of clarity is noteworthy.

The Interpretive Guidance can be contrasted with the approach taken by the Israeli Supreme Court in the *Targeted Killing Case*.¹⁵⁹ The court clearly indicated that permitting a terrorist to have a place of refuge, “to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided.”¹⁶⁰ There is also a significant amount of academic comment against adopting the revolving door approach.¹⁶¹ However, consistent with the position taken by the Interpretive Guidance author, Nils Melzer, in his book *Targeted Killing in International Law*,¹⁶² the revolving door concept has been adopted by the Guidance.

The Interpretive Guidance concludes that “civilians” can only be targeted during each specific act on the basis that it would be “impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurring basis and whether they have the continued intent to

158. *Id.* at 44; *see also id.* at 71 (noting that even when civilians repeatedly take direct part in hostilities, there is no clear basis for prediction as to their future action).

159. HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel (*Targeted Killings*) [2005] ¶¶ 38-40, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

160. *Id.* ¶ 40 (emphasis added).

161. *E.g.*, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 193 (2005) (“If we adopt the restricted theory, according to which international terrorists are civilians who may only be targeted while taking a direct part in hostilities, the right of self-defence under Article 51 of the UN Charter following an armed attack by a terrorist group may become meaningless.”); Michael N. Schmitt, “*Direct Participation in Hostilities*” and *21st Century Armed Conflict*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift für Dieter Fleck 505, 509-510 (H. Fischer et al. eds., 2004) (“The best approach is . . . the only one that is practical in actual combat operations. Once an individual has opted into the hostilities, he or she remains a valid military objective until unambiguously opting out.”); Watkin, *supra* note 137, at 17 (“To the extent that civilians fulfill the same function as combatants . . . they are logically subject to targeting under the same provisions of international humanitarian law.”).

162. *See* MELZER, *supra* note 138, at 347.

do so again.”¹⁶³ Contrary to the assumption inherent in this statement, it is not difficult logically, operationally, or factually to determine future activity from past conduct. This is an intelligence issue involving the same considerations as determining who is performing a “continuous combat function.” Indeed, the difficulty suggested by the ICRC in relation to “persistently recurring” participation appears directly at odds with the test set out in the Interpretive Guidance as to what constitutes “a continuous function.” The Interpretive Guidance indicates that such a function “may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.”¹⁶⁴ Where participation on a persistent recurring basis fits in between sporadic participation and the performance of a continuous combat function is unclear.

Particularly problematic is the Interpretive Guidance’s failure to address the risk to which uninvolved civilians are exposed and the effect that recurring participation can have on the strength of the protection associated with civilian status. From a humanitarian perspective it might have been expected to have placed more emphasis on this reality of contemporary combat. Similarly, by focusing on the performance of acts at the tactical level, the Interpretive Guidance has not addressed a number of issues. In many circumstances, waiting for an act to be carried out may leave security forces with insufficient time to react, thereby actually increasing the risk to civilians who are the targets of the attack. Moreover, by virtue of such activity being carried out in an urban setting, this focus on the tactical level may put even more uninvolved civilians at risk. The decisions are difficult and the consequences are often ones of life or death. The ability to hide behind a revolving door and thereby gain a tactical advantage through a claim to civilian status is difficult to justify.

Unfortunately, the Interpretive Guidance significantly understates the problems this creates for personnel seeking to comply with their legal obligations when it admits that the “re-

163. Interpretive Guidance, *supra* note 1, at 45.

164. *Id.* at 35.

volving door” of protection “may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities.”¹⁶⁵ It has been noted that shooting at uninvolved civilians is a war crime.¹⁶⁶ The “revolving door” issue provides a classic example of where a desire to expand protection to civilians runs up against the hard realities of contemporary operations. Soldiers and other security personnel must be instructed not to target civilians. One of the challenges created in adopting too literal an approach to combatancy based on a bifurcated notion of lawful combatants and civilians is that, technically, those personnel end up targeting “civilians” who take a direct part in hostilities. This reality is often avoided by referring to opponents as fighters or insurgents so that they are separated from the uninvolved civilian population.

In adopting the “revolving door” theory as it has, the Interpretive Guidance blurs the line between those civilians who take a direct part in hostilities and members of organized armed groups. Combined with a narrow concept of membership in an organized armed group and a correspondingly broad notion of who is a civilian, the protection normally associated with uninvolved civilians begins to look like a form of immunity for insurgents. It is a protection which is consciously not provided to State security forces. Further, on one level the term “revolving door” evokes the idea of a form of carnival shooting gallery, where soldiers must wait until an opponent pops out from behind a door to be shot at. At some point, the credibility of the law begins to be undermined by suggesting an opponent can repeatedly avail themselves of such protection. As has been noted by Michael Schmitt, “[i]f civilians could repeatedly opt in and out of hostilities, combatants victimized by their activities will quickly lose respect for the law, thereby exposing the civilian population as a whole to greater danger.”¹⁶⁷ Though the Interpretive Guidance states that it reflects the “prevailing view”¹⁶⁸ of the participants who participated in its drafting, it is not the view likely to be taken

165. *Id.* at 71.

166. *See, e.g.*, Parks, *supra* note 154, at 119 (noting that firing at a “civilian” puts one at risk of being put on trial as a war criminal).

167. *See* Schmitt, *supra* note 161, at 510.

168. Interpretive Guidance, *supra* note 1, at 71 n.192.

by those who actually have to make decisions on targeting in order to protect themselves and others, or advise those who do.

V. A PREFERRED APPROACH: THE TARGETING OF ARMED FORCES AND PROTECTION OF CIVILIANS

Given the foregoing outline of the complex and at times unfinished analysis presented in the Interpretive Guidance, the question remains as to whether any approach avoids the problems identified in this Article. The primary weakness in the Interpretive Guidance approach is the decision to treat regular State armed forces in a different way than “irregular” armed forces. This distinction is made even though some of those irregular armed forces fight on behalf of States. What the Interpretive Guidance fails to recognize is that the conduct of military operations across the broad scale of armed conflict is a group activity which requires fundamentally the same organization regardless of whether one fights for a State or a non-State actor. The scope of armed conflicts not of an international character can be extremely broad, ranging from civil war between armed forces conducting conventional as well as unconventional operations to more contemporary urban guerrilla warfare. Further, not all irregular armed forces wear civilian clothes or always conduct their operations as hit-and-run guerrilla tactics. Even when they do, those groups require not only the participation of fighters, commanders, and planners, but also logisticians and intelligence personnel. Further, it has long been recognized that insurgent campaigns, like conventional warfare, are fought with strategic as well as tactical goals in mind.¹⁶⁹ As a result, the exercise of command, planning, intelligence, and even logistics functions can involve direct participation in hostilities above the tactical level.

The approach to determining membership which best reflects how warfare is conducted is to treat all armed forces the same. This approach is reflected in the more generic Common Article 3 and Additional Protocol I approaches to categorizing those forces. As a result, individuals are simply members of armed forces regardless of which party to a conflict

169. See DAVID GALULA, *COUNTERINSURGENCY WARFARE: THEORY AND PRACTICE* 3 (2006) (“Paraphrasing Clausewitz, we might say that ‘Insurgency is the pursuit of the policy of a party, inside a country, by every means.’”).

they fight for, the domestic law basis of their enrolment, or whether they wear a uniform. When engaging in armed conflict with insurgent and other organized armed groups, the key factor in determining if a person can be attacked is whether the individual is a member of the armed forces (dissident armed forces or organized armed groups) under a command responsible for the conduct of its subordinates. Individual civilians and contractors do not operate “under command.”¹⁷⁰

A distinction is made between groups organized to participate in the armed conflict and individual civilians who, on an exceptional basis, may take a direct part in hostilities. Indicia of membership in an organized armed group should include whether a person is carrying out a combat function. Such a function would involve 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 in an armed group. This would include intelligence gathering, maintaining communications, or conducting logistics. However, it is not necessary that members of the organized armed group carry a weapon at the time they are being targeted. Under this approach, 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. It is that organization which fights as a group.

Further, a combat function does not have to be carried out either full time or on an exclusive basis in order to establish membership in an organized armed group. The farmer by day and soldier by night phenomenon was rejected in the ICRC Commentary to Additional Protocol I.¹⁷¹ Someone who provides logistics support as a member of an organized armed

170. *Cf.* Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 639 (May 7, 1997) (discussing “acts taken against an individual who cannot be considered a traditional ‘non-combatant’ because he is actively involved in the conduct of hostilities by membership in some form of resistance group”).

171. *See* ICRC, *supra* note 93, ¶ 1677 (“[A]ny concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization . . . becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobil-

group, including cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces. Membership in organized armed groups may be established in any number of ways, including by use of intelligence. Carrying out an attack or preparing to do so would constitute taking a direct part in hostilities. However, the commission of such an act is not the sole means of establishing membership in an organized armed group. Members of such groups do not need to be engaged in an attack in order to be targeted, although if they cannot be distinguished from the civilian population, they cannot be attacked.¹⁷²

Organized armed groups may use civilians to provide services such as selling food under contract or otherwise much like civilian contractors working with regular State armed forces. These civilians accompanying organized armed group cannot be targeted unless and for such time as they participate directly in hostilities. This could include civilians providing supplies to armed forces in the immediate area of operations. Civilians who are not members of organized armed groups may also take a direct part in hostilities. Of course, civilians enjoy the protection of that status “unless and for such time as” they directly participate in hostilities. They lose the protection only for the duration of that participation. However, given the lack of credibility associated with the term, there can be no “revolving door” of protection. After the first involvement, any subsequent act demonstrating direct participation would start to provide the basis to believe that there is the beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities. Repetitious participation can be considered in determining if such persons are in reality continuously engaged in hostilities. When such participation occurs, affirmative disengagement would be required in order to establish that such persons are no longer direct participants

ized by the responsible command . . .), whether or not he is in combat . . .”).

172. See LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 59 (2002) (“[I]t would be unrealistic to expect government troops not to take measures against rebels simply because they are not involved in an attack. . . . Nevertheless where insurgents cannot be differentiated from civilians, they must cease to be legitimate targets.”).

in hostilities.¹⁷³ A determination of disengagement would be based on concrete, objectively verifiable facts and on standards of good faith and reasonableness in the prevailing circumstances. This approach not only reinforces the distinction principle but also recognizes that true civilian participation has to be limited in time and frequency so as not to undermine the protection associated with civilian status.

VI. CONCLUSION

The Interpretive Guidance raises more questions than it answers. It does not appear that after six years of work the Interpretive Guidance has accomplished what it set out to do: find an interpretation of direct participation in hostilities that enhances the protection of civilians and promotes a better understanding and faithful application of international humanitarian law. Ultimately, the question must be asked whether the Interpretive Guidance presents a useful guide for practitioners, academics, and the courts to use in order to clarify this difficult and often confusing area of law. Unfortunately, the Interpretive Guidance presents new concepts and looks at “armed forces” in a manner which is significantly different from the way such forces have been analyzed to date. The use of terms like “revolving door of protection,” “continuous combat function,” and “persistent recurring basis” inject new, confusing, and difficult-to-justify concepts into the lexicon of international humanitarian law. The Interpretive Guidance is certainly not a re-statement of existing law.

The choice made in the Interpretive Guidance to treat organized armed groups in a completely different fashion than regular State armed forces in both international and non-international armed conflict is novel and problematic. It does not reflect either the nature of warfare or the historical and contemporary scope of armed conflict. In effectively creating a third category of participant in armed conflict, it represents a dramatic shift from the approach taken by the ICRC to date. The Interpretive Guidance also adopts a position which clearly disadvantages States in relation to organized armed groups against which they are engaged in armed conflict. The distinc-

173. See Schmitt, *supra* note 55, at 536 (“[A] civilian who participates in hostilities remains a valid military target until unambiguously opting out through extended nonparticipation or an affirmative act of withdrawal.”).

tion between the armed forces of States and non-State actors is magnified by creating the “continuous combat function” test for membership in organized armed groups and then tying it to a narrow concept of direct participation in hostilities.

According to the Interpretive Guidance an individual cannot be targeted for performing certain logistics functions for an organized armed group, while that same person would be a lawful target if they performed that role in support of State armed forces. This interpretation will likely be found not to be credible by soldiers asked to apply such guidance. The reason for adopting this approach is not adequately justified, particularly where the principle of distinction requires positive identification of a target before engaging regardless of which armed force the person fights for. The problem in putting this guidance into operation is also evident when one considers how a soldier is supposed to try to distinguish between a civilian who participates on a “persistently recurring basis” and a member of an organized armed group who performs a “continuous combat function.”

It is difficult to see why the Interpretive Guidance would have aligned membership in organized armed groups closer to civilians and farther away from regular State armed forces. Doing so creates a bias against State armed forces, making its members much easier to target while imposing on them more exacting criteria when targeting opponents. In suggesting a narrower notion of membership in organized armed groups, with a resultingly broader category of civilians operating in support of them, an interpretation of the law is presented that appears focused, perhaps subconsciously, on the goal of limiting conflict. Civilians cannot be targeted and many functions integral to the effective functioning of an armed force are “civilianized” in respect of organized armed groups. Therefore, in theory, less violence will result and civilians, including those integrally supporting organized armed groups, will be protected from direct targeting.¹⁷⁴ However, both approaches

174. See MICHAEL WALZER, ARGUING ABOUT WAR 13 (2004) (“For many years, we have used the theory of just war to criticize American military actions, and now it has been taken over by the generals and is being used to explain and justify these actions. Obviously, we must resist. The easiest way to resist is to make noncombatant immunity into a stronger and stronger rule, until it is something like an absolute rule: all killing of civilians is (something close to) murder, therefore any war that leads to the killing of

are problematic. Two of the greatest attributes of international humanitarian law have been its emphasis on being applied equally to all participants and avoiding a connection between *jus in bello* rules and *jus ad bellum* principles. Ultimately, it does not appear that the Interpretive Guidance has either sufficiently clarified the “black letter” legal text regarding direct participation, or comprehensively addressed the issue of targeting in non-international armed conflict.

The Interpretive Guidance undoubtedly will attract considerable academic debate and likely prompt a number of States to amend their military law manuals to clearly establish that they are not in agreement with the suggested interpretive approach. Should courts be called upon to consider the issue of direct participation, it will be important that alternative theories are available and presented to ensure they have access to a broader range of interpretations. Unfortunately, the Interpretive Guidance represents a lost opportunity for clarifying this area of international humanitarian law—although the theories it suggests will undoubtedly frame further debates about what constitutes direct participation in hostilities.

civilians is unjust; therefore every war is unjust. So pacifism reemerges from the very heart of the theory that was meant to replace it.”).

