Targeted Killing in Modern Warfare

JIM SERPLESS

ABSTRACT

State sponsored targeted killing is on the rise. Military technology and doctrine do not wait for legal frameworks to develop. There is a cognitive gap between state practice and the law regulating targeted killing. This results in unnecessary civilian casualties and a detrimental effect on strategic relations between states. There is no internationally agreed legal framework to regulate targeted killing. This article acknowledges the current military reality of low-intensity asymmetric wars between disparate forces where targeted killing takes place and argues that the current law of armed conflict is adequate to regulate this new phenomenon. Grey areas in need of refinement however do exist: in particular, categories of armed conflict and whether their breadth should be expanded, the notion of combatants in non-international armed conflicts, the concept of direct participation in hostilities and its resulting effect on the principle of distinction. These grey areas do not render the laws of armed conflict redundant, although international consensus must be achieved in order to adequately regulate the conduct of targeted killing. The article contends that a normative paradigm regulating targeted killing must be agreed upon by the international community in order to better protect civilians in conflict, maintain international relations and bring accountability to this new and fast-expanding phenomenon.

I INTRODUCTION

On 30 September 2011, in al-Jawf province Yemen, Anwar al-Awlaki a United States (US) citizen dubbed the 'bin Laden of the internet' and allegedly head of operations for Al Qaeda in the Arabian Peninsula (AQAP), was sitting down for breakfast with three other suspected AQAP members.[1] A predator drone was spotted by a member of the group. The group then attempted to flee in a vehicle. Two American predator drones fired hellfire missiles at the vehicle containing the group resulting in their deaths. The US has continued to employ this very same tactic used against Anwar al-Awlaki in its 'Global War on Terror'. Other well-known examples include the December 2005

* Staff Cadet, Royal Military College of Australia; BA/LLB (Hons), Monash University. The author of this article is a serving member of the Australian Army. The views expressed herein are the author's own and do not necessarily reflect those of the Australian Defence Force or the Department of Defence.

1 Aamer Madhani, 'Cleric al-Awlaki dubbed 'bin Laden of the Internet'', *USA Today*, 25 August 2010; Mark Mazzetti, Eric Shmitt, Robert Worth 'U.S.-Born Qaeda Leader Killed in Yemen', *The New York Times*, 30 September 2011.

elimination of senior Al Qaeda (AQ) operative Abu Hamza Rabia in Pakistan[2] and the unsuccessful effort to kill AQ co-leader Ayman al-Zawahiri, also in Pakistan, that resulted in the death of 18 civilians[3] and the infamous 2 May 2011 raid by US Navy Seals resulting in the death of Osama Bin Laden and four others.[4] Taken collectively, these and other instances, of which there are many,[5] appear to demonstrate that the US has adopted a tactic similar to one the Israeli government has openly used to counter terrorist attacks since the outbreak of the al-Aqsa Intifada in September 2000.[6] Israel, through its policy of targeted killing, has identified, located, and killed hundreds of alleged terrorists through various means.[7] The total number of Palestinians killed as a result of Israel's policy of targeted killing is estimated by B'Tselem to be 428 as at 31 December 2011.[8]

The increasing trend in state sanctioned targeted killing has elicited both condemnation and support. Amnesty International,[9] Human Rights Watch,[10] some entities of the United Nations[11] and numerous international legal scholars have shown their disdain for such practice.[12] However there seems to be a changing perception of the legality of

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2 Daniel Byman, 'Targeted Killing, American-Style', *L.A. Times* (Los Angeles), 20 January 2010.

3 Eban Kaplan, 'Q&A: Targeted Killings', *The New York Times* (New York), 25 January 2006

4 Cooper, Helene, 'Obama Announces Killing of Osama bin Laden', *The New York Times* (New York), 1 May 2011.

5 Concrete data is difficult to find in relation to targeted killings. However, the New America Foundation's statistics are widely seen as an objective representation. According to which there have been 283 drone strikes within Pakistan since 2004 resulting in the deaths of 38 militant leaders. See New America Foundation, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2011*(2011), <http://counterterrorism.newamerica.net/drones> at 3 December 2011.

6 Steven R. David, 'Fatal Choices: Israel's Policy of Targeted Killings' (2002) 51 *Middle East Security and Policy Studies* 1-2; Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 *Cornell International Law Journal* 233, 239-242.

7 Steven R. David, above n 6, 1-2.

8 B'Tselem, *Statistics: Fatalities* (2011), B'Tselem, <http://old.btselem.org/statistics/english/Casualties.asp> at 3 December 2011.

9 Amnesty International, *Israel and the Occupied Territories: Israel Must End its Policy of Assassinations*, 4 July 2003 AI Index: MDE 15/056/2003; Amnesty International Press Release, *Yemen/USA: government must not sanction extra judicial executions*, 8 Nov. 2002, AI Index: AMR 51/168/2002; Amnesty International, *Yemen, The Rule of Law Sidelined in the Name of Security*, 24 Sep. 2003, AI Index: MDE 31/006/2003.

10 Human Rights Watch, *US: Clarify Position on Targeted Killings*, Human Rights Watch, <http://www.hrw.org/news/2010/12/07/us-clarify-position-targeted-killings> at 7 December 2010 (although HRW recognises that targeted killing may be legal, it calls on the US to 'immediately clarify its legal rationale' for the practice)

11 See, *eg*, Comm'n on Human Rights Res. 2003/6, 22, U.N. Doc. E/CN.4/2003/L.11 (April 15, 2003) (condemning Israel actions against individual terrorists as 'extrajudicial executions'); U.N. Econ & Soc. Council [ECOSOC], Comm'n on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, 61, U.N, Doc. E/CN.4/2001/121 (March 16, 2001) (stating that Israel's use of targeted killing constitutes 'political assassination').

12 Steven R. David, 'Israel's Policy of Targeted Killing', (2003) 17 *Ethics and International Affairs* 111; Stefanie Schmahl, 'Targeted Killings – A Challenge for International Law?' in Christian Tomuschat, Evelyne Lagrange, Stefen Oeter (eds.), *The Right to Life*, Leiden 2010 264. Antonio Cassese on Whether Israel's Targeted Killings of Palestinian Terrorists in Consonant with International Humanitarian Law on Behalf of Petitioners, HCJ 5100/94 Public Committee Against Torture in Israel v. Israel (Israel 1999)

targeted killing. Numerous commentators contend that the practice is not only legal but also effective.[13] A recent report by Philip Alston, the former UN Special Rapporteur on extrajudicial executions, stated that within certain situations targeted killings are legal under international law.[14]

This article acknowledges the political and military reality 'on the ground' where the policy of targeted killing is not only becoming more common, but being regarded as an 'essential counterterrorism tool'.[15]

This article contends that an international norm of targeting killing is likely to emerge, if it has not already. Although there are strong arguments that the current international legal framework is adequate to regulate targeted killing in conflict - a view the author holds - there are compelling arguments against. Some commentators believe that the speed with which technology and military doctrine are advancing has created a cognitive gap between the law itself and the phenomenon it is supposed to be regulating. Given the apparent inevitability that targeted killing is on the rise and prolific throughout most modern conflicts, the international legal community must regulate targeted killing. Considering both these viewpoints the article will discuss whether current international humanitarian law is adequate to regulate targeted killing. It will also consider whether the practice of targeted killing has satisfied the law-creating process of international custom and should be regarded as legal in its own right. Regardless of the viewpoint taken the current state of the law is untenable.

II TARGETED KILLING AS CUSTOMARY INTERNATIONAL LAW

According to the classical sources of international law, codified in Article 38 of the Statute of the International Court of Justice, international law rules are primarily found in treaties, international custom, and general principles of law recognised by civilized nations. Presently, there is no multilateral treaty that includes a legal framework for undertaking targeted killing nor are there guidelines for the targeting process or the physical act of killing. This analysis also assumes that international humanitarian law is inadequate to regulate the practice. Therefore the legality of targeting killing is more likely to derive from international custom.

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13 Daniel Byman, 'Do Targeted Killings Work?' (2006) 85 *Foreign Affairs* 95-96; Kenneth Anderson, 'Targeted Killing in U.S. Counterterrorism Strategy and Law' (Working Paper, American University Washington College of Law, 2009) 25; Ryan, J. Vogel, 'Drone Warfare and the Law of Armed Conflict, (2010) 39 *Denver Journal of International Law and Policy* 113.

14 Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc A/HRC/14/24/Add.6 (2010) (Although Alston notes that current state practice 'has been a highly problematic blurring and expansion of the boundaries of the applicable legal frameworks')

15 Kenneth Anderson, *Targeted Killing*, Defining Ideas, Hoover Institute, <http://www.hoover.org/publications/defining-ideas/article/5281> at 4 December 2011.

A *State Practice and Targeted Killing*

There has been little discussion about whether the practice of targeted killing satisfies the requirements of international custom. Under the classical doctrine of customary international law, for a norm to be binding upon a state, there must exist extensive and uniform state practice carried out so as to show a general recognition that a rule of law or legal obligation is involved.[16] Such extensive and uniform state practice is non-existent. Although there exists an increasing trend in the use of targeted killing programs by states, a reasonable observer would certainly conclude that practice is by no means extensive and uniform.

B *The Problem with Customary International Law*

The willingness and frequency of states to undertake targeting killing does not necessarily imply the existence of a right under international law for its use. The International Court of Justice in the *North Sea Continental Shelf Cases* stated that the frequency or even the habitual character of acts is not in itself enough for a proposed rule to have evolved into a principle of customary international law. For such a right to exist, targeted killing must be undertaken with a belief that the practice is lawful in its own right or with regard to the current laws of armed conflict. Whilst an argument could be put forward that states believe they are undertaking targeting killings within the bounds of the laws of armed conflict this argument is far from reproach.

Even if the requisite *opinio juris* exists, the scope and content of the right to undertake targeted killings in customary international law remains uncertain. For example, can targeted killing be undertaken outside the formally recognised categories of international armed conflict or does it constitute a separate individual right? Do the traditional restraints and principles of humanity apply to targeted killings? If so, how are they implemented in the process of targeting and the physical act of killing? Who can be targeted and why? The uncertainty raised by these issues, when the practice of targeted killing is on the rise and terrorism more prolific, has led to unnecessary loss of civilian life and undue strain on international relations between states.[17] It is for these reasons that targeted killing can, and should, be regulated under the current international humanitarian law framework.

III REGULATION OF TARGETED KILLING: THE HOSTILITIES PARADIGM

A *The Paradigm of Hostilities: An Introduction*

16 Article 38, para. 1(b), of the Statute of the International Court of Justice; *North Sea Continental Shelf Cases*, ICJ Rep., 1969, 43 para. 74.

17 For an example see generally Dennis Kux, *US-Pakistan Relations in the Summer of 2011* (2011) Real Instituto Elcano.

Difficulties arise when attempting to regulate targeted killing under international humanitarian law in its current state; however it provides the most suitable framework to regulate targeted killing. International humanitarian law is the body of international law designed to regulate the conduct of armed conflict, thus its applicability is dependent on the situation in which the targeted killing takes place and whether it amounts to an armed conflict.

The laws of armed conflict have traditionally been divided into two categories – those of international armed conflict, and those of non-international armed conflict. This is reflected by the two Protocols of 1977 to the Geneva Conventions.[18] However in reality this distinction is not so easily defined and arguably lacks utility.[19] This distinction is pertinent to the current analysis as instances of targeted killing operations frequently occur in internationalised internal armed conflicts.[20] It is possible to have within one conflict three or more parties fighting under different defined categories of conflict. To illustrate, the current conflict in Afghanistan involves numerous foreign states as well as internal violence between the Afghan government and non-state actors. Further, the dubious 'global war on terror' or 'War on Terrorism' provides further challenges to the separation of international and non-international armed conflicts.[21] A conflict between a state and a transnational network operating from numerous states, but not necessarily with their support, stretches the traditional concepts of international and non-international armed conflict. Again using Afghanistan as an example, US military actions against AQ have occurred both against AQ as a separate and distinct group and against AQ members who are a part of the Taliban and then later side with a new Afghan government. Numerous labels have been applied to the Afghan conflict such as an international armed conflict, non-international armed conflict, and internationalized non-international armed conflict[22] as well as proposals of a 'third' new type of armed conflict.[23] As international humanitarian law is the body of law designed to regulate the conduct of armed conflict, the applicability of international humanitarian law to

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18 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol 1) (8 June 1977) 1125 UNTS 3 (herein AP I); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), (8 June 1977), 1125 UNTS 609 (herein AP II). This distinction is further highlighted in the separate categories of war crimes in the statute of the International Criminal Court.

19 For a detailed analysis of the distinction between international and non-international armed conflict, and its argued lack of utility see E Crawford, 'Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflict' (2007) 20(2) *Leiden Journal of International Law*.

20 Hans-Peter Gasser, 'Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon' (1983) 33 *American University Law Review* 145. To determine whether and internal armed conflict becomes internationalised see *Prosecuter v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 2 October 1995, para 84 (herein *Tadic*).

21 A Roberts, 'The Laws of War in the War on Terror' (2003) 32 *Israel Yearbook on Human Rights* 193-245, 196, 201-203.

22 Dinah Pokempner, 'The "New" Non-State Actors in International Humanitarian Law' (2006) 38 (3) *George Washington International Law Review* 551, 553-4.

23 See below for a discussion of the 'War on Terrorism'.

targeted killing is dependent upon it being carried out within a defined armed conflict. One must first endeavour to identify if the targeted killing is undertaken within an armed conflict – which can be a formidable task.

B *International Armed Conflict*

International jurisprudence and the majority of authors in this field agree with the following concept of international armed conflict:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2 of the Geneva Conventions, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.[24]

The pertinent question therefore is whether targeted killings against non-state actors can be considered part of an international armed conflict. The Conventions only apply to armed conflicts between contracting parties.[25] As non-state actors cannot be contracting parties to these treaties it follows that these rules will not apply as between a state and a non-state actor. Further, as non-state actors are not signatories to these treaties, under customary international law, there is no notion of a high contracting party, thus automatically excluding non-state actors coming under the purview of these rules.[26] Generally the rules of international armed conflict only apply in situations where two or more states are engaged in armed conflict against each other.[27]

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24 Nils Melzer, *Targeted Killing in International Law* (2008), 251; Pictet, *Commentary GC III* (Art 2), 23. Confirmed in ICTY, *Delalic Case (Judgement of 16 November 1998),* 184 and 208. See also Christopher Greenwood, *Scope of Application of International Humanitarian Law* (Dieter Fleck 2nded. 2008) 202; Dietrich Schindler, *Different Types of Armed Conflict* (Sijthoff and Noordhoff, 1980) 131; Hans-Peter Gasser, *International Humanitarian Law an Introduction* (P Haupt,1993) 22.

25 Article 2 of the Hague Regulations; Article 2 common to the 1949 Geneva Conventions (ratified by all member states of the United Nations).

26 Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, 2010) 96. Although an argument may be made that the determination of custom focuses on the substantive elements of the rules rather than their applicability, the position of custom relating to extraterritorial force against non-state actors is unclear. However the major body of rules constituting international armed conflict is predicated on inter-state conflicts between two opposing states. See Sean Murphy, 'Evolving Geneva Convention Paradigms in the 'War on Terrorism"'(2007) 75 *George Washington Law Review* 8.

27 There are limited exceptions. For example Article 1(4) of the First Additional Protocol to the Geneva Conventions extends the ambit of the rules of international armed conflict to 'include armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self determination'. This article may be applicable to a conflict between a state and non-state actor but are not applicable to the situations examined in this article. Another is where the non-state actor is actually acting as an agent of, or within, the structure of another state. A plausible argument could be made that Al-Qaeda, as hostilities became protracted in Afghanistan, began to fight within the chain of command of the Taliban. The Taliban being the then *de facto* government making a strong argument those hostilities at that point in time would have been or could be part of an international armed conflict. See Lubell, above n 26, 98. The reverse of this scenario is another possibility: where a state becomes a party to a conflict between another state and non-state actor.

C *Non-international Armed Conflict*

Targeted killing of non-state actors may be better governed by international humanitarian law through the paradigm of non-international armed conflict. The laws of non-international armed conflict are derived from Common Article 3 to the 1949 Geneva Conventions and in the 1977 Second Protocol to the Conventions. Further rules have also been accepted as customary international law.[28] The test for the existence of a non-international armed conflict is more difficult than for international armed conflicts.[29] According to treaty and customary law, there are three elements deemed to constitute a non-international armed conflict against a non-state armed group:

1) the non-state armed group must be identifiable based on objective criteria;
2) there must be a minimal threshold of intensity and duration; and
3) the conflict must be confined to the restricted territory of a state.[30]

Two major difficulties present in asserting that a conflict between a state and a non-state armed group constitutes a non-international armed conflict – especially considering the transnational context in which many armed groups now operate. The definitions of non-international armed conflict adopted in Common Article 3 to the Geneva Conventions and Additional Protocol II both refer to a conflict within the territory of a state party. Non-state armed groups such as AQ operate on a transnational basis and do not restrict their activities to one state. AQ does not discriminate between borders; as illustrated in the Federally Administrated Tribal Area that borders Afghanistan. The notion of a border here is completely foreign to many members of AQ operating within that area. This implies that international humanitarian law does not apply to conflicts between states and non-state armed groups who operate in one or more countries. This conclusion is untenable. There is no substantive reason that norms applying to armed conflict between a state and non-state armed group within a state should not also apply to transnational conflicts between a state and non-state armed group and as such the latter should incorporate the applicable body of international humanitarian law.

The second major obstacle is the scope and level of violence required for a conflict to be regarded as a non-international armed conflict.[31] Assuming a conflict between a state and non-state armed group operating in a transnational context reaches the requisite level and scope of violence to constitute a non-international armed conflict, then the resulting conflict will again come under the applicable international humanitarian law

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28 *Tadic*, para 70; see also Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law* (2005) (herein CLS).

29 For example, it may depend on whether the State is party to Additional Protocol II to the Geneva Conventions.

30 For a detailed analysis of the test see, Solis, *The Law of Armed Conflict* (CUP, 2010), 152; Alston, above n 14, para 52.

31 The ICTY in the *Tadic* case, at para 70, held that non-international armed conflict exists when there is 'protracted armed violence between governmental authorities and organized armed groups'.

relevant to non-international armed conflict. The difficulty herein lies in identifying who are combatants under this scenario.[32] The author argues that it should be determined by identifying the parties to the conflict – and an individual's status in relation to these parties. This leads to the logical conclusion that non-international armed conflict involves a conflict between the armed forces of a state and an organised armed group with all individuals within these groups being deemed combatants. According to this analysis, the US and AQ are involved in a non-international armed conflict and are combatants who may be targeted.[33] Further examples include the targeted killing of Anwar al-Awlaki, within the context of increased hostilities in Yemen involving the US and Yemeni governments, on one hand, and AQAP on the other.[34]

D *A New Category of Armed Conflict: the 'War on Terrorism'*

International and non-international armed conflict were generally viewed as covering all possible forms of contemporary armed conflict. However, after 11 September 2001, the current framework, that has taken more than a hundred years to develop, is being challenged.[35] Predominantly driven by the US there is a claim that a third type of conflict now exists. This new conflict is referred to as the 'War on Terrorism' or 'transnational' armed conflict.[36] The US government asserts that the law of armed conflict governs the 'War on Terror' but that it constitutes neither an international or non-international armed conflict nor does customary international law apply.[37]

There is little support for the incorporation of a new category of armed conflict. The argument that customary international law has expanded the current existing framework of international armed conflict beyond its current scope is unconvincing. The creation of custom requires constant and uniform state practice as well as the general belief that this practice conforms to a rule of law. With regard to the 'War on Terror', and targeted killing within this context, such qualified practice is absent. In particular the requisite *opinio juris sive necessitates* is non-existent.[38] The current state of international customary law leaves no doubt that customary law has not accommodated this third category of armed conflict.

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32 M. Sassoli, A.A. Bouvier, *How Does Law Protect in War?* (ICRC, 1999) 208.

33 D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?' (2005) 16 *The European Journal of International Law* 198.

34 Robert Chesney, 'Who May be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (Working Paper No 189, University of Texas, 2010) 30.

35 Jean-Phillippe Lavoyer, 'International Humanitarian Law and Terrorism' in L Lijnzaad et al (eds) *Voice of Humanity* (Leiden/Boston: Martinus Nikhoff Publishers, 2004) 262.

36 The US Government referred to the 11 September 2001 attacks as 'acts of war' and claimed to be engaged in a 'war against terrorism'. See George W. Bush, White House press statement: *Statement by the President in Address to the Nation*, 11 September 2001.

37 Melzer, above n 24, 263; US Department of Justice, Memorandum: *Application of Treaties*, 12. For a detailed examination see generally: Duffy, *The 'War on Terror' and the Framework of International Law* (2005) 250-271.

38 Melzer, above n 24, 267.

A more suitable analysis of the 'War on Terrorism' would be that of a socio-political phenomenon. The so called 'War on Terror' is of an unknown duration and takes place within undefined territorial boundaries; furthermore actors within it are neither identifiable nor clearly specified.[39] It resembles more of a unilateral campaign against a socio-political phenomenon than an armed conflict between specific parties. Although means of combating the phenomenon include targeted killing and traditional conventional means of warfare, numerous other instruments are also utilised. These include, but are not limited to, domestic law enforcement agencies, international diplomacy, intelligence gathering, financial sanctions, trade and immigration control and aid and development activities. Similar to the US 'War on Drugs' or the 'War on Poverty', the 'War on Terror' does not permit the expansion or creation of a new category of international conflict. It is the author's view that such conflict can be adequately regulated under the current international humanitarian legal regime in relation to non-international armed conflicts.

IV WHO MAY BE LAWFULLY TARGETED

In a situation of armed conflict international humanitarian law is enlivened. Targeted killing presents new challenges to the established *jus in bello*, particularly given civilian-saturated environments prevalent in modern warfare. Distinction with relation to targeting, particularly relating to civilians taking direct part in hostilities and members of armed groups, is the main focus of this section. The principle of distinction is more easily applied within the framework of international armed conflicts between nation states. In non-international armed conflict - the main focus of this analysis - where one party is a non-state actor, some of the rules based on this principle become highly contentious and open to numerous interpretations.[40] It should be noted that the debate around such issues in no way detracts from the paramount importance and applicability of the principle of distinction.[41] This analysis assumes that targeted killing is undertaken within the context of a non-international armed conflict and as such can be regulated by international humanitarian law. The following applicable rules of international humanitarian law provide the best opportunity to assist in the regulation and accountability of targeted killing. With regard to the targeting killing of non-state actors, however, there remain complex obstacles in the interpretation of these principles.[42]

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39 Ibid 266.

40 For a discussion with relation to modern warfare see R Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 *University of Pennsylvania Law Review* 730.

41 J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Vol 1: Rules* (ICRC/CUP, 2006) 3; Y Dinstein, C Garraway and M Schmitt, *The Manual on the Law of Non-International Armed Conflict: With Commentary* (International Institute of Humanitarian Law, 2006) 11.

42 The principle of distinction is based on the premise that an individual is either a combatant or a civilian. Generally combatants are legitimate targets during an armed conflict whilst civilians are

A *The Basic Rule*

International humanitarian law governing non-international armed conflict contains far fewer provisions on the conduct of hostilities compared to international armed conflicts.[43] However, the most important rules and principles applicable to the conduct of hostilities in international armed conflict are today recognised as having obtained customary nature with regard to non-international armed conflict. The customary rule of distinction applicable to conflicts of a non-international character dictates that parties to the conflict must at all times distinguish between civilians and combatants. Accordingly, attacks may only to be directed against the latter.[44] Under non-international armed conflict the category of persons protected against direct attack includes peaceful civilians, medical and religious personnel, as well as persons *hors de combat*.[45] The category not entitled to immunity against direct attack includes members of the armed forces including: state armed forces and other organized groups – who are party to the conflict, civilians directly participating in hostilities and those deemed by militarily necessity as targets with regard to all the circumstances at the time.[46] Thus, when determining whether an individual constitutes a lawful military target within a non-international armed conflict, their status as a combatant or civilian must first be clarified.

B *Who May be Targeted?*

Can the majority of targets be categorised as combatants or, if not, can they be deemed civilians directly participating in hostilities? It should be noted from the outset that there is disagreement on the existence of 'combatants' within the context of non-international armed conflicts.[47] States have traditionally resisted recognition of the combatant's privilege and the corresponding eligibility for prisoner of war (POW)

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not (unless they are directly participating in hostilities, which is discussed in detail below). It is this category from which the legality of the means used in the targeted killing can be derived. However the rules of non-international armed conflict do not provide a definition of combatant. Furthermore, there is no agreed definition of direct participation in hostilities. Thus, in large part, the targeting of individuals for killing is left to the policy of the State carrying out the act. See Lubell, above n 25, 136-137.

43 For a detailed analysis on the principle of distinction in relation to international armed conflict see n 24, 301-303.

44 Jean-Marie Henckaerts & Louise Doswald Beck, *Customary International Humanitarian Law* (ICRC/CUP 2006) Rule 1 CLS; Melzer, above n 24, 311.

45 Art 13 AP II; Art 8(2)(e)(i); Art 9(1) AP II; Rules 25 and 27 CLS; Art 7(1) AP II; Rule 47 CLS; Melzer, above n 24, 311-312.

46 Members of armed forces, Art 13 AP II. For civilian directly participating in hostilities Art 51(3) AP I; Art 13(3) AP II; Rule 6 CLS; Melzer, above n 24, 312-313.

47 International Committee of the Red Cross (ICRC) in its study of customary international humanitarian law states: 'Combatant status… exists only in international armed conflicts'; see Henckaerts and Doswald-Beck, above n 41, 11.

status for non-state organised groups who take up arms to challenge the state. This unwillingness stems from a reluctance of the state to legitimise such conduct.[48]

The status of combatant also accrues a key, and very important within the context of this analysis, detriment. Under the principle of distinction, a combatant lacks immunity from targeting, thus unlike a civilian, can be targeted without reference to whether he or she is directly participating in hostilities. Combatant status affords states tremendous benefits when implementing a targeted killing policy, allowing prospective targets to be engaged at all times. Furthermore, this enables a clear distinction to be drawn between combatants and the civilian population.

The key issue that comes to the fore is, should the constituent elements that comprise the concept of combatant – the combatant's privilege, eligibility for POW status, and lack of immunity from targeting – be disaggregated? Would this provide a more suitable answer to the categorisation of potential victims of targeted killing policies? The International Committee of the Red Cross (ICRC) calls for this approach to be taken within the context of non-international armed conflicts. The ICRC asserts that although no formal 'combatant status' exists within non-international armed conflict, certain individuals nonetheless may be treated as combatants for the purposes of distinction.[49] Kretzmer, on the other hand, argues that combatants exist within the concept of non-international armed conflicts and that they can be legitimately targeted. He contends that combatants include both members of the state forces and the organised armed group or non-state actor involved in that conflict. Both sets of individuals are valid targets and should be targeted in accordance with the principle of distinction.[50]

The disaggregated view is to be preferred. As another proponent of this view, Melzer, contends, labelling all organized armed groups within a non-international armed conflict as civilians due to the non existence of combatant status is a 'misconception of major proportions', one that 'entails a distortion of the fundamental concepts of 'civilian', 'armed forces' and 'direct participation in hostilities' and, ultimately, leads to irreconcilable contradictions in the interpretation of these terms'.[51] Disaggregation of the constituent elements that comprise the concept of combatant enables the law to better accommodate the complexities of modern warfare by giving greater flexibility in discerning parties to a conflict. The flow on effects of such a determination allow for greater regulation, such as the better application of the principle of distinction.

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48 Kretzmer explains 'states were, and still are, unwilling to grant status of combatants to insurgents and other non-state actors who take part in non-international armed conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity for criminal liability for fighting, and prisoner of war status when apprehended'; Kretzmer, above n 33, 197.

49 Henckaerts and Doswald-Beck, above n 41, 11.

50 Kretzmer, above n 32, 197-198.

51 See Melzer, above n 24, 316. (Melzer argues that in almost any non-international armed conflict – be it in South East Asia in the 1960 and 1970s, in Central America in the 1980s, or in Colombia, Sri Lanka, Chechnya or the Sudan – it is sufficient to conclude that governmental armed forces do not hesitate to directly attack insurgents even when the latter are not engaged in military operations.)

Furthermore, this view offers greater certainty and therefore increases respect and adherence to international humanitarian law.

V DIRECT PARTICIPATION IN HOSTILITIES

Determining who qualifies as a lawful object of attack in the context of targeting killing within modern warfare is an increasingly onerous task. While it is self evident that only persons who qualify as combatants or civilians taking direct part in hostilities fall into this category, the increasing numbers of non-state actors and civilians in areas of conflict, has blurred the line between the status of civilians protected from deliberate attack and non-state actors or combatants subject to attack.[52] This blurring can even be said to be a deliberate tactic employed by non-state actors as a strategic move to counter the military superiority of their nation state military opponents.[53] These types of asymmetric warfare tactics greatly increase the complexity of the target decision-making process. Targeted killing operations against non-state actors whose physical characteristics are indistinguishable from the civilian population require the utmost level of care, as the consequence of error results in an unacceptable strategic impact upon state military objectives. Errors in targeted killing missions also create unforeseen strategic losses completely disproportionate to the gains offered by the successful execution of an operation. An illustrative example is negative impacts on bilateral security alliances.[54] Secondly, and arguably more important, is the exacerbated risk of alienating the civilian population. Such alienation results in a fatal consequence inconsistent with the core tenet of counterinsurgency strategy - and most effective counter to the asymmetric threat posed by transnational non-state actors – protection of the local population.[55]

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52 *See* Solis, above n 30, 188 ('A combatant remains a combatant when he/she is not actually fighting.'); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2010) 33 ('Combatants fall into two categories: (i) Members of the armed forces of a belligerent Party… (ii) Any non-members of the armed forces who take an active part in the hostilities…').

53 *See* Charles J. Dunlap, Jr., 'Lawfare Today: A Perspective' (2008) 3 *Yale Journal of International Affairs* 146, 148 (explains the use of modern media by insurgents to exploit civilian casualties and thus create a strategic impact on the long term efficacy of a conflict).

54 *See* Scott Shane, 'Drone Strike Kills Qaeda Operative in Pakistan, U.S. Says', *The New York Times* (New York) 19 January 2012 (describes the strain on US/Pakistani relations after the American killing of Osama Bin Laden and an airstrike that killed two dozen Pakistani soldiers on the border).

55 See Joint Chiefs of Staff, *Joint Pub 5-03.1: Joint Operation Planning and Execution System Volume I (Planning Policies and Procedures)* ch. 2, para. 8 (1993) (discussion of target identification and assessment at the strategic level in the larger context of the joint planning process); *see also* Department of the Army, FMI 3-07.22, *Counterinsurgency Operations*, para. 2-10 (2004) (highlighting the crucial need to protect the civilian population in order to achieve success in counterinsurgency operations); Indeed, this was highlighted in the Interpretive Guidance - Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (*2009) International Committee of the Red Cross <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> at 18 August 2011 (analysing the

A *The Direct Participation in Hostilities Project*

In 2003 the ICRC launched a major research effort to explore the concept of direct participation by civilians in hostilities. The aim was to provide greater certainty governing loss of protection from immediate attack for civilians who involve themselves in armed conflict. Approximately forty eminent international law experts, including military officers, representatives of non-governmental organisations, academics and government attorneys participated in a series of workshops. In May 2009, the ICRC published the culmination of this process resulting in the 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (Interpretive Guidance).[56] Originally planned as a consensus document, the proceedings proved highly contentious.[57] The ICRC took an unusual step in publishing the document without identifying the participants. It also included an express caveat identifying the Interpretive Guidance as 'an expression solely of the ICRC's views'.[58] This should not detract from the value the Interpretive Guidance has provided. It is a sophisticated work that clearly advances the general understanding of the complex notion of direct participation. Furthermore, it has brought the issue of direct participation to the forefront of international humanitarian law dialogue - a place it should enjoy in light of the complexities involved in 21st century conflict.

B *The Notion of Direct Participation in Hostilities Generally*

Parties to an armed conflict who use military violence must distinguish between combatants and civilians. The former are legitimate military targets, while the latter are immune from attack. Civilians, however, lose their immunity from attack 'for such time as they directly participate in hostilities.'[59] Scholars and practitioners universally accept

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problems presented by the increasing number of participants that do not adequately distinguish themselves from civilians).

56 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (*2009) International Committee of the Red Cross <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> at 18 August 2011.

57 It is the author's view that the normative paradigm set forth in the Interpretive Guidance is one that states that actually go to war cannot countenance. As Schmitt in 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', (2010) 1 *Harvard National Security Journal* 6 states:

> it [the Interpretive Guidance] must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, international humanitarian law represents a very delicate balance between two principles: military necessity and humanity. It is in this regard that the Interpretive Guidance falters… On repeated occasions its interpretations skew the balance towards humanity. Unfortunately, such deviations from the generally accepted balance will likely cause states, which are ultimately responsible for application and enforcement of the law, to view the Interpretive Guidance sceptically.

58 Ibid 6.

59 51(3) of Additional Protocol I to the Geneva Conventions (13(3) in Additional Protocol II).

the normative premise that civilians enjoy protection from attack under international humanitarian law and that they lose such protection when and while directly participating in hostilities. Nevertheless, the exact meaning of 'directly participating' in hostilities is yet to be clarified with any precision. There is no authoritative guidance as to which activities qualify as direct participation, or on the related issues of who qualifies as a civilian and the duration for which the loss of protection lasts. Analysis up until the current time has relied upon a certain instinctive case-by-case basis.[60] For instance, in the *Tadic* case, the International Criminal Tribunal for the Former Yugoslavia noted:

> [It] is unnecessary to define exactly the line of dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.[61]

The challenge, in an absence of a universally accepted framework for determining direct participation determinations, has unsurprisingly caused a grey area in the law. Such ambiguity has forced states to 'go it alone' in determining policies, and more importantly rules of engagement, in relation to targeted killing. This, in the author's view, is the single most decisive factor in creating an accountability vacuum within which objection to targeted killing is filled. Lack of an objective criterion for determining the status of non-state actors as enjoying civilian protection or loss thereof is critical to the accountability of any targeted killing program. The myopic view focusing solely on direct participation in hostilities as the criterion for targeting authority is counter to the principles of international humanitarian law and impractical for military decision makers amidst the friction and uncertainty created by war.

This article will now canvass the major grey areas in the body of law surrounding direct participation in hostilities. The Direct Participation in Hostilities Project will be used as the lens to examine the three main unresolved issues. These are as follows:

1) Who qualifies as a civilian in the context of direct participation;
2) What conduct amounts to direct participation; and
3) When is a civilian directly participating such that they lose their civilian status?

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60 For instance the U.K. Manual on the Law of Armed Conflict provides that '[w]hether civilians are taking direct part in hostilities is a question of fact.' United Kingdom Ministry of Defence, *The Manual on The Law of Armed Conflict*, 5.3.2 (2004). Similarly the U.S. Commander's Handbook on the Law of Naval Operations states that '[d]irect participation in hostilities must be judged on a case by case basis… Combatants must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location, attire and other information at the time.' Department of the Navy, *The Commander's Notebook on the Law of Naval Operations*, NWP 1-14M, 8-2 (2007).

61 *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment of May 7 1997.

The current approach to targeting categorisation in non-international armed conflict is flawed. It should focus on hostilities between opposing armed groups whose members should be presumptive military objectives; not merely a mass body of civilians treated as individuals. The targeting paradigm in non-international armed conflict does not warrant a fundamentally different approach to that taken in conventional international armed conflicts.[62] This approach differs to that taken by the Interpretive Guidance.[63] The integrity of the targeting legal framework depends on the recognition of opposing non-state groups.[64] Recognition facilitates the targeting decision-making process and aids in implementing the principle of distinction, achieved by establishing two distinct groups: those presumed hostile and therefore subject to immediate attack, and all others (civilians) presumed non-hostile and as a consequence protected from immediate attack.[65] The Interpretive Guidance's focus on conduct-based targeting to assess a non-state combatant's status is merely a permutation of traditional status recognition and should be treated as such. Organisational membership and subordination to command and control is the fundamental difference between non-state combatants and civilians in any armed conflict. The utility in the notion of direct participation in hostilities lies not in determining which individual civilians are taking a direct part in hostilities, but in determining when an individual appearing to be a civilian is in fact a combatant of a non-state organised armed group. This is best achieved through a status-based targeting approach concentrating on subordination to command and control.

C *The Concept of 'Civilian'*

The definition of 'civilian' is of vital importance as it determines the scope of persons protected against direct attack. According to the Interpretive Guidance, in an international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse* are entitled to protection against direct attack unless and for such a time as they take a direct part in hostilities.[66] Members of irregular armed forces (e.g. militia, volunteer corps, etc.) whose conduct is

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62 AP I art. 51(2), (3) ('The civilian population as such, as well as individual civilians, shall not be the object of attack… unless and for such time as they take a direct part in hostilities').

63 Melzer, above n 24, 76:

> In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction (a point on which this author agrees). In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore a particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

64 AP I, art. 48 ('in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants…').

65 Geoffrey S Corn and Chris Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts' (2011) 33 (2) *University of Pennsylvania Journal of International Law* 315.

66 Melzer, above n 24, 26.

attributable to a state party to an armed conflict are considered part of its armed forces.[67]

In non-international armed conflict it becomes more difficult to distinguish those who may validly be targeted and those who may not. Organised armed groups, who do not always wear a uniform or distinctive insignia, constitute parties to non-international armed conflicts. According to the Interpretive Guidance, identification or membership is determined through conduct. The decisive criterion for individual membership in an organised armed group is whether the person assumes a continuous function for the group involving direct participation in hostilities. This is referred to as the 'continuous combat function' (CCF) test.[68] The CCF test was an attempt to resolve the highly contentious 'for such a time' aspect of the direct participation rule.[69] Prior to the CCF test some experts worried that irregular forces were being provided greater protection than members of regular armed forces, who did not enjoy an analogous temporal limitation to attack.[70]

The CCF arose out of concern that members of organised armed groups often failed to distinguish themselves from the civilian population and as a consequence increased the likelihood of attacks on civilians due to the complexity involved in the targeting process.[71] As highlighted in the Interpretive Guidance, membership in irregularly constituted groups is not consistently expressed through uniforms, fixed distinctive signs or identification cards.[72] Presented with this difficult challenge, the experts felt this membership may be limited through a conduct-centric approach. Members who were unambiguously acting within a capacity involving a combat function met the threshold required by the CCF test and therefore were valid military targets. Evidence of CCF, according to the Interpretive Guidance, may be determined:

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67 Membership in these irregular armed forces belonging to the conflict is determined based on the same functional criteria that apply to armed groups in non-international armed conflict.

68 According to the Interpretive Guidance, CCF is synonymous with direct participation. Group members whose function is to engage in actions that would rise to the level of direct participation (discussed below) are subject to attack regardless of whether they are engaged in these activities at the time.

69 Combatants could only be targeted whilst directly participating in hostilities and could not be targeted when they were not.

70 Melzer, above n 24, 22:

> It would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war.

71 Indeed the author believes that this is a conscious tactic used by members of organised armed groups.

72 Melzer, above n 24, 32-33:

> In view of the wide variety of cultural, political, and military contexts in which organised armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to 'membership' within the meaning of international humanitarian law… In practice, the informal and clandestine structures of most organised armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State Party to the conflict and its armed forces.

> through the carrying of uniforms, distinctive signs, or certain weapons. Yet it 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 organised 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 operations. [73]

The resulting consequence is that members of an organised armed group who have a CCF may be attacked at any time, whereas those who do not, but who take part in sporadic or spontaneous acts, must be treated as civilians directly participating in hostilities and so are subject to attack only for the duration of that particular operation. It is difficult to imagine the efficacy of such an approach in practice. It is impractical to distinguish between the two categories. To illustrate, if an individual is identified as having engaged in hostilities in a past engagement, how can a state force know whether the participation was merely periodic when the same individual conducts a subsequent operation against the state force?[74] Consider the mention of an identity card. It is beyond all reason to think how the carrying of an identity card will assist an attacker in differentiating members who have a CCF and civilians. In reality, the majority of attacks will be carried out in a high stress, time-limited and civilian-saturated area where distinction based on function, arrived at by the analysing of conduct, will prove highly difficult. The conduct-focused approach of the Interpretive Guidance is of limited practical assistance to state armed forces and therefore, unfortunately, offers little chance of compliance.

Another criticism of the CCF criterion is the adverse distortion on the military necessity and humanitarian balance of international humanitarian law. The CCF approach precludes direct military attack against members of non-state armed groups who do not perform a CCF. In contrast, membership in a state's military offers no such protection even when that member performs no function that would amount to direct participation.[75] For example, a cook in the regular armed forces may be lawfully attacked at anytime; his or her counterpart in a non-state organised armed group may only be attacked if he or she either assumes a CCF or is directly participating in hostilities, and then only for such time as that participation occurs.[76] On balance, this is an illogical and unacceptable situation.

Although a diligent effort to clarify and increase protection of civilians in modern combat, the CCF will accomplish little. The basic tenet of characterising non-international armed conflict as involving hostilities between state forces and a mass of civilians directly participating in hostilities is fatally flawed. Such an approach distorts the fundamental lines of authority historically associated with armed conflict. Treating

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73 Ibid 35.

74 Schmitt, above n 57, 23.

75 Adam Roberts, 'The Equal Application of the Laws of War: A Principle Under Pressure', (2008) 90 *International Review of the Red Cross* 931 (discussing different legal regimes applicable on the battlefield).

76 Ibid.

members of non-state armed groups as civilians directly participating in hostilities, even as members with a CCF, results in a dilution of state forces' ability to target these individuals. Furthermore, refusal to segregate the population into distinct combatant and civilian populations compromises and makes implementing the principle of distinction far too complex.[77] The conduct-centric approach is of little practical value and focus should be on traditional status-based recognition. Status-based targeting acknowledges the fundamental difference between non-state organised armed groups and civilians to an armed conflict – group subordination to command and control and not individual conduct.

D *The Concept of Direct Participation*

The concept of direct participation determines individual conduct that in turn leads to the suspension of a civilian's protection against direct attack by state forces. The notion of direct participation refers to those specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It should be interpreted synonymously in situations of international armed conflict and non-international armed conflict.[78]

There are three common elements outlined in the Interpretive Guidance that form the 'constitutive elements' of direct participation:[79]

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

Applied in conjunction the three requirements, according to the Interpretive Guidance, permit a reliable distinction between activities amounting to direct participation in hostilities and activities which are not part of the conduct of hostilities and, therefore, do not entail a loss of protection against direct attack.[80]

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77 Corn, Jenks, above n 65, 21.

78 International Committee of the Red Cross, 'International Humanitarian Law and the challenges of contemporary armed conflicts' (paper presented at 31st International Conference of the Red Cross, Geneva, Switzerland, 1 December 2011) 43.

79 Melzer, above n 24, 46.

80 Melzer, above n 56, 44.

The first element considers the requisite degree of harm that must be suffered by the enemy or civilian as a result of the physical conduct of an individual. Difficulty lies in determining the nature and degree of harm justifying the loss of civilian status. This element protects those individuals whose conduct has a merely incidental or inconsequential effect upon the enemy.[81] The Interpretive Guidance states that the 'threshold of harm' must either adversely affect the enemy or harm protected persons or objects. The Interpretive Guidance analysis of 'threshold of harm' is generally sound and no further critique is necessary.[82]

The Interpretive Guidance's formulation of 'direct causation' is more contentious. The Interpretive Guidance requires that the harm caused by the act 'be brought about in one causal step.'[83] This constitutes an overly strict formulation of causation. Take for instance, a young man in the tribal areas of southwestern Pakistan performing reconnaissance for the local Pakistan-Taliban militia who are fighting against Pakistan and US government forces. He is tasked to gather intelligence on troop movements, enemy disposition and the types of weapons they are using. This information is then passed on to the militia for their use in operational planning. Under the Interpretive Guidance's approach, this man is not participating in hostilities because his acts are deemed too remote. Nevertheless, his intelligence is a vital component of the militia's operations.

It is reasonable to assert that such operational activities are sufficiently proximate to the resulting harm suffered by the enemy from the subsequent military operation, enhanced by the intelligence gathered, and should therefore be categorised as direct participation. Although the young man's intelligence gathering does not inflict harm in one causal step, it constitutes an essential link in the chain immediately preceding the final harm caused. Acts of harm represent an apex of a pyramid built on the efforts of support personnel such as the young Pakistani man.[84] The resulting militia attack relies on the accuracy of that information.

An alternative that would better balance military necessity and the protection of civilians would be to include 'operational activities that facilitate and are closely connected with the materialisation of harm' into the test for causal proximity.[85] This enables state forces to target individuals who engage in precursor operational activities that make the ultimate infliction of harm a reality. For instance, this would allow forces in Afghanistan and Iraq to target Improvised Explosive Devices (IEDs) production

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81 The classic example is the child who throws a rock at an armoured vehicle.

82 Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 *New York University Journal of International Law and Politics*, 697, 712-724 (provides a detailed analysis of 'threshold of harm', although he concurs that the Interpretive Guidance is generally sound on this point).

83 Melzer, above n 56, 55.

84 DamienVan Der Toorn, 'Direct Participation in Hostilities': A legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' (2010) 17 *Australian International Law Journal* 7.

85 Ibid 24.

facilities before they are placed within the local community and amongst the civilian population. Caterers and support personnel such as mechanics, however, would not be subject to direct attack as their operational activities are not 'closely connected to the materialisation of harm'.[86] This broader approach conforms better with the ICRC's goal in protecting civilians and balancing military necessity and humanitarian concerns.

The third constitutive element - belligerent nexus - requires the act to in some way be tied to the armed conflict. This requirement excludes actions such as looting and civil unrest that merely exploit the lack of law and order inherent in conflict.[87] This applies even when a party to the conflict is the object of the attack, such as self-defence against a combatant acting criminally, for instance during a rape.[88] The Interpretive Guidance adopted an objective approach in determining whether the act in question is 'specifically designed to directly cause the required threshold of harm'.[89] Therefore, civilians forced into fighting or child soldiers under the age of 15 can be treated as direct participants even though their participation is, at law, involuntary.[90] The objective action of the participant to harm the enemy determines his or her participation, not whether he or she intended to harm the enemy.

The only shortcoming in the constitutive element is that the act must be in 'support of a party to the conflict and to the detriment of another.'[91] Two problems can be identified with this approach. First, this definition focuses solely on harm as the defining factor. For instance, one party's action to a conflict must cause physical detriment to the other. Direct participation can, however, also include acts that directly enhance the military capacity or operations of a party, without necessarily causing immediate harm to the enemy.[92] Secondly, this implies that modern warfare is a zero-sum game in which one party solely benefits from the harm caused to the other. Modern warfare is a complex environment and it is possible for a group or individual to be opposed to both sides of a conflict. An illustrative example is the Shia militia in Iraq during the early days of the war, being opposed to the US military and Sunni militias.[93] Due to these factors the belligerent nexus would be better defined as acts 'in support of a party to the conflict or to the detriment of another.'[94] This definition provides a more flexible approach that takes into account the many potential parties and individuals motivations to partake in modern conflict.

86 Ibid.
87 Schmitt, above n 82, 735.
88 Ibid 735.
89 Melzer, above n 56, 58-59.
90 Schmitt, above n 82, 735.
91 Melzer, above n 56, 58.
92 Schmitt, above n 82, 736.
93 Ibid 736.
94 Ibid.

E *Temporal Aspect of Direct Participation*

Civilians enjoy protection against direct attack 'unless and for such time as' they take a direct part in hostilities.[95] The ICRC states that civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organised armed groups belonging to a non-state party to an armed conflict cease to be civilians and lose protection against direct attack for as long as they assume a CCF.[96] Two areas of controversy arise within the ICRC's interpretation. First, the 'for such time' principle or more widely known as the 'revolving door' debate.[97] The second surrounds the precise moment at which direct participation begins and ends.

A logical reading of the phrase 'unless and for such time' implies that civilians lose and gain protection against direct attack in line with their actions or direct participation in hostilities (the so called 'revolving door' of protection). This has led some authors to argue that the 'revolving door' of civilian protection is not a 'malfunction' of international humanitarian law, but an integral and intended part of the law of hostilities.[98] According to the Interpretive Guidance, individuals who participate in hostilities on a recurrent basis regain protection from direct attack upon returning home and lose it again only when they launch the next attack.

Again, the ICRC has created a situation that state military forces are unable to countenance. Such an interpretation will degrade combatants' respect for the law. The reason civilians lose their protection from direct attack is because they have consciously chosen to directly participate in hostilities; it is not because they necessarily represent a threat.[99] This interpretation will, in the longer term, reduce protection for civilians caught up in conflict:

> If civilians could repeatedly opt in and out of hostilities, combatants victimised by their activities will quickly lose respect for the law, thereby exposing the civilian population as a whole to greater danger. […] The best approach is therefore 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. This may occur through extended non-participation or an affirmative act of withdrawal. Further, since the individual who directly participated did not enjoy any privilege to engage in

95 Art 51(3) AP I; 13(3) AP II.

96 Melzer, above n 56, 44.

97 Popularly symbolised by the farmer who works in his fields by day but becomes an insurgent fighter at night.

98 Melzer, above n 24, 347. (However the author also notes that the speed at which the 'door revolves' and therefore its practical relevance as a legal mechanism for the conduct of hostilities depends on the temporal scope given to the notion of 'direct participation in hostilities'; Melzer, above n 55, 70 ('integral part, not a malfunction of international humanitarian law. It prevents attacks on civilians who do not, at the time, represent a military threat').

99 Schmitt, above n 57, 33.

> hostilities, it is reasonable that he or she assume the risk that the other side is unaware of such withdrawal.[100]

Furthermore, this approach is untenable from a military perspective. To illustrate, in asymmetrical warfare, individual insurgents typically mount hit and run attacks; or carry out attacks in creative ways whereby they do not have to face a conventionally superior force, as with an IED or landmine. Without an opportunity to identify insurgents in such situations the only plausible approach to combating this threat is to locate their caches or bomb-making facilities. According to the Interpretive Guidance, however, once the insurgents return from an attack, such as planting an IED, they are safe until such a time as they directly participate in hostilities again.[101] It enables insurgents to attack at a time of their choosing and then melt back into the protection of the local civilian population. This engenders disrespect for international humanitarian law by state forces that feel the law provides unnecessary protection to non-state actors. Disrespect turns to non-compliance thereby endangering civilians further.[102] Insurgents in fact will use their civilian status in between attacks to prepare and plan for their next operation.[103] There is a serious military necessity to humanitarian distortion present in the Interpretive Guidance's approach.

The second issue concerns the precise moment at which direct participation begins and ends. The Interpretive Guidance states that preparatory measures 'are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.'[104] On the other hand, actions 'aiming to establish the general capacity to carry out unspecified hostile acts do not' rise to this level.[105] Deployment 'begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation', whereas 'return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation'.[106] The issue turns on acts taking place

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100 Michael N. Schmitt, '"Direct Participation in Hostilities" and 21st Century Armed Conflict', 510 in Fischer, *Crisis Management and Humanitarian Protection* (2004); See also Schmitt, above n 56, 38 (explaining the more logical approach being 'one whereby a civilian directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non participation or an affirmative act of withdrawal'); See also *Al Ginco v. Obama*, 626 F. Supp. 2d 123 (Dist. Court, Dist of Columbia, 2009). (The US District Court for the District of Columbia addressed the question of status as a member of an organised armed group in relation to a Guantanamo detainee. At para 129 is a legal test to determine the question of extended non participation. The district court held that 'to determine whether a pre-existing relationship sufficiently eroded over a sustained period of time, the Court must, at a minimum, look to the following factors:

> (1) the nature of the relationship in the first instance;
> (2) the nature of the intervening events or conduct; and
> (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody').

101 Melzer, above n 56, 70.

102 Van Der Toorn, above n 84, 25-26.

103 Ibid 26.

104 Melzer, above n 56, 51.

105 Ibid 65.

106 Ibid 67.

prior to or after a hostile action and whether they constitute a concrete component of an operation.

A hypothetical scenario best highlights the problem with the Interpretive Guidance's restrictive approach:

> Three Afghani men, who are supportive of, but not integrated into, the Taliban, intend to place an IED on a road regularly used by International Security Assistance Force (ISAF) supply vehicles in southern Afghanistan. On the first day, they talk to some contacts to arrange the sourcing of the components for the device. On the second day, they receive the components and begin to assemble the device. On the third day, they visit the roadside to watch the movements of enemy supply vehicles in order to determine where best to place the device. On the fourth day, they finish assembly of the device. In between this conduct, they return to their vocation as farmers. On the fifth day, one of them prepares a hole in which to place the device. Finally, on the night of the sixth day, they place the device and fill in the hole. They wait on a nearby vantage point on the seventh day, watching for enemy vehicles to pass and remotely detonate the device destroying a vehicle and its operators.[107]

Under the Interpretive Guidance's approach 'participation' is limited to the individual acts on each of the consecutive days. The intervening periods, where the three return to farming, are deemed to be peaceful activity. This is the case even though those periods of peaceful activity are minor interruptions in an organised and lethal operation against a conventional military force.

An alternative approach, supported by numerous scholars and commentators, is the chain of causation approach.[108] Each link in the chain must be closely connected with the next. The chain is severed when an individual demonstrably disengages from the series of acts. This approach encompasses the entire chain of subsequent acts and deems the whole period as direct participation in hostilities. The result is the scope for targeting better aligns with realities of modern warfare, garners greater support from state forces, and ultimately leads to greater respect of international humanitarian law and as a result increases protection of civilians in conflict.

VI CONCLUSION

Current international humanitarian law is adequate to regulate the practice of targeted killing. This is so even given the apparent grey areas surrounding the categories of recognised conflicts, the notion of combatant in non-international armed conflicts and the concept of direct participation in hostilities canvassed above. There are also more immediate and practical reasons for this to be so. The international framework to regulate states' use of force has been developed over hundreds of years and has wide reaching international support. Attempting to redraft or propose a new agreement in

107 Van Der Toorn, above n 84, 21.

108 See generally Yoram Dinstein, 'Distinction and the Loss of Civilian Protection in Armed Conflict' *in Israel Yearbook on Human Rights* (2008) 38, 189-90; Schmitt, above n 56, 36; Van Der Toorn, above n 82, 21.

relation to targeted killing and how it is regulated may be seen as taking a large step backwards.

Targeted killing is becoming more prolific and its use as a strategic policy by states to respond to the challenges of modern conflict will not abate. The current legal framework is adequately equipped to deal with targeted killing; however, further clarification is required. Grey areas surrounding categories of armed conflict, the notion of combatant in non-international armed conflicts and the notion of direct participation in hostilities, in particular, expose the shortcomings of the current legal framework. Without clarification, and the resulting certainty that brings, civilians and relations between states will continue to be exposed to unnecessary risk as states attempt to 'go it alone' in interpreting targets in line with their own strategic objectives. These individual state objectives will not always conform to the principles of international humanitarian law and are subject to the political considerations of the day.

The value of regulating targeting killing has already been recognised by prominent international legal scholars and commentators.[109] The agreement of a normative framework for targeted killing will mitigate the strategic and political fallouts that have marred targeted killing to date. As Melzer states:

> The danger of targeted killing lies much less in the method as such than in the myths and misconceptions which surround it. In order to avoid an unjustified demonization of targeted killings and to put this method into its proper juridical perspective, it was indispensable to make an honest attempt at identifying and disentangling these misapprehensions in the service of the rule of law and, ultimately, of the inherently human values held by civilized societies.[110]

An international consensus defining the limits and use of targeted killing is necessary in order for states to be held accountable. The author recommends using the current international humanitarian framework. However, alternatives exist and could take the form of an international treaty or a consultation of experts similar to the ICRC's Direct Participation in Hostilities Project. At a minimum there must be the beginning of an international dialogue on the rules and limitations of targeted killing. It is crucial that whichever approach is taken, it must account for the complexities of modern warfare. Failure to do this will result in adherence to the chosen normative framework being lost in the friction and uncertainty of war.

109 The author commends the efforts of Nils Melzer, Ben Saul, Noam Lubell, P. W. Singer.

110 Melzer, above n 24, 429.