So-called Targeted Killings in Volatile Occupied Territories- the Concept of Direct Participation in Hostilities, the Principle of Proportionality, and the Shifting Boundaries of IHL and IHRL (Please do not cite, as it remains a draft version, with footnotes yet to be completed).

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1. Introduction

This paper aims to analyse the so-called targeted killings undertaken in volatile occupied territories riddled with (occasional or frequent) eruptions of armed violence. It seeks to examine the extent to which the interlocking relationship between international humanitarian law (IHL) and international human rights law (IHRL) can operate to address the conditions under which an occupying power in such turbulent context of occupation can resort to lethal measures against individual persons which it considers to pose an imminent and serious danger. In so doing, the paper will focus on two key areas that are of special relevance to the assessment of targeted killings: (i) the elements (*Tatbestand*) of the concept of direct participation in hostilities; and (ii) the role of the IHL-based principle of proportionality, as influenced by the IHRL-derived test of proportionality, in constraining lethal pinpoint measures taken in the course of conduct of hostilities.

2. What is Targeted Killings in International Law?

Targeted killing is a commonly used concept that often refers to a lethal force used against an individual person. The experts who gathered to discuss a multitude of implications of this issue at the former Centre Universitaire du Droit International Humanitaire (CUDIH), Geneva, in 2005 provided the following cogent definition:

> A targeted killing is a lethal attack on a person that is not undertaken on the basis that the person concerned is a "combatant", but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities.[1]

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Please do not cite this paper, as this remains a first draft. Footnotes remain to be completed.

[1] Definition employed by the experts of the CUDIH's meeting, *Report of the Expert Meeting on the Right to Life in*

This pattern is often relied upon against an alleged, suspected, or actual terrorist, or against any other unprivileged belligerent in occupied territories. Targeted killing often takes the depersonalized form of aerial killing, including by way of drones. If this method of deploying lethal force is considered to fall outside the framework of the IHL rules on conduct of hostilities, this amounts to an extra-judicial killing, which is clearly outlawed.

3.Delimiting the Parameters of Analysis

3.1. Overview

When armed violence has occurred, or is occurring, in volatile (parts of) occupied territories, three preliminary questions must be analyzed before the State concerned (most often, the occupying power) can lawfully resort to exceptional measures of targeted killings: (i) the normative framework within which targeted killings take place (the normative standards of law enforcement based on laws of occupation and IHRL, or IHL rules on conduct of hostilities); (ii) legal characterization of armed conflict; and (iii) legal status of persons to be targeted. These are the preliminary questions that must be examined prior to states invoking the method of targeted killings. After serious deliberations over these contextual questions, the State may come to decide the option of using lethal pinpoint force against specific individuals rather than relying on less deleterious alternatives such as arrest and judicial measures (trial and prosecution). It is at this point that more specific, *ex ante* questions ought to be appraised by the State, the questions mostly related to the principle of proportionality as examined later in this paper.

3.2. Determining the Normative Framework

First, the State must ascertain the normative framework within which targeted killings can be ordered. It must at first be determined whether the violence that triggers the State's a specific response, or whether the framework of armed violence within which such a response is undertaken, crosses the minimum threshold of armed conflict in the juridical sense, or remains of short duration and/or of low intensity[2]

Armed Conflicts and Situations of Occupation, CUDIH Geneva, 1-2 September 2005, Section E; L. Doswald-Beck, L. Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?", (2006) 86 *International Review of the Red Cross (IRRC)*881, at 894.

[2] With respect to non-international armed conflict (NIAC), as opposed to international armed conflict (IAC), the present writer agrees with the ICRC's gradual move to lower the threshold of applicability of common Article 3 GCs. Despite such a "downward trend", the intensity required of the threshold of establishing NIAC is considered higher than that required of IAC, which can be recognized even with regard to a cross-border exchange of fires or scuffles. See C. Greenwood, "International Humanitarian Law (Laws of War)", in: F. Kalshoven (ed), *The Centennial of the First International Peace Conference – Reports and Conclusions*, (2000) 161 at 232 (suggesting that the standard of applicability of APII be lowed to the same as that appropriate for common Article 3 GCs).

sufficient to be met by law enforcement measures governed by laws of occupation and IHRL.[3] The IHL treaties that deal with occupation, such as the 1907 Hague Regulations and the 1949 Geneva Civilians Convention, do not provide clear guidelines on the circumstances in which resort to lethal force may be exceptionally allowed, leaving much leeway to occupying powers.[4] It is against such normative background that the "percolating" effect of IHRL is understood as of special import in filling normative lacunae. Aside from such a complementary function, the role of IHRL can be much more assertive and robust, as will be seen in relation to the transplantation of sub-tests of the IHRL-based proportionality test in the context of conduct of hostilities.

3.3. Legal Characterization of Armed Conflict (IAC or NIAC)

The second question is closely intertwined with the first question. It must be examined whether such armed conflict is of international or non-international nature. Because of the difference in the minimum level of violence required for international armed conflict (IAC) and non-international armed conflict (NIAC), the first and second questions can only conjunctively be tackled, with special focus on the duration and intensity of violence.

3.4. Legal Status of Persons to be Targeted

The outcome of the second question is of special relevance to the third question, namely the legal status (civilians, combatants,[5] or unprivileged belligerents/unlawful combatants[6]) and the treatment given to

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[3] On this matter, there is a separate question of the jurisdictional basis for applying IHRL in occupied territories, but examinations of this will simply go beyond the scope of this paper.

[4] Doswald-Beck (2006), *supra* n. 1, at 892.

[5] If the targeted persons are classified as combatants who have yet to surrender, then it is generally contended that they can be considered the lawful military target not only during their direct participation in hostilities but also throughout the period of their membership (subject to the conditions that no perfidy and no means or methods of warfare causing unnecessary suffering or superfluous injury are used): H. Moodrick Even-Khen, "Case Note: Can We Now Tell What 'Direct Participation in Hostilities' is?, *Hebrew Univ. of Jerusalem, International Law Forum,* 1 July 2007 (reprinted in: (2007) 40 *Israel L.Rev.* 213) at 19. Nevertheless, they can be sufficiently disassociated and disengaged to be considered no longer combatants under international law.

In contrast, for the proposal that even with respect to combatants, the general principle of military necessity requires that the application of the doctrine of less restrictive alternative, so that if they can be captured, then such non-lethal measure ought to be opted, see ICRC, *Interpretive Guidance on Direct Participation in Hostilities under International Humanitarian Law,* (2009) [hereinafter, *Interpretive Guidance on DPH*]at 81; and O. Ben-Naftali and K.R. Michaeli, "'We Must Not Make a Scarecrow of the Law' – A Legal Analysis of the Israeli Policy of Targeted Killings", (2003) 36 *Cornell ILJ* 233 at 279 and 290.

individual persons that are the targets of direct pinpoint attacks. In the context of IAC, the International Committee of the Red Cross (ICRC) takes a view that *all* persons other than members of armed forces of a party to the conflict or participants in a *levée en masse* are civilians, and hence shielded from direct attacks unless and for such time as they a direct part in hostilities.[7] In contrast, the present writer proposes that civilians directly involved in military activities be classified as unprivileged belligerents. Yet, he argues that the outcomes of recognizing such third category should be essentially the same, namely, the loss of protection from direct attacks only for the duration of their participation in hostile acts.[8] With respect to the fighting members of organized armed groups, who do *not* "belong to a Party to the conflict"[9] within the meaning of Article 4A(2) of the Third Geneva Conventions 1949 (GCIII), they are, as examined below, unprivileged belligerents. As such, they would risk losing much of rights and privileges associated with civilians for the entire duration of hostilities, and when held, they can benefit only from a fraction of rights, including the minimum guarantees embodied in common Article 3 of the Geneva Conventions (GCs)[10] and the customary law equivalent of Article 75 Additional Protocol I (API).

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[6] If targeted individual persons are categorized as unprivileged belligerents in IAC, the period in which they would lose entitlement to immunity from direct attacks is only during the period of their direct participation in hostilities, because they remain civilians outside such period, so long as they do not become members of the armed forces of a party to the conflict: N. Melzer, *Targeted Killing in International Law*, (Oxford: Oxford Univ. Press, 2008), at 310. However, there remain serious problems of their possible disentitlement to the detailed guarantees embodied in the provisions of Part III, GCIV. For the view recognizing the third concept of unprivileged belligerents or unlawful combatants, see R.R. Baxter, "Sop-called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs", (1951) 28 BYIL 323; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge: Cambridge Univ. Press, 2004), at 29-33; D. Fleck (ed), *The Handbook of International Humanitarian Law*, 2nd ed., (Oxford: Oxford Univ. Press, 2008), at 82, para. 302; C. Greenwood, "International Law and the 'War on Terrorism'", (2002) 78 *International Affairs* 301 at 316-7; A. Roberts, "The Laws of War in the War on Terror", in: W.P. Heere (ed), *Terrorism and the Military –International Legal Implications*, (2003), 65 at 82.

[7] ICRC, *Interpretive Guidance on DPH, supra* n. 5, at 16, 20 and 21. Along the similar line, the ICTY, in the *Blaskic* case, defined civilians as "persons who are not, or no longer, members of the armed forces": ICTY, *Prosecutor v. Blaskic*, No. IT-14-T, Judgment of 3 March 2000, para. 180.

[8] Here, the present writer is not dealing with fighting members of irregular armed groups.

[9] In contrast, members of irregular armed forces who have demonstrated "a sufficient degree of military organization" and met the requirement of "belonging to a party to the conflict" remain entitled to combatant privilege and PoW status upon capture, even if they fail to fulfill the four established conditions (namely, (i) a responsible command; (ii) fixed distinctive sign recognizable from a distance; (iii) carrying arms openly; and (iv) compliance with laws and customs of war): ICRC, *Interpretive Guidance on DPH, supra* n. 5 at 22.

[10] *ICRC Commentary to GCIII*, at 57.

In the context of NIAC, the treaty-based rules fail to articulate the notions of combatants[11] (and hence prisoners of war (PoW) status). It is nonetheless possible to contemplate the notion of "functional combatants" to describe members of dissident armed forces, who cannot regain civilian privileges as long as they assume combatant functions.[12] Such a notion would help alleviate the problem of non-recognition of combatant status in NIAC, the problem that risks fudging the difference between civilians and fighting members and undermining the protection of the former.[13] That said, much of uncertainty remains over two further questions: (i) criteria for determining the combatant status in NIAC; and (ii) the possibility of introducing the concept of unprivileged belligerents in NIAC.[14] With respect to the question (ii), the absence of "privileged combatancy" in the context of NIAC, namely combatants entitled to PoW status upon capture, casts serious doubt on the validity of this concept in relation to NIAC.

As regards the question (i), it is not their membership of a particular armed organized group but their actual, direct participation in hostilities within the meaning of common Article 3 GCs that makes individual persons combatants in NIAC.[15] The UN Human Rights Inquiry Commission, which was set up by the erstwhile Commission on Human Rights, rejected the Israeli government's claim of combatant status of the victims of "targeted political assassinations". The reason was that at the material time when killed, they were not participating in the hostilities, and that no evidence was adduced by Israel to

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[11] The absence of the notion of combatants in NIAC can be explained by the reluctance of the States to give insurgent groups not only any legitimacy but also immunity from criminal liability for fighting: D. Kretzmer, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", (2005) 16 EJIL 171 at 197. However, as Kretzmer notes, reference to the term "civilians" in APII and the Rome Statute suggests existence of "non-civilians" or "combatants" in NIAC: *ibid*., at 197.

[12] Melzer,*supra* n.6 at 328. He considers that such "functional combatants" are determined by membership in organized armed dissident groups: *ibid*.

[13] M. Schmitt, "The Principle of Discrimination in 21st Century Warfare", (1999) 2 *YaleHR&Dev LJ* 143 at 160-1; Y. Dinstein, "Unlawful Combatancy", (2002) 32 *Israel YbkHR* 247, at 249; and Kretzmer, *supra* n. 11 at 198.

[14] Given the absence of "privileged combatancy", namely combatants entitled to PoW status upon capture, in NIAC, many authors question the validity of this concept in NIAC: K. Dörmann, "The Legal Status of 'Unlawful/Unprivileged Combatants'", (2003) 85 *IRRC* No. 849, 45 at 47; and Melzer, *supra* n. 6 at 332.

[15] Kretzmer, *supra* n. 11 at 199. Along the same line, Ruys refers to the presumption of a protected civilian status in case of doubt and stresses a context-specific interpretation rather than the "membership approach": T. Ruys, "License to Kill? State-Sponsored Assassination under International Law, (2005) 44/1-2 *Military Law and Law of War Review* 13 at 35.

corroborate their alleged combat role despite their appearance.[16] This finding provides two useful guidelines for verifying the legitimate target status of individual persons, namely the evidence that they are taking a direct part in hostilities at the relevant time, and the existence of other evidence of their combatant role.[17]

The mist surrounding the third question will become clearer once it is realized that the most decisive question, regardless of the recognition of unprivileged belligerents or not, is how to clarify the notion "direct part in hostilities". Indeed, even if one assumes, as the Israeli Supreme Court did in the *Targeted Killings* Judgment, that there is no middle-ground notion of unprivileged belligerents or unlawful combatants,[18] the civilians who have directly participated in hostilities would have to bear the legal outcomes akin, if not identical, to those of unprivileged belligerents. The two main such outcomes are: (i) forfeiture of their immunity from direct attacks; (ii) disentitlement to PoW status after capture; and (iii) susceptibility to criminal prosecution for their participation in hostilities.[19] Further, unless they are

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[16] Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine, Report of the Human Rights Inquiry Commission established pursuant to Commission resolution S-5/1 of 19 October 2000*, E/CN.4/2001/121, 16 March 2001, para. 62.

[17] Kretzmer, *supra* n. 11 at 199.

[18] The bifurcated approach based on civilians and combatants can also be corroborated by the Inter-American Commission of Human Rights (IACmHR): IACmHR, *Report on Columbia 1999*, Chapter IV, para. 55 (asserting that civilians taking direct part in hostilities retain their civilian status).

[19] The ICRC's *Customary IHL Study* notes that "international law does not prohibit States from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly: J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, (Cambridge: Cambridge Univ. Press, 2005), Rule 6, at 23. Nevertheless, it is generally considered that international law does not prohibit civilians participating in hostilities: R.W. Gehring, "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I", (1980) XIX-1-2 *Military Law and Law of War Review* 11, at 13; J.-F. Quéguiner, "Direct Participation in Hostilities under International Humanitarian Law", *Working Paper, IHL Research Initiative: Reaffirmation and Development of IHL*, Program on Humanitarian Policy and Conflict Research at Harvard University, November 2003, at 11; K. Watkin, "Humans in the Cross-Hairs: targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict", in: D. Wippman and M. Evangelista (eds), *New Wars, New Laws? – Applying the Laws of War in 21st Century Conflicts*, (Ardsley, NY: Transnational, 2005) 137, at 164 and 177; and Melzer, *supra* n. 6 at 330.

Contra, see M.N. Schmitt, "Direct Participation in Hostilities" and 21st Century Armed Conflict" in: H. Fischer (ed), *Crisis Management and Humanitarian Protection – Festschrift für Dieter Fleck*, (Berlin: Berliner Wissenschafts-Verlags, 2004), at 506 [heinafter Schmitt (2004)a]; and US Military Tribunal at Nuremberg, *Trial of Wilhelm List and Others (Hostages Trial*), 8 July 1947-19 February 1948, *UNWCC*, (1949) 8 *LRTWC* 34, Case No.

transferred to, and held in, occupied areas, they fall outside the scope of protection of the rights guaranteed in Part III of GCIV (namely, the most important part of GCIV, which relates to rights and privileges of "protected persons").

4. Fundamental Assumptions

Before undertaking detailed examinations of the two substantive issues (the notion of direct participation in hostilities; and the principle of proportionality), the fundamental assumptions of this paper need to be highlighted. First, it is proposed that in occupied territories, the normative framework of law enforcement standards based on IHRL and IHL should be the default rules, unless and to the extent that these are modified by the IHL rules on conduct of hostilities.[20] The International Court of Justice (ICJ),[21] the European Court of Human Rights (ECtHR)[22] and many monitoring bodies[23] of IHRL have recognized the parallel application of IHL and IHRL in military occupations. Even in case occupying powers are confronted with demonstrators or riots in occupied territories, it is the measure of arrest and trial that should be preferred.[24] Indeed, the existence of Article 68 GCIV suggests that the process of arrest, capture, prosecution and punishment pursuant to the law enforcement model should be the standard for the purpose of maintaining public order and security within the meaning of Article 43 of the 1907 Hague Regulations and Article 64 of the Fourth Geneva Convention (GCIV).[25] Second, as a corollary of the first assumption, levelling potentially lethal measures at the suspected terrorist or other civilians taking direct part in hostilities (or unprivileged belligerents) without giving them the chance of trial is a blatant violation not only of their non-derogable right to life, but also of their due process guarantees such as the right to be presumed innocent. Third, it can be advanced that the key to determining the applicability of

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47, at 58 (holding that: "[t]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars").

which held that: "[t]he rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars".

[20] See CUDIH, *supra* n. 1, at 19, 22-23.

[21] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Rep. 204, paras. 102-114; and *Case Concerning Armed Activities on the Territory of the Congo*, Judgment, 19 December 2005, ICJ Rep. 2005, para. 216.

[22] ECtHR, *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, paras. 63-64.

[23] Human Rights Committee (HRC), *General Comment 31*, para. 10; and its *Concluding Observations on the Second Periodic Report on Israel*, 21 August 2003, para. 11.

[24] Ben-Naftali and Michaeli (2003), *supra* n. 5, at 290 (suggesting that even combatants become legitimate targets "if all other means to apprehend them fail"); CUDIH, *supra* n. 1, at 26 (all experts agreed on this issue); Doswald-Beck (2006), *supra* n. 1, at 890.

[25] CUDIH, *supra* n. 1, at 22-23.

IHRL should be not only the criterion of effective territorial control, but also the sufficient degree of *personal* control exercised by the occupying power to arrest individual persons. This is especially true of an extraterritorial operation of deliberate targeted killing.[26] Fourth, where the armed forces of the occupied State or members of independent groups fulfilling the prisoners of war (PoW) condition under Article 4A(2) GCIII are conducting combat operations in the occupied territory, it is *generally* (*but not exclusively*) the IHL rules on conduct of hostilities rather than the standards of law enforcement (laws of occupation and IHRL) that govern the State's response.[27]

What is intractably difficult and controversial is the question whether it is lawful to rely on targeted killings in: (i) volatile occupied territories where because of outbreak of hostilities, parts of the territories (temporarily) escape the effective control of the occupying power; and (ii) occupied territories where portions of the territories come under the effective control of an autonomous authority. In both scenarios, the occupying power is unable to effectuate arrest of suspected terrorists or other "hostile civilians" directly involved in military activities. In the second scenario, the pitfall may be aggravated by the unwillingness or inability of the autonomous entity genuinely to apprehend the terrorist suspects and to transfer them to the occupying power.

5. The Concept of Direct Participation in Hostilities

5.1. Modalities of Civilian Involvement

Three genres of civilian involvement in military activities seem to stand out in the contemporary armed conflict: (i) individual persons who get involved in military activities in a voluntary, spontaneous and temporary (even one-off) manner and *individually* commit hostile acts; and (ii) individuals who belong to members of organised armed groups; and (iii) those individuals who are hired by private military or security companies (private contractors) for executing tasks normally assumed by armed forces.[28] With respect to the third category, one can add the growing number of civilian employees in a host of functions, again, traditionally assumed by military personnel.[29] They are deemed "civilians accompanying the armed forces" entitled to PoW status after capture, within the meaning of Article 4A(4) GCIII. The majority of both private contractors and civilian employees do not, however, generally perform tasks

[26] Melzer, *supra* n. 6 at 137. See also ibid., at 134-5.

[27] CUDIH, *supra* n. 1, at 24.

[28] Compare H.-P. Gasser, "Protection of the Civilian Population", in: Fleck (ed), *supra* n. 6, Ch. 5, 237, at 261, para. 519.

[29] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 37. See also the soft law resulting from a diplomatic initiative of the Swiss government in tandem with the ICRC on this issue: the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict of 17 September 2008 (agreed upon by 17 participating states).

requiring their direct involvement in hostile acts. Such lack of "continuous combat function" indicates that they are considered civilians under IHL[30] but susceptible to the risk of incidental death or injury due to their proximity to military objectives.[31] Indeed, since they are not combatant members of the armed forces, it is forbidden for states to authorize them to take a direct part in hostilities on their behalf without integrating them as members of their armed forces.[32] If they nevertheless directly participate in hostilities, they can become direct military targets during the period of such participation.[33] Be that as it may, whether or not those individuals retain the civilian immunity from direct attacks hinges ultimately upon the clarifications of the concept "direct participation in hostilities" within the meaning of Article 51(3) API.

5.2. General Remarks on the Notion of Direct Participation in Hostilities

Article 51(3) API stipulates that "[c]ivilians shall enjoy the protection afforded by this Section unless and for such time as they take a direct part in hostilities". The identical notion is also embodied in Article 13(3) APII. In essence, this notion derives from the terminology used in common Article 3 GCs, "[p]ersons taking no active part in the hostilities". Although common Article 3 GCs uses the terminology "active part in hostilities" instead of "direct part in hostilities", the ICTR in the *Akayesu* case ruled that they should be interpreted synonymously.[34] The customary law status of this rule laid down in Article 51(3) API is corroborated in doctrines and in the jurisprudence. The outcomes of the ICRC's *Customary IHL Study* categorize this as a customary rule applicable both in IAC and in NIAC.[35] In the *Targeted killings* judgment, the Israeli Supreme Court (sitting as the High Court of Justice) held that Article 51(3) API in its entirety represents customary international law.[36] That said, the constituent elements

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[30] ICRC and TMC Asser Institute, *Third Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law", Geneva, 23-25 October 2005, Summary Report*, at 21 [hereinafter, *Report of the Third Expert Meeting on DPH*] at 80.

[31] *Ibid.*, at 34 *et seq;* and ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 38.

[32] ICRC/Asser Institute, *Report of the Third Expert Meeting on DPH* (2005), *supra* n. 30, at 80; and ICRC, *Interpretive Guidance on DPH* (2009), *ibid*., at 38.

[33] ICRC, *Interpretive Guidance on DPH* (2009), *ibid*., at 39. The remaining question would be whether they are considered to remain civilians or instead to become unprivileged belligerents. The ICRC adheres to the former view: *ibid*.

[34] ICTR, *Prosecutor v. Jean-Paul Akayesu*, Judgment of Trial Chamber, 2 September 1998, Case ICTR-96-4-T, para. 629. This point is also recognized in: *ICRC's Commentary to APII*, at 1453, para. 4787 ("[t]he term 'direct part in hostilities' is taken from common Article 3, where it was used for the first time").

[35] Henckaerts and Doswald-Beck, *supra* n. 19, at 19-24 (Rule 6).

[36] HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 30; available at http://www.court/gov.il (last visited on 30 June 2008).

(*Tatbestand*) of this concept are left unarticulated and unelaborated.[37] A coherent normative standard of this concept ought to be established to admit only of "limited elasticity".[38]

Several preliminary comments can be made out on the concept of "direct part in hostilities".[39] First, even if terrorists and other irregular fighters are classified as civilians, they clearly risk forfeiting privileges associated with civilians so long as they take direct part in hostilities.[40] In this light, the loss of civilian status of individual persons can be considered temporary and more aptly described as "suspension" of civilian protections. As a corollary, with the concept of direct participation in hostilities serving as a benchmark for appraising civilian status, the fact that an individual is a member of a rebel or armed opposition group alone cannot justify his/her on-sight targetability of lethal means. In essence, the automatic reliance on the "membership approach" ought to be rejected.[41] These considerations suggest that civilians losing or regaining their protection against direct attacks is observable in parallel with the intervals of their engagement in direct participation in hostilities. This is the so-called "revolving door" theory.[42]

The ICRC's Commentary on API encapsulates the difficulty in assessing the notion "taking a direct part" under Article 43 API:

> Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad…as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.[43]

The thrust of the notion of direct participation in hostilities lies, according to the *ICRC's Commentary* on API in "*a direct causal relationship* between the activity engaged in and the harm done to the enemy at

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[37] Henckaerts and Doswald-Beck, *supra* n. 19 at 21. See also Moodrick Even-Khen, *supra* n. 5 at 7.

[38] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5, at 42.

[39] See Schmitt (2004)a, *supra* n. 19 at 507; and J.K. Kleffner, "From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference", (2007) 54 *NILR* 315.

[40] The ICRC and the Asser Institute have been jointly carrying out expert meetings on the notion of direct participation in hostilities. For the most recent document, see ICRC, *Interpretive Guidance on DPH* (2009), supra n. 5, which owes much to Nils Melzer.

[41] See, however, CUDIH, *supra* n. 1, at 39 (the division of opinions among the experts on this matter).

[42] Melzer, *supra* n. 6 at 347.

[43] *ICRC's Commentary to API*, at 516, para. 1679.

the time and the place where the activity takes place".[44] According to the *ICRC's Commentary on APII*, this causal link must be strictly interpreted so as to require an immediate consequence.[45] The criterion of causal linkage will be more in-depth examined below. Apart from causal relationship, the same *Commentary* stresses the test based on both the nature and purpose of impugned acts.[46] In relation to Article 51(3) API, the *ICRC's Commentary on API* notes that hostile acts, the abstention from which is required for civilians to claim immunity from direct attacks, refer to "acts which *by their nature and purpose* are intended to cause actual harm to the personnel and equipment of the armed forces".[47] Apart from the two tests (the criterion of direct causal relationship, and the nature/purpose test), the approach of the Inter-American Commission of Human Rights (IACmHR) suggests the existence of immediate military threat as another crucial test.[48]

The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009) [hereinafter, *Interpretive Guidance on DPH]* highlights three cumulative criteria in order for a specific hostile act to qualify as direct participation in hostilities: (i) the threshold of harm; (ii) direct causation; and (iii) belligerent nexus.[49] According to Mezler, the first criterion suggests that "hostilities must result in any degree of harm of a specifically military nature or in extra-custodial death, injury or destruction of persons or objects protected against direct attack". [50] The

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[44] *Ibid*, emphasis added.

[45] The *ICRC's Commentary to APII*, at 1453, para. 4787.

[46] The test based on a causal relationship is also emphasized in relation to APII. With respect to Article 13(3) APII, the ICRC*'s Commentary* notes that "[t]he term 'direct part in hostilities"…implies that there is a sufficient causal relationship between the act of participation and its immediate consequences": *ICRC's Commentary to APII*, at 1453, para. 4787.

[47] *ICRC's Commentary to API*, at 618, para. 1942, emphasis added.

[48] In its *Report on Columbia* (1999), the IACmHR stated that:

> [C]ivilians present an immediate threat of harm to the adversary when they prepare for, participate in, and return from combat. As such, they become subject to direct attack. Further, by virtue of their hostile acts, such civilians lose the benefits pertaining to peaceable civilians of precautions in attack and against the effects of indiscriminate or disproportionate attacks.

IACmHR, *Report on Columbia* (1999), Chapter IV, para. 54. See also Quéguiner, *supra* n. 19, at 3 (arguing that "the behaviour of a civilian must constitute a direct and immediate military threat to the adversary"); Melzer, *supra* n. 6 at 337.

[49] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 46. See also Melzer, *supra* n. 6 at 276.

[50] Melzer, *supra* n. 6 at 276.

second criterion demands that "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".[51] The third criterion in turn requires the act to "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".[52] Analytically, the ICRC's *Interpretive Guidance on DPH* considers these three criteria to be part of the constitutive elements (*Tatbestand*) of the concept of direct participation in hostilities,[53] and classifies the temporary element "for such time" as part of a question of modalities of this concept. In contrast, the present writer starts with the premise that the first criterion of the threshold of harm is a component element of the term "hostilities" only. In contrast, the second criterion ("direct causation") can be deemed a separate *Tatbestand* question, as this corresponds to the distinction between "direct" or "indirect" participation in hostilities.[54] Similarly, the third criterion should be seen as an implied element of the notion of direct participation in hostilities. Further, in contrast to the ICRC's *Interpretive Guidance on DPH*,[55] the present writer comprehends the phrase "for such time" as suggesting a temporal element of this notion.

5.3. Definition of "Hostilities"

5.3.1. Overview

The term "hostilities" is broader in scope than the notion "attacks",[56] but narrower than that of "armed conflict".[57] It can be considered the sum total of either "hostile acts" or all "military operations" undertaken pursuant to the conflict.[58] According to the *Report of the Third Expert Meeting on "Direct*

[51] ICRC, *Interpretive Guidance on DPH* (2009), supra n. 5 at 46.

[52] *Ibid*.

[53] *Ibid*., at 46-64.

[54] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 52.

[55] The *Interpretive Guidance* treats the temporal question as a facet of the modalities regulating the loss of civilian protection: *ibid*., at 70-3.

[56] The *ICRC Commentary to AP* defines "attacks" as "the use of armed force to carry out a military operation at the beginning or during the course of armed conflict": *ICRC Commentary to AP*, para. 1882. See also API, Article 49(1). Melzer argues that the notion "attacks" can be recognized not only in case of open combat, but also in relation to the placing of explosive devices, sabotage, and even the transmission of orders for combats: Melzer, *supra* n. 6 at 270-1.

[57] Melzer, *supra* n. 6 at 269 and 275. On the other hand, he considers that the term "hostilities" can be interchangeably employed with the notion of "military operations", "operations of war" and "operations" under IHL treaty-based rules: *ibid*., at 271.

[58] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 44. See also *ibid*., at 43 (defining the concept "hostilities" as "the (collective) resort by the parties to the conflict to means and methods of injuring the enemy");

Participation in Hostilities under International Humanitarian Law" (2005), jointly convened by the ICRC and the Asser Institute [hereinafter, Third Expert Meeting on DPH], the term "hostilities" is considered to encompass both "all acts that adversely affect or aim to adversely affect the enemy's pursuance of his military objective or goal", and "all military activities directed against the enemy in an armed conflict".[59] However, excluded from the concept of "hostilities" are activities of a merely war sustaining nature, in particular, activities relating to "war effort" undertaken by workers in the armament industry.[60]

One remaining question of the meaning "hostilities" is whether the concept of direct participation in hostilities can be understood as going beyond a specific hostile act, so that in case of civilians involved in hostile acts "on a persistently recurrent basis", their continued intent to undertake speculative hostile acts in the future can be sufficient to establish their direct participation in hostilities and susceptibility to direct attacks. This is an approach suggested by the Israeli Supreme Court in the *Targeted Killings* Judgment.[61] Nevertheless, as the ICRC's *Interpretive Guidance on DPH* notes, the continuation approach in case of permanent and recurrent participants obscures the distinction between the "*temporary, activity-based loss of protection*" based on direct participation in hostilities, and "*continuous, status or function-based loss of protection*" premised on combatants status or "continuous combat function".[62] The result would be to jeopardize civilian protections by way of erroneous or arbitrary attacks.[63]

5.3.2. Threshold of Harm

The ICRC's *Interpretive Guidance on DPH* states that this criterion does not require the "*materialization* of harm", but only the "objective likelihood" that a specific act will lead to such harm.[64] Surely, this makes sense in operational realities. In essence, the objective likelihood test is taken for suggesting that

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ICRC and Asser Institute, *Report of the Third Expert Meeting on DPH, supra* n. 30, at 21. See also *ICRC Commentary to AP*, paras. 1942 *et seq*: and *Melzer*, supra n. 6 at 273.

[59] ICRC and Asser Institute, *Report of the Third Expert Meeting on DPH*, at 22 et seq.

[60] *Ibid*., at 21.

[61] Israel, HCJ, HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 39; available at http://www.court/gov.il (last visited on 30 June 2008) [hereinafter, *Targeted Killings* judgment](referring to "civilians" preparing for the next hostility in the chain of hostile acts). Compare D. Statman, "Targeted Killing", (2004) 5 *Theoretical Inquiries in Law* 179, at 195-6 (discussing whether the location at which targeted killings take place is of material relevance to their legal and moral questions).

[62] ICRC, *Interpretive Guidance on DPH* (2009), supra n. 5 at 45, emphasis in original.

[63] *Ibid*.

[64] *Ibid*., at 47, emphasis in original.

"harm which may reasonably be expected to result from an act in the prevailing circumstances".[65] The *Interpretive Guidance* notes that without "adverse military effects", such acts as building fences or roadblocks, interrupting electricity, water or food supplies, appropriating cars and fuel, manipulating computer networks, and arresting or deporting persons are not of the kind deemed to yield the sufficient level of harm to be qualified as direct participation in hostilities.[66]

5.4. Direct Causation

As briefly discussed above, the term "direct" in the notion of direct participation in hostilities ought to be interpreted as a constituent element of this notion, which denotes the direct causation between a specific act and the adverse effect.[67] With regard to the requisite degree of the causation factor, Schmitt takes a broader view in favour of presuming the loss of immunity from direct attacks. He suggests that the concept of direct participation requires "but for" causation (namely, the results would not have been yielded but for the act in question). Still he stresses "causal proximity to the foreseeable consequences of the act".[68]

With regard to the notion taking "a direct part" (in hostilities), in the *Targeted Killings* judgment, as in the case of its assessment of the temporal element that will be examined below, the Israeli Supreme Court follows the methodology of firstly identifying two extreme ends of the scale. On one hand, persons in the chain of command, who plan and decide hostile acts, and those who enlist, order and send persons to commit them, are held to be clearly direct participants in hostilities. On the other hand, acts constituting indirect support, such as selling supplies and financing hostile acts, are found to be outside the scope of "direct participation in hostilities".[69] It is the middle area between the two extreme ends, which however, provides a fairly broad scope for the notion of direct participation in hostilities.[70] On this matter, the Court's methodology is guided by reference to the *function* of individuals, with the Court adamant that "the function determines the directness of the part taken in hostilities". In essence, it considered the notion of taking a "direct part" in hostilities to encompass: (i) "a person who collects intelligence for the army, whether on issues regarding the hostilities…or beyond those issues…"; (ii) "a person who transports unlawful combatants to or from the place where hostilities are taking place"; (iii) "a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service

[65] *Ibid*.

[66] *Ibid*., at 50.

[67] *Ibid*., at 52.

[68] Schmitt (2004)a, *supra* n. 19 at 508.

[69] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 37.

[70] *Ibid*., paras 34-37.

to them, be the distance from the battlefield as it may".[71] The case-by-case nature of the approach is nonetheless criticized for failing analytically to define and elaborate upon who are direct participants, and hence for leaving much of leeway to operational discretion of commanders.[72]

It can be argued that the opposing concept "indirect" causal link,[73] which does not make specific acts direct participation in hostilities, refers to "war-sustaining activities", namely activities other than conduct of hostilities and form part of the general war effort.[74] The ICRC's *Interpretive Guidance on DPH* considers general war effort to refer to "all activities objectively contributing to the military defeat of the adversary". This broad category embraces political, economic or media activities supporting the war effort.[75] Clearly, it is not possible to pinpoint at what juncture the causal link can be deemed direct or indirect. It all comes down to "a sufficiently close causal relation",[76] namely, to the "causal proximity", rather than the temporal or geographic proximity of a specific act.[77] Further, an uninterrupted causal chain of events is not required of this causal link criterion to be met.[78]

Given the collective and complex nature of modern military operations involving different sectors, the assessment of direct causation ought to be undertaken in tandem with other acts. A specific act alone may not suffice to produce anticipated damage but can do so only when forming "an integral part of a concrete and coordinated tactical operation" consisting of the plurality of acts.[79] Clarifying the criterion of direct

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[71] *Ibid*., para. 35.

[72] Moodrick Even-Khen, *supra* n. 5 at 24 and 25.

[73] In the *Targeted Killings* judgment, the Israeli Supreme Court considered that the persons who take "indirect" part in hostilities to cover: (i) "a person who sells food or medicine to an unlawful combatant"; (ii) "a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid"; and "a person who distributes propaganda supporting those unlawful combatants": HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 35. The *UK Manual* states that civilians who provide information or materiel, assist escapers, or hide weapons, are indirectly participating in hostilities. According to it, they may be subject to punishment solely pursuant to laws or regulations promulgated by the occupying power: UK Ministry of Defence, The Manual of the Law of Armed Conflict (Oxford: Oxford Univ. Press, 2004), at 280, para. 11.14.

[74] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 51.

[75] *Ibid*.

[76] *Ibid*., at 53. For instance, in case of recruiting or training personnel, only if this is destined "for implementing "a predetermined hostile act" can one envisage the sufficient causation to be established: *ibid*.

[77] *Ibid*., at 55.

[78] *Ibid*., at 54.

[79] *Ibid*., at 54-5.

causation is of special significance to examining whether civilian involvement in controversial activities may constitute direct participation in hostilities, the issue that will be dealt with below.

5.5. Belligerent Nexus

The criterion of belligerent nexus can be considered an implicit and inherent element *Tatbestand* of the notion of direct participation in hostilities. A specific act that is likely to result in concrete harm to the adverse party to the conflict ought to be done in furtherance of an armed opposition group, or specifically against the interest of the adverse party. Hence, acts done for private gains and purposes are excluded. Despite the similar nature, the element of belligerent nexus ought to relate to the "objective purpose of the act" manifested in the design of the act or operation, quite independent of the mental state of individual participants. The objective purpose must be strictly distinguished from the notion of "subjective intent" or "hostile intent".[80]

5.6. The Temporal Scope of the Loss of Protection against Direct Attacks

5.6.1. Overview of the Temporal Element "For Such Time"

Civilians taking a direct part in hostilities will be bereft of immunity from direct attacks, but the suspension of immunity can be justified solely during the period in which they present danger for the adversary.[81] The *ICRC Commentary to API* stresses that upon completion of hostile acts, they will regain the same privilege as other peaceful civilians.[82] In its *Report on Columbia (1999)*, the IACmHR stated that "[u]nlike ordinary combatants, once they [civilians who have taken direct part in hostilities] cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts".[83] Along this line, Melzer argues that in no period before or after this can they be divested of immunity from direct attacks.[84] However, such liberal approach will result in the "revolving door" situation, naemly the phenomenon of civilians losing and regaining their civilian privileges and rights upon taking direct part in hostilities or upon completion of them.

There is a serious objection that the "revolving door" interpretation will allow terrorists to enjoy the best of both worlds. They remain civilians most of the time, and they will be exposed to danger only while

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[80] *Ibid*., at 59-60.

[81] *ICRC Commentary to AP*, para. 4789 (APII, Article 13). See also ICRC, *Interpretive Guidance on DHP (*2009), at 70.

[82] *ICRC Commentary to AP*, para. 1944. See also A. Behnsen, "The Status of Mercenaries and Other Illegal Combatants under International Humanitarian Law", (2003) 46 *German YbkIL* 494 at 504.

[83] IACmHR, *Report on Columbia* (1999), Chapter IV, para. 55.

[84] Melzer, *supra* n. 6 at 347.

actually implementing a hostile act.[85] Indeed, Parks contends that under customary law, civilians who have crossed the line and committed hostile acts could not revert to civilians and remain a legitimate target.[86] In a move that seems to depart from its earlier report on Columbia (1999), the IACmHR, in its *Report on Terrorism and Human Rights (2002)*, observes that once a person becomes a combatant, regular or irregular, s/he cannot revert back to a civilian.[87]

There is surely a strong cogency in the argument that state armed forces confronted with terrorists are placed in an intractable, asymmetrical conflict, in which often conscripted members of armed forces become legitimate military targets. In contrast, the opponent terrorist members, who have joined and participated in hostile acts by their voluntary or will and full-blown intent of murder, would remain entitled to civilian privileges outside the narrow temporal span of their direct participation in hostilities. [88] This rather contradictory panoply of moral canvass is partly explicable by the problem of depersonalization of warfare assumed by IHL rules, the problem which cannot be resolved by international law's almost reflexive penchant for de-contextualized analytical elegance.[89] Even so, one must bear in mind two aspects in particular. First, civilian immunity from direct attacks is presumed in case of doubt.[90] This suggests that "all feasible precautions" ought to be taken in advance, and that "good faith" examinations are required as to whether targeted individuals actually constitute legitimate military objectives.[91] Second, special regard should be had to the relative weight of eliminating, on a doubtful legal basis, individual persons whose direct participation in hostilities in the past was merely spontaneous and unorganized[92] and of short duration, as compared with the highly grave danger of arbitrarily or

[85] Kretzmer, *supra* n. 11 at 193. See also Parks, "Air War and the Laws of War", (1990) 32 Air Force LR 1 at 118-120; and Watkin, *supra* n. 19, at 156 (warning against "a danger that the term 'for such time' will lead to an interpretation that civilians are only combatants while they carry a weapon and revert to civilian status once they throw down a rifle or return home from a day in the trenches").

[86] Parks, *ibid*., at 118-120.

[87] IACmHR, *Report on Terrorism and Human Rights,* OEA/Ser.L/V/II.116, Doc.5rev.1 corr., 22 October 2002, para. 69

[88] Such unequal nature of the conflict involving conscripted armed forces and terrorist groups is pointed out by Statman: Statman, *supra* n. 61, at 185-6.

[89] For a similar line of observations, see Ben-Naftali & Michaeli (2003-2004), *supra* n. 5 at 235, 237-238 and 292.

[90] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5, at 73, and 75-6. *Contra*, see, however, Schmitt (2004)a, *supra* n. 19 at 509 (proposing that "[g]ray areas should be interpreted liberally, i.e., in favour of finding direct participation. (…[that]) a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible").

[91] Melzer, *supra* n. 6 at 353.

[92] On this matter, see ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 71.

erroneously killing innocent civilians. It is set against such operational danger that the ICRC's *Interpretive Guidance on DPH* has come explicitly to affirm that "the revolving door of civilian protection is an integral part, not a malfunction, of IHL".[93]

At the Third Expert Meeting on DPH,[94] the experts put forward three doctrinal approaches to determine the time span required for the notion of direct participation in hostilities:

(i) the "specific acts" approach;
(ii) the affirmative disengagement approach; and
(iii) the "functional/membership" approach.

Next, inquiries will be undertaken into each of these approaches.

5.6.2. The "Specific Acts" Approach

The first approach requires that the temporary span of the concept of direct participation in hostilities should be determined on the basis of the direct causation of harm caused by each of the hostile acts.[95] As he notes, it would certainly be impracticable to require State authorities to determine the causal relation of specific acts undertaken by members of armed organised groups.[96]

5.6.3. The "Affirmative Disengagement" Approach

Second, the "affirmative disengagement approach" posits that civilians would be deprived of protection from direct attacks from the time when they first take direct part in hostilities and remain so until they "affirmatively disengage" from such activities.[97] The gist of this approach eliminates the advantage

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[93] *Ibid*., at 70.

[94] ICRC/Asser Institute, *Report of the Third Expert Meeting on DPH* (2005), *supra* n. 30, at 59-65.

[95] Ibid., at 60-62. See also Melzer, *supra* n. 6 at 347-8.

[96] Melzer, *supra* n. 6 at 348. However, he qualifies this statement, noting that some members are involved in a manner that is "merely unorganized, spontaneous or sporadic" and "cannot pose a significant military challenge": ibid. On this matter, see also. R.K. Goldman, "Americas Watch's Experience in Monitoring Internal Armed Conflicts", (1993) 9 Am Univ. JIL and Policy 49 at 67.

[97] ICRC and Asser Institute, *Report of the Third Expert Meeting on DPH supra* n. 30, at 59 and 62-3. See also ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 72 (stating that disengagement "need not be openly declared" but must be manifested "through conclusive behaviour").

As an aside, it ought to be noted that even members of regular State armed forces can restore civilian protections once they similarly disengage from active duty and re-integrate into civilian life because of a full discharge from duty, or

accruing from the revolving door of participation in hostilities.[98]

Melzer suggests that the disengagement be "objectively recognizable" for the opponent of hostilities.[99] Along this line, Schmitt emphasizes the objective elements such as "an affirmative act of withdrawal" or "extended non-participation".[100] Nevertheless, he contends that such persons remain susceptible of risk of direct attacks by the adversary who may be unaware of their withdrawal.[101] A more flexible guidance is furnished by the ICRC's *Interpretive Guidance on DPH(2009).* On one hand, its position appears to verge on the objective approach. It states that disengagement "need not be openly declared…[but] can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function". On the other, it recognizes that assumption or disengagement of "a continuous combat function"[102] hinges on "criteria that may vary with the political, cultural, and military context".[103] This flexible approach seems to admit of interpretation based on distinct cultural values espoused by particular ethnic members of armed organized groups.

Another crucial problem relating to the affirmative disengagement approach is the unfeasibility of keeping track of individual behaviours of disengagement in relation to a large number of members belonging to armed organised groups. As noted at the Third Expert Meeting on DPH,[104] this problem is compounded by the de-personalized nature of modern aerial warfare involving remote controlled weaponry and drones.[105] In other words, it may be contended that instead of individual approach, the disengagement should be assessed on the basis of the organization as a whole.[106]

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as deactivated reservists: ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5, at 25 (in IAC) and 31 (in NIAC).

[98] Watkin, *supra* n. 19, at 167.

[99] Melzer, *supra* n. 6 at 352.

[100] Schmitt (2004)a, *supra* n. 19 at 510. Similarly, Watkin refers, as evidence of express and credible withdrawal, to acts of surrender, taking a form of parole, giving up weapons: Watkin, *supra* n. 19 at 167.

[101] Schmitt (2004)a, *supra* n. 19 at 510.

[102] "Continuous combat function" is considered to require "lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict": ICRC, *Interpretive Guidance on DPH, supra* n. 5 at 34. See also *ibid*, at 33 and 36.

[103] *Ibid*., at 72.

[104] ICRC and Asser Institute, *Report of the Third Expert Meeting on DPH (2005), supra* n. 30, at 62.

[105] For assessment of aerial targeted killings, see C. Downes, "'Targeted killings' in an Age of Terror: the Legality of the Yemen Strike", (2004) 9 JCSL 277.

[106] ICRC and Asser Institute, *Report of the Third Expert Meeting on DPH (2005), supra* n. 30, at 62.

5.6.4. The Functional/Membership Approach

The third approach proposes that the first and the second approach should be used in conjunction, depending on both the membership and the function of specific individuals. Put in a different way, "membership" and "function" serve as cumulative elements.[107] On one hand, the "specific acts" approach is applied both to "unorganized civilians" (such as lonely fighters, and one-off or sporadic participants in hostilities), and to "non-combatant" members" of organized armed groups belonging to a non-State party to an armed conflict.[108] On the other, "affirmative disengagement" is required of *members* of organized armed groups.[109] It is proposed that the membership in an organized armed group can be established at the moment when a civilian begins *de facto* assuming "a continuous combat function" for the group.[110] The gist of this approach is to deny members of the armed organized groups the advantage of the "revolving door", which members of State armed forces do not enjoy. As a result, members of the former groups can be targeted at any time for the entire duration of their membership during hostilities, and only "unorganized armed actors" involved in hostilities on a spontaneous or sporadic basis can benefit from the "revolving door".[111] This is the approach suggested at the *Third Expert Meeting on DPH* (2005).[112] At the same conference, a modified version of this proposal was put forward. According to this, only *fighting* members of organized armed groups should be bound to undertake "affirmative disengagement".[113] The identification of fighting members can be facilitated by a functional approach similar to the one concerning traditional armed forces so as to exclude non-combatant members of armed forces, such as cooks, secretaries and other administrative personnel.[114]

The viability of the membership approach is sustained by the *ICRC Commentary to APII*[115] and many academics,[116] even though its feasibility to the determination of armed actors operating in NIACs without

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[107] ICRC/Asser Institute, *Report of the Third Expert Meeting on DPH* (2005), supra n. 30 at 82.

[108] *Ibid*., at 63.

[109] *Ibid*.

[110] ICRC, *Interpretive Guidance on DPH, supra* n. 5 at 16 and 72.

[111] Melzer, *supra* n. 6 at 350.

[112] ICRC/Asser, *Report of the Third Expert Meeting on DPH* (2005), *supra* n. 30, at 59.

[113] *Ibid*., at 63; Melzer, *supra* n. 6 at 349.

[114] *Report of the Third Expert Meeting on DPH* (2005), supra n. 30 at 64. See also *ibid*., at 78; and Melzer, *supra* n. 6 at 352.

[115] *ICRC Commentary to AP*, para. 4789 (APII, Article 13) (stating that "those who belong to…armed groups may be attacked at any time").

[116] See Quéguiner, *supra* n. 19 at 8-9; Watkin, *supra* n. 19 at 160 *et seq.*

belonging to a State party to the conflict remains debatable.[117] Succour lent to the membership approach can also be seen in the jurisprudence. In the *Tadic* case, the Trial Chamber of the ICTY referred to "…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".[118]

5.6.5. The Approach Followed by the Israeli Supreme Court in Assessing the Temporal Element

In the *Targeted Killings* judgment,[119] the Israeli Supreme Court pointed out that there is no agreed definition of the temporal element "for such time" within the notion of direct participation in hostilities. It recognises that individuals regain civilians' privilege of immunity from direct attack once they cease to take a direct part in hostilities. The gist of its approach is akin to the "membership approach", even though it does not specifically rely on the *function* of members.

President Barak's case-by-case analysis was firstly to identify clear-cut and extreme ends and then gradually to shrink the definitional spectrum of this element in search for "cores" implicit in this element. On one end of the extreme, President Barak identified a civilian who takes direct part in hostilities one single time, or sporadically, but who later dissociates him/herself from that activity. He found that these persons could be classified as civilians entitled to immunity from direct attack once they are detached from that activity. On the other end, he referred to the case of a "civilian" who has joined a terrorist organisation as a "full-time" member, and within its organizational framework continuously commits a series of hostilities, with short interval of rest. He held that the temporal notion "for such time" applies to the whole period of his/her organizational membership.[120] Despite the criticism directed at little guidance

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[117] Quéguiner, *ibid.*, at 9; and Melzer, *supra* n. 6 at 351.

[118] ICTY, *Tadic* case, IT-94-1-T, Judgment of 7 May 1997, para. 639.

[119] *Ibid.*

[120] Israel, HC *796/02, Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 39, available at http://www.court/gov.il (last visited on 30 June 2008). This view is endorsed in: W.J. Fenrick, "The Targeted Killings Judgment and the Scope of Direct Participation in Hostilities", (2007) 5 *JICJ* 332, at 337. Statman provides a very hawkish view on this matter, arguing that:

> …let us now consider a...case, where the enemy chief-of-staff is now targeted while riding in his armed car or while sitting in his headquarters, but while on a family vacation with his family. A sniper manages to get close enough to the hotel they are staying at and shoots the chief-of-staff, or a soldier dressed as a waiter poisons him while he is eating dinner. (…) While we do feel some initial revulsion toward it… it is not easy to explain why killing an enemy officer in a hotel would not be morally legitimate, but killing him on the way to his office or in his office would be. The problem is that it is morally justified for *Q* to kill *P* in self-defense only because *P* poses a serious threat to *Q* that cannot be neutralized in any other way. But if this is the case, why should *P's* location be

it provides for the temporal scope,[121] this reflective, case-by-case analysis is instrumental in narrowing down and delimiting "*the grey area* between the two extremes".[122] Indeed, this is very reminiscent of John Rawls' notion of "reflective equilibrium", reliance on which is proposed to mediate between intuition and moral principles in ethical theories.[123] Rawls suggests that instead of making one judgment outweigh the other, the interpretation of existing judgments and principles should continue to be revised in a two-way reconciling process until it reaches a fixed point, or an equilibrium, that yields the principles which match our considered and adjusted judgments.[124] Barak's dictum distinguishes the non-committed and committed individuals on the basis of the "membership approach". It can be countered that even in relation to the persons who continuously engage in organizational activities, their occasional leisure time, however brief, should fall outside the temporal framework required by the notion "for such time".[125] Indeed, this shows the incoherence of the assessment of temporal span *independently of* the appraisal of the meaning of the terms "hostilities" and "direct part".

5.6.6. Military or Political Leadership

Closely related to the function/membership approach is the question whether, and if so, to what extent,

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> relevant to the question of whether or not he can justifiably be killed? It would be relevant if self-defense were allowed only in cases of a direct and imminent threat. (…) A change in one's location (from office to home or from headquarters to a hotel) cannot provide moral immunity from attack to a person who might otherwise be killed in self-defense, assuming…that the permission to kill him does not rest on his posing an immediate threat.

Statman, *supra* n. 61, at 195-196. He argues that the prohibition against targeted killing is not intrinsically valid as a moral principle, and that compliance with this must depend on reciprocity between a state and a targeted terrorist group. Both of his suppositions must be countered on the basis of the growing influence of the elaborate elements of the right to life under international human rights law, as explained in Chapter 18.

[121] O. Ben-Naftali, "Case Comment – A Judgment in the Shadow of International Criminal Law", (2007) *JICJ* 322 at 329.

[122] A. Cassese, "On Some Merits of the Israeli Judgment on Targeted Killings", (2007) 5 *JICJ* 339, at 343, emphasis in original.

[123] J. Rawls, *A Theory of Justice*, revised ed., (1999), at 17-19. The idea of "reflective equilibrium" is expressly or implicitly relied upon throughout Rawls' threoretical explorations: *ibid*, at 42, 379, 381, 392 and 396.

[124] *Ibid*., at 18-19.

[125] For instance, snipers employed by the occupying power to liquidate a terrorist member resting at home may confidently assert their skills in "precision attack" so that their lethal force is very unlikely to cause any injury or killing on the targeted person's family members or friends. Nevertheless, killing a terrorist in front of his/her family and justifying such action on the ground that such action forms part of conduct of hostilities, would be morally troubling.

political leaders of irregular armed groups, as opposed to military leaders of such groups who are clearly "non-civilians", can be denied the "revolving door" so as to be considered susceptible of direct attacks throughout the duration of hostilities. On this matter, Ben-Naftali and Michaeli suggest that only operational leaders are susceptible of becoming victims of direct attacks, excluding the on-sight targetability of political leaders on the basis that their civilian immunity is preserved.[126]

On the other hand, if the answer to the first question is in the affirmative, then the next question would be whether only high-ranking leaders, or even low-ranking personnel, have to assume the risk of totally losing civilian immunity.[127] Moodrick Even-Khen draws a line between: (i) those political leaders who are "not directly in charge of carrying out military acts"; and (ii) those political leaders who "directly influence" the process of implementing these acts. She argues that the first category of political leaders should be entitled to civilian immunity from direct lethal targeting. On the other hand, she contends that the second genre of political leaders can be treated akin to operational leaders who find themselves in the chain of command, and hence directly attacked.[128] As she proposes,[129] for the purpose of determining the function of political leaders directly involved in military activities, it is of material assistance to draw on two criminal law concepts: (i) the doctrine of command responsibility under customary law and treaty-based rules (Articles 86-87 API; and Article 28 of the Statute of the International Criminal Court (ICC)); and (ii) the doctrine of organizational and functional control, as laid down in Article 25 ICC. Once the line is drawn between members of political leadership and low-ranking members of irregular armed groups, one can come to hold an assumption, albeit rebuttable, that the former category of political members are continuously involved in military activities and susceptible of direct attacks.[130]

5.7. Category of Acts That Constitute "Participation in Hostilities"

5.7.1. Overview

Determining acts that constitute "participation in hostilities" depends very much on a case-by-case analysis. The criterion of "direct causal linkage" discussed above is of special relevance to this analysis.

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[126] Ben-Naftali and Michaeli (2003), *supra* n. 5, at 278-9 (arguing that "non-combatants should receive the utmost protection from acts of violence involved in hostilities", stressing the need for a case-by-case analysis and the principle of less restrictive alternative ("the availability of other means" even with respect to civilians who prepare to take direct part in hostilities or return from combat) and 290 (suggesting that even in respect of combatants, they are not legitimate military targets all the time, highlighting, again, the less injurious means, such as apprehension and judicial measures, and the existence of "an immediate threat" to security).

[127] Moodrick Even-Khen, *supra* n. 5 at 24.

[128] *Ibid*., at 30.

[129] *Ibid*., at 31.

[130] *Ibid*.

Other factors assisting such determination encompass: the functions and the position in a hierarchy assumed by individual persons, the proximity of such functions and positions to armed violence, the relative weight of such functions or positions in the overall effort of hostile acts, and more specific factors such as their behaviour, attire and location in concrete circumstances.[131]

Cassese suggests a very narrow scope of direct participants in hostilities, referring to actual engagement of civilians in combat, open carrying of arms during military deployments preparatory to an attack.[132] This approach is based on the criteria for determining combatants entitled to PoW status. With great respect to Prof. Cassese, the present writer submits that this is, however, a confusion of the two separate issues: criteria for entitlement to PoW status; and the meaning of participation in hostilities. While confining the parameters of civilians susceptible of direct attacks, Melzer advances a slightly broader interpretation. He considers that the notion "direct participation in hostilities" should be confined to "the actual conduct of military operations, which includes deployment to and return from specific military engagements, but not the 'peaceful' interval between specific engagements".[133] His approach is to determine acts tantamount to participation in hostilities by reference to the test of "direct causation", as discussed above. It requires the examinations to focus on whether specific acts carried out by individual persons will directly cause harm to the adversary.[134] On the basis of this test, it is suggested that *support*

[131] The *US Naval Handbook* provides that:

> Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be **attacked**. (…) Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf o military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behaviour, location and attire, and other information available at the time.

US, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, (New Port, RI, 1997), para. 11.3 (emphasis in original).

[132] A. Cassese, Expert Opinion on Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law, submitted on 18 July 2003 to the Israeli Supreme Court at the request of the Petitioners in: HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, available at http://www.stoptorture.org.il/files/cassese.pdf (files available at the http://www.stoptorture.org.il) at 7.

[133] Melzer, *supra* n. 6 at 337. For the question whether deployment and return constitute part of direct participation in hostilities, see ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 67.

[134] Melzer, *ibid*.

activities which do not yield direct harm to the enemy forces are ruled out. Further, *preparatory measures* can constitute a direct participation in hostilities if they have "an immediate or direct causal link" to "a concrete military threat or harm".[135] In this respect, as the ICRC's *Interpretive Guidance on DPH* notes, the temporal or geographical proximity is not material.[136] Melzer proposes distinction between "concrete" preparations which are aimed at undertaking specific hostile acts,[137] which can be considered direct participation in hostilities, and "general" preparations,[138] which are generally not.

Insightful guidance can also be obtained from the proposal by Ben-Naftali and Michaeli. They highlight the need to diagnose whether civilians taking part in hostilities present "a direct and immediate threat" to the security of the adverse party to the conflict.[139] Analytically speaking, it is possible to contemplate that the element of "a direct and immediate threat" is a constituent element of the notion "direct participation in hostilities".

5.7.2."Civilians" Involved in Controversial Activities: Civilians Working in Military Objective; Truck Divers Carrying Ammunitions; and Voluntary Human Shields

As demonstrated in the *Targeted Killings* judgment, what remains of marked importance is to delimit the spectrum of hostile acts so as to ascertain what acts would constitute "direct participation in hostilities". Because of the inherently case-by-case nature of diagnosis, pinpointing specific acts of civilian involvement in military activities that are susceptible to direct lethal force remains intractable. Overall, it would be safe to argue that among the controversial categories of civilian involvement, civilians can be considered susceptible of direct lethal force when engaged in such acts as: gathering information for direct use in military operations, operating a weapons system, supervision of military equipments, and transmission of information on targets.[140]

One of the most frequently raised questions would be the on-sight targetability of three categories of persons: (i) civilians working in military objectives, such as in munitions factories and military vehicle

[135] *Ibid*., at 344.

[136] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 66 (describing the act of loading bombs onto an airplane for launching a direct attack on military objectives in a combat zone as a measure preparatory to a specific hostile act qualified as direct participation in hostilities).

[137] They include acts of installing a specific booby trap or transporting ammunition from a military camp to a firing position.

[138] These embrace acts of producing, selling or purchasing weapons, ammunition and explosives, transporting ammunition from the factor to a port for further shipping.

[139] Ben-Naftali and Michaeli (2003-2004), *supra* n. 5 at 279.

[140] Gasser (2008), *supra* n. 28 at 262, para. 519.

maintenance depots; (ii) civilian drivers of military transport vehicles; and (iii) civilians who have become "voluntary human shields". Examinations turn to each of the categories.

5.7.3. Civilians Working in Munitions Factories

With respect to the civilians working at or around the military objective, along the line of reasoning on "general preparation" suggested by Melzer, the ICRC's *Customary IHL Study* (2005) enunciates that even persons employed in the armaments industry are not necessarily participating in hostilities. On the other hand, it is suggested that since factories of this industry normally constitute lawful military objectives, they may be subject to the risk of collateral or incidental damage within the meaning of Article 51(5)(b) API.[141]

5.7.4. Civilian Drivers of Military Transport Vehicles

Opinions are, however, divided over the legal characterization of persons driving trucks carrying ammunition, as described in the above second category.[142] On one hand, a rather categorical approach takes the position that such persons may be regarded as taking a direct part in hostilities and directly attacked.[143] The Israeli Supreme Court in the *Targeted Killings* judgment found such drivers to meet the test of "direct participation" and to forfeit immunity from attacks.[144] On the other, the *UK Manual of the Law of Armed Conflict (2004)* explicitly recognizes that such drivers can retain civilian immunity from direct attacks. Melzer proposes to undertake inquiries into whether such transport takes place in the course of *concrete* preparations (such as in the case of moving ammunition from a military camp to a firing position to a tank in a combat zone) or of *general* preparations (removal of ammunitions from a

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[141] Henckaerts and Doswald-Beck, *supra* n. 19, Rule 6, at 23. See also Gasser, *ibid.*, at 232-233, para. 518.

[142] On this matter, see J.R. Heaton, "Civilians at War: Re-examining the Status of Civilians Accompanying the Armed Forces", (2005) 57 *Air Force Law Review* 155, at 171 (as to the so-called revolving door problem of civilians taking up arms) and 174 (concerning civilian employees and contractors); Parks, *supra* n. 59, at 112-145, in particular, 116-121, and 132; Schmitt (2004)a, *supra* n. 19at 507; L.L. Turner and L.G. Norton, "Civilians at the Tip of the Spar", (2001) 51 *Air Force Law Review* 1, at 29-32 (discussions on civilians who perform functions classified as "direct support", and other civilian contractors).

[143] Schmitt distinguishes between truck drivers who transport ammunition from the factory to ammunition deports, who do not "clearly" meet the test of "direct participation in hostilities", and those drivers who deliver it to the front lines, who "arguably" would do so: Schmitt (2004)a, *ibid*., at 508. See also Dinstein (2004), *supra* n. 6, at 27; A.P.V. Rogers, *Law on the Battlefield*, 2nd ed (2004), at 10-12; and A.P.V. Rogers and P. Malherbe, *Fight it Right - Model Manual on the Law of Armed Conflict*, (1999) at 29 (stating that it is forbidden for civilians to "act…as drivers delivering ammunition to firing positions").

[144] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 35.

factor to a port for shipping). He suggests that the general preparatory measures be *generally* excluded from the acts constituting "direct participation in hostilities".[145] Even so, resolving this question depends on such other relevant factors as their affiliation with (or the degree of connection to) an armed group, the type of contents transported, and the circumstances of bombing. Once an attack is carried out, any injury or death caused on them may be viewed as collateral or incidental damage in relation to direct and concrete military advantage accruing from the attack against the convoys or the trucks, which are military objectives.[146] In this light, it ought to be noted that the legality of pinpoint lethal force against drivers can be evaluated, regardless of whether they are unaware of, or negligent in understanding, both what they transport and whether they are making even slight contribution to hostile acts. The assessment of *mens rea* of the affected individuals (the drivers) is pertinent only to the extent that commanders ordering the specific attacks are aware of their innocent mental state.

5.7.5. Human Shields

Equally controversial is the question of the legality of targeting civilians who serve as a "human shield" for terrorists taking a direct part in hostilities. On this matter, many commentators place emphasis on the voluntary element of their participation and reject their immunity from direct attacks.[147] Along the same line, the Israeli Supreme Court in the *Targeted Killings* case distinguished two different groups of civilians: (i) those civilians who are forced to do so by terrorists against their will; and (ii) those civilians who do so "of their own free will, out of support for the terrorist organization". The Court regarded the first category of persons as "innocent civilians" that remain immune from direct attacks. On the other hand, the individual persons who become voluntary human shields were categorized as civilians taking a direct part in hostilities, who risk becoming (or do actually become) the lawful military target for the duration of their participation in hostile acts.[148] The notable feature of this methodology is to lay

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[145] Melzer, *supra* n. 6 at 344.

[146] Turner and Norton, *supra* n. 142, at 31-32 (arguing, however, that on *policy* grounds, civilians who directly support the war effort should not be targeted).

[147] See, *inter alia*, Dinstein (2004), *supra* n. 6 at 130; and Schmitt (2004)a, *supra* n. 19 at 521 *et seq* (noting, however, that children are the exceptions, due to their lack of "mental capacity to form the intent necessary to voluntarily shield military objectives").

[148] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 36. For the same view, see Schmitt (2004)a, *ibid.,*at 521-522 (except for children who act as "voluntary" shields due to the lack of their mental capacity to form the necessary intent to participate in voluntary shielding action). In another context, Schmitt argues that:

emphasis on the *mens rea* of the participants in hostile acts.

In contrast, the ICRC's *Interpretive Guidance on DPH* considers that the causal linkage between the presence of civilians voluntarily acting as human shields and the anticipated harm is still remote and "indirect". It suggests that voluntary human shields are not tantamount to direct participation in hostilities.[149] Criticism is levelled at the *Targeted Killings* judgment for its "overly expansive" interpretation of the notion "direct part in hostilities". It is claimed that fathoming the motivation behind acts of persons shielding terrorists (protection of terrorists, or defence of their houses against possible military attacks) is troublesome, and that there remains the risk of abuse by a targeting State.[150] Similarly, Melzer stresses the strictly objective test, contending that "as long as these 'voluntary human shields' do not actually defend military objectives or attempt to physically hamper military operations, they cannot be regarded as directly participating in hostilities, and do not lose immunity from direct attack".[151] They reject the test based on *mens rea* (volition and motives) as impracticable and unsuitable. It is proposed that any direct attack against such persons should be considered unlawful.[152] The suggestion that civilians would lose their immunity from attacks even on the basis of the *mens rea* must be outright rejected.

Even so, the *mens rea* of such civilians can constitute relevant factors. First, the fact that civilians

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> … human shields are deliberately attempting to preserve a valid military objective for use by the enemy. In this sense, they are no different from point air defenses, which serve to protect the target rather than destroy inbound aircraft…Voluntary shielding is unquestionably direct participation.

M.N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", (2004) 5 *Chicago JIL* 511, at 541 [Schmitt (2004)b].

[149] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 57. In this respect, the *Interpretive Guidance* notes that voluntary human shields provides only a legal and not physical obstacle to military operations in view of its effect of shifting the parameters of proportionality to the detriment of an attacker: *ibid*.

[150] Schondorf comments that:

> …how can one know whether a civilian who in the face of an attack on his apartment building (in which terrorist organizations store weapons) climbs to the roof of the building does so in order "to support [a] terrorist organization", or in order to protect his apartment from destruction? How can one know if he was forced to do so or if he has done so "of [his] own free will"?

Schondorf, *supra* n. 21, at 308.

[151] Melzer, *supra* n. 6 at 346.

[152] *Ibid*., at 308.

knowingly decided to stay in the targeted building can be taken into account in the *ex ante* assessment of proportionality of incidental loss envisaged in an attack on the building.[153] Second, this is also of special pertinence to the *post factum* appraisal of compensation for the victims (and their families).[154]

5.8. Concluding Observations on the Concept "Direct Participation in Hostilities"

The foregoing appraisal has sought to delineate the boundaries between civilians entitled to immunity from attacks and those who lose such immunity on the basis of their direct participation in hostilities, principally occurring in a volatile occupied territory. The concept of "direct part in hostilities" is the subject of on-going debates among IHL experts.[155] One last caveat is that the fact that a civilian is considered to take a direct part in hostilities does not *ipso facto* justify the shift of applicable laws from the law enforcement model based on IHRL to the IHL rules. As will be discussed in the next section, the principle of proportionality applied to assess the legality of excessive, collateral damage has been very much influenced by the development of IHRL-based, requirement of proportionality.

6. The Proportionality Appraisal of the Right to Life in Situations of Hostilities in the Context of IHRL

6.1. Modalities of the IHRL-Based Principle of Proportionality in Assessing the Right to Life in Relation to Conduct of Hostilities

The *direct* application of the principle of proportionality in the context of conduct of hostilities has been fully established in the jurisprudence of IHRL. Even so, some of the salient differences in the operational modality of the proportionality yardstick in IHL and IHRL need to be borne in mind. The fundamental interests juxtaposed against a countervailing interest invoked by state authorities in the parameters of proportionality differ in these two branches of international law. On one hand, the IHRL-based principle of proportionality turns on damage caused on the right to life of targeted individual persons. On the other, the IHL-based test of proportionality is purported to focus on the collateral civilian damage to be occasioned on innocent bystanders and to evaluate the relative excessiveness of such damage in proportion to the concrete military advantage. Further, in the IHL context, once the principle of distinction is satisfied, with the targeted individual person determined as a legitimate military objective (combatant or unprivileged belligerent), there will *not generally* arise any violation of the rights to life or physical integrity of the targeted person. Admittedly, the commanders must also take into account other

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[153] Schondort, *supra* n. 21 at 308.

[154] The requirement to assess the amount of compensation on the basis of the knowledge or the degree of negligence may be of special significance, for instance, to the drivers of bombs, who may become the victims of lawful target of lethal force. The *mens rea* of such drivers may be inferred from the specific circumstances of the case.

[155] See ICRC/Asser Institute, *Report on the Third Expert Meeting on DPH* (2005), *supra* n. 30. The outcomes of these meetings have resulted in the compilation of ICRC, *Interpretive Guidance on DPH*, *supra* n. 5.

general principles of IHL, such as the prohibition of superfluous injury/unnecessary suffering, and the principle of military necessity. Yet, the considerations of these principles, albeit applied in parallel, are separate issues and not the questions of proportionality.[156]

One can hypothesize three patterns of the interplay between the IHRL-based notion of proportionality and the IHL-derived test of proportionality in the case-law of IHRL:

(i) the approach of applying the IHRL-based test of proportionality to the assessment of specific conduct of hostilities, with some sub-tests of the IHRL-based test coming into play (if not taking an upper hand);
(ii) the decision to rely *primarily* on the IHL-based notion of proportionality; and
(iii) the gradual process in which the IHRL-based test of proportionality may become adjusted and approximated to the IHL-derived notion of proportionality, with IHL-based factors and subtests amply analyzed in the judicial reasoning.

The salient features emerging from the IHRL case-law is that the second pattern is conspicuously absent. According to this pattern, the IHL understood as *lex specialis* in relation to IHRL would require the latter rules to give way to the former rules. Indeed, the first and the third patterns are more discernible. The first pattern can be of practical use in situations of relatively brief fighting of insignificant intensity. Yet, the case-law of the international monitoring bodies of IHRL has yet fully to tap into this method. However, the modality of this approach, even in more volatile areas, is most elaborately and cogently demonstrated by the Israeli Supreme Court in the *Targeted Killings* judgment, as will be analysed below. Overall, the European Court of Human Rights (ECtHR) is exhibiting a preparedness to apply the third pattern in more full-blown conflict situations. In essence, the prevalence of the third patterns demonstrates the validity of the reasoning given by the International Court of Justice (ICJ) on the *lex specialis* rule in its *Wall* advisory opinion,[157] namely, the comprehension of the relationship between IHL and IHRL as complementary and reinforcing to each other.

The third pattern of cases, which are characterized by the gradual approximation (albeit, not certainly the total confluence) of IHRL-based test of proportionality to the IHL-rooted notion of proportionality, can be exhibited in the case-law of the ECtHR dealing with conflict situations in South-western Turkey (Kurdistan) and Chechnya. Here, two salient features can be highlighted. First, there is an endeavour to

[156] Melzer, *supra* n. 6 at 404.

[157] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, 136 at 178, para. 106. See also ICJ, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment of 19 December 2005, para. 216.

incorporate the principle of precaution as part of the proportionality appraisal. Second, set against the body of IHL as *lex specialis*, the IHRL-based test of proportionality has been applied in a manner that incorporates the IHL-based sub-tests of proportionality.

The first such feature can be illustrated in *Ergi v. Turkey* where the ECtHR examined the sub-test of precaution and rules of means and methods of lethal force, whose corresponding rules can be found in API. Arguably, there is a shift of analytical focus of the proportionality test from the right to life of the targeted individual persons to the collateral damage to the right to life of an innocent bystander. In that case, when assessing, under Article 2 ECHR (right to life), the accidental killing of a woman allegedly caught in cross-fire between Turkish security forces and PKK terrorists, the ECtHR found that Turkey breached the principle of proportionality by failing "to take *all feasible precaution in the choice of means and methods of a security operation* mounted against an opposing group with a view to *avoiding or, at least, minimising the incidental loss of civilian life*".[158] The Court arrived at this finding even without conclusive evidence as to the exact source of the bullet that killed the applicant's sister. In its view, it was reasonable to draw an inference that "precautions" were insufficient to discharge the positive duty of protecting and ensuring the right to life of an innocent civilian.[159]

The Court's heightened standard of proportionality even in the context of a security operation can be demonstrated by its methodology of laying accent on the *ex ante*, positive duties of protection and prevention in respect of the right to life. According to the erstwhile Commission, (and the Court which endorsed its opinion), even if the state security forces were taking "due care" of civilians in its response to terrorist firings, this was not sufficient. The Court asserted that the duty of precaution and care required to minimise incidental loss of civilians must take into account the possibility that terrorist organisations will not respond with such restraint and precautions in their attack as state agents are required to do.[160] In the *Ergi* case, the Court did not explicitly invoke any IHL rule. Yet, the dictum was enunciated in the passage peppered with key terminology of IHL such as "means and methods of a security operation", "civilian life" and "incidental loss".[161] This evinces an insightful methodology of reading and tacitly integrating IHL rules into the process of proportionality appraisal in human rights context.

In *Isayeva, Yusupova and Bazayeva v. Russia*, the ECtHR was confronted with a scenario much closer to an active combat. It was asked to examine whether missile attacks against a convoy of trucks that

[158] ECtHR, *Ergi v. Turkey*, Judgment of 28 July 1998, para. 79, emphasis added.

[159] *Ibid*., para. 81. For a similar reasoning based on the finding that the police used excessive firing, see ECtHR, *Güleç v. Turkey*, Judgment of 27 July 1998, paras. 69-73

[160] *Ibid*., at 80.

[161] *Ibid*., paras. 79-81.

transported internally displaced persons in Chechnya were carried out in harmony with Article 2 ECHR. After giving a benefit of doubt to the respondent government with respect to the legitimacy of the aim of the attack under Article 2(2)(a) (defence of a person from unlawful violence from an insurgent group), the Court meticulously examined whether the attacks complied with the "absolute necessity" requirement under this provision. What matters is that the proportionality appraisal took into account factors, which are generally the subject of scrutiny by a local commander in armed conflict. Such factors included specific elements of the operation (the impact assessment of the specific missile attacks, the timing and the frequency of the attacks, absence of adequate precaution, the number of direct, accidental civilian casualties, and the responsible authority's knowledge of both civilian presence and attacks against it), the systemic failures (inadequacy in planning and control in the overall operation), and the question of evidence (discrepancy of testimonies).[162] Nevertheless, despite the third party submission by the NGOs, which referred specifically to common Article 3 GCs and the ICC Statute,[163] the Court did not explicitly invoke IHL rules.[164]

6.2. Incorporation of Subtests of Proportionality Developed in IHRL Context into Appraisal of Conduct of Hostilities

Next, the analyses will turn to the more explicit reliance on subtests of proportionality elaborately developed by monitoring bodies of IHRL to examine conduct of hostilities. Such audacious approach can be evidenced in the recent case-law of the Israeli Supreme Court, acting as the High Court of Justice.

In the *Beit Sourik* judgment, the Israeli Supreme Court applied the component elements of proportionality developed in IHRL context to assess proportionality of lethal measures. In essence, the (then) President Barak stressed the three-pronged test of proportionality, which consists of three limbs: (i) the rational link test, which requires the means chosen to be rationally capable of attaining the desired military objective; (ii) the less restrictive alternative (LRA) doctrine, according to which the means selected should cause the least foreseeable incidental harm (injury or death) to innocent civilians who are passers-by; and (iii) the proportionality *stricto sensu*, namely, the requirement that the harm caused by the selected measure ought to strike a reasonable balance to its anticipated military gains.[165] These

[162] EctHR, *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, paras.

[163] *Ibid*., paras. 163-164.

[164] See also N. Lubell, " Challenges in Applying Human Rights Law to Armed Conflict", (2005) 87 *IRRC*, No. 860, 737 at 744.

[165] This tripartite formula of proportionality appraisal has been recognized (not exclusively but prominently) in HCJ 2056/04, *Beit Sourik Village Council v. The Government of Israel and Commander of the IDF Forces in the West Bank*, The Supreme Court Sitting as the High Court of Justice, 58(4) *Piskei Dinn (PD)* 807, 29 February 2004; 11 March 2004; 17 March 2004; 31 March 2004; 16 April 2004; 21 April 2004; and 2 May 2004; (2004) 43

correspond to the tripartite test of proportionality (suitability; necessity or LRA; and proportionality in a narrow sense) developed in the jurisprudence of EU law and German public law.[166]

6.3. The Less Restrictive Alternative (LRA) Test

According to the Israeli Supreme Court in the *Targeted Killings* case, the government must satisfy itself that there are no other effective means available which would be less injurious to the targeted civilians.[167] The onerous duty of establishing whether the LRA subtest[168] has been met rests on the attacking army.[169] The Court conceded that the evaluation of the efficacy of the LRA test may be qualified by two relative factors. First, such alternatives may not actually be available in occupied territory. Second, the application of the proportionality test in a narrow sense may override the appraisal based on the LRA test. This can occur when the danger to which soldiers may be exposed is considered to outweigh benefits of resorting to non-lethal measures, such as arrest, investigation and trial.[170]

6.4. The Applicability or not of the LRA Subtest to the Assessment of Conduct of Hostilities

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ILM 1099, at 1114-1115, paras. 40-43. In that case, the Court found a segment of the route of the barrier to be disproportionate in breach of the LRA doctrine, as it recognized the existence of an alternative route.

[166] See G. Ress, "Der Grundsatz der Verhältnismäßigkeit im deutschen Recht, in: H. Kutcher, G. Ress, F. Teitgen, F. Ermacora, and G. Ubertazzi, G., *Der Grundsatz der Verhältnismäßigkeit in europäischen Rechtsordnungen – Europäische Gemeinshcaft, Europäische Menschenrechtskonvention, Bundesrepublik Deutschland, Frankreich, Italien, Österreich,* (1985), 5; J. Schwarze, *European Administrative Law*, (1992), Ch. 5; De Búrca, G., "The Principle of Proportionality and its Application in EC Law", (1993) 13 YEL 105; and Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR,* (2002), at 190-5.

[167] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 40.

[168] For the discussions on the LRA subtest in relation to the Japanese Constitutional Law, see N. Ashibe, *Kenpo-gaku*, Vol. II: Jinken Soron, (Tokyo: Yuhikaku, 1994), at 233-5.

[169] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel,* Judgment of 11 December 2005, para. 40. See also Kretzmer, *supra* n. 11 at 203.

[170] *Ibid*., para. 40. In this context, the learned Judge cites the writing of controversial (though eminent) academic, A. Dershowitz, *Preemption: A Knife That Cuts Both Ways*, at 230 (2005).

However, it is not clear how, as mentioned by the learned Judge, the alternative course of action, such as use of non-lethal measures, may result in "its harm to nearby innocent civilians …[being] greater than that caused by refraining from it": id.

One of the crucial implications of the Israeli Supreme Court in the *Targeted Killings* case[171] is that on the basis of the LRA subtest, lethal force would be deemed disproportionate whenever non-lethal alternative course of action is available. On this matter, the Supreme Court relied on the judgment of the ECtHR in the *McCann* case in which it was ruled that:

> [T]he use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.[172]

This dictum does not expressly indicate the LRA subtest. Instead, with its reference to "lack of proper care", it seems to highlight that the *mens rea* based on recklessness or gross negligence is sufficient to engage state responsibility for a violation of the right to life. Nevertheless, the reference to "steps which would have avoided" both fatality of the suspects and danger to bystanders may indicate that it considered the LRA test a component element of proportionality.

In the *Targeted Killings* case, President (emeritus) Barak, when relying on the *McCann* formula on proportionality enunciated in the law enforcement context, did not differentiate between "calm" occupation zones and trouble-ridden spots. It seems that he assumed the relevance and practical utility of the LRA subtest in occupied territory *in general*.[173] He asserted that a non-lethal measure such as arrest, investigation and trial "is a possibility which should always be considered".[174] Indeed, the same line of reasoning was adopted by the UN Human Rights Committee (HRC) in its *Concluding Observations on Report from Israel*. The HRC has stated that "before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted." [175]

Several crucial or far-reaching implications can be drawn from the above dictum. First, the application of the LRA subtest even in combat zones may not be entirely excluded. Second, a state would be bound to choose non-lethal measures such as capture and detention in lieu of directly attacking enemy combatants,

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[171] HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 40.

[172] ECtHR, *McCann v. UK*, Judgment of 27 September 1995, A 324, para. 235.

[173] This can be inferred from the eminent Judge's proposition that the LRA test "might actually be particularly practical under conditions of belligerent occupation": HC *796/02,Public Committee Against Torture in Israel v. The Government of Israel*, Judgment of 11 December 2005, para. 40.

[174] *Ibid.*

[175] *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, 21 August 2003, para. 15.

whenever such less injurious alternatives are feasible. Indeed, such a ramification can be considered intrinsically derived from the general and overarching principle of military necessity.[176] Third, more specifically, the LRA subtest may be invoked to determine the lawfulness of means and methods causing non-lethal or less injurious consequences on a targeted person (civilians taking a direct part in hostilities) in the midst of heated battle. These ramifications are surely laudable as *lex ferenda*. Yet, it seems irreconcilable with operational realities. Can such requirements flowing from the LRA test be feasible whenever lethal force is levelled at civilians taking direct part in *cross-border* hostilities in the area outside the boundaries where the invading power has yet to establish effective control?[177] Cohen and Shany criticize that the transposition of the LRA subtest developed in law enforcement operations to situations of armed conflict is misplaced.[178] As they note,[179] it may be claimed that within the framework of IHL on both IAC and NIAC, a state is not (always) obliged to favour non-lethal measures over lethal ones to neutralise fighting capacity of enemy combatants.[180] It can be suggested that the impact of LRA appraisal on modalities of attack against a combatant be limited only to certain means (weapons, such as blinding laser weapons etc) and methods (for instance, killing by treacherous or perfidious methods). It may even be proposed that by categorising members of terrorist organisations as civilians (albeit subject to the test of direct participation in hostilities), and importing the subtests of proportionality developed in IHRL context into conduct of hostilities, the Israeli Supreme Court, albeit inadvertently, gave "more protection" to such "unlawful combatants" than to lawful combatants.[181]

6.5. Proportionality *Stricto Sensu*

The troubling aspect of the concept of proportionality in a narrow sense in the IHL context can be summarized in a two-fold fashion. First, in assessing relative weight and value assigned to competing interests, lives of innocent civilians who are anticipated to suffer injuries or lose their lives are abstracted and subsumed into a sterile and impersonalized (or depersonalized) notion of collateral loss or injuries. Second, such incidental loss or injuries is placed on a scale to be weighed against the amorphous notion of military advantages. At what rate the cost of individual persons' lives can be considered "acceptable" in specific *ex ante* risk assessment is an innately difficult question that causes a moral dilemma to military

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[176] ICRC, *Interpretive Guidance on DPH* (2009), *supra* n. 5 at 81.

[177] A. Cohen and Y. Shany, "A Development of Modest Proportions – The Application of the Principle of Proportionality in the Targeted Killings Case", (2007) 5 *JICJ* 310, at 315.

[178] Ibid., at 314.

[179] *Ibid*., at 315.

[180] This can be implicit in the understanding that combatants obtain immunity from attacks only if they manifest their intent to surrender: Dinstein (2004), *supra* n. 6, at 145.

[181] Cohen and Shany, *supra* n. 177 at 314.

planners and soldiers alike.[182] In contrast, the test of proportionality under IHRL starts with the assumption that balancing the right to life on a scale in itself ought to be disfavoured, or at least avoided to the maximum extent. The exigent nature of the IHRL-based notion of proportionality is readily recognizable by the stringent interpretation of the concept of "absolute necessity" used in the escape clause of the right to life under Article 2 ECHR. According to this interpretation, use of lethal force is allowed only exceptionally. This is confined only to the situations where serious violence against an innocent person is so imminent that an attempt to arrest the perpetrator would be futile.[183] Viewed in that light, such difference in underlying rationales may explain the more lax standard contemplated in the notion of proportionality in IHL.

Further, an acceptable threshold may be deemed lower in *ex post* evaluation of factual circumstances, which can be undertaken with the benefit of hindsight well beyond the heat of battleground. Yet, this should not result in imposing practically insurmountable decisions on soldiers in a front. All that is required of military planners and soldiers is to carry out "meticulous examination of every case".[184] Indeed, in a general context of international norms which are couched in ambiguous terms, the *ex post facto* nature of attributing liability for violations of such vague primary norms might be perceived as a manifestation of "dubious legitimacy", which in turn might detract from the "compliance pull" on the part of the military planners and service personnel.[185] The outcomes of these examinations suggest that speculative and ultimately subjective elements cannot be entirely dissociated from the exercise of *ex ante*

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[182] *Ibid*., at 316. See also E. Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", (2006) 39 *Israel Law Review* 81, at 92-93 (proposing "a duty to reduce harm to enemy civilians that does not entail an obligation to assume personal life-threatening risks").

[183] N. Rodley, *The Treatment of Prisoners under International Law*, 2nd ed., (1999) at 182-8; G. Nolte, "Preventive Use of Force and Preventive Killings: Moves into a Different Legal Order", (2004) 5 *Theoretical Inquiries in Law* 111; and Kretzmer, *supra* n.11 at 179. That said, Kretzmer leaves room (albeit very limited) for the so-called "last window of opportunity" argument. He argues that use of lethal force may be justified even if the attack might not be imminent, but where the need to use such force to prevent serious violence might be immediate (that is, where the chance of preventing the attack may not otherwise be feasible); *ibid*., at 182. On this matter, see M. Schmitt, "Counter-Terrorism and the Use of Force in International Law", (2002) 32 *Israel YbkHR* 53 at 110.

[184] *The Public Committee Against Torture in Israel v. The Governmetn of Israel*, para. 46.

[185] Y. Shany (2005), "Toward a General Margin of Appreciation Doctrine in International Law?", (2005) 16 EJIL 907 at 921. See also Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", (2003) 97 *AJIL* 38, at 77. In a context of state of emergency under international human rights law, the ECtHR referred to the judicial propriety in avoiding reviewing the efficacy of the measure in question in hindsight, on the basis purely of retroactive examinations: *Ireland v. UK*, Judgment of 28 January 1978, A 25, 2 EHRR 25, at 95.

risk assessment.[186]

Surely, when analysing the parameters of military advantages, President Barak in the *Targeted Killings* case carefully fleshed out the requirement that such advantage to be anticipated must be "concrete and direct" as provided in Article 57(2)(a)(iii) API.[187] This judgment may be taken as indicating an emerging proclivity of judicial bodies, national and international, to weave the rigorous standards of proportionality *stricto sensu* developed in IHRL (and EU law) context into the analysis of cost-benefit impacts of attacks in armed conflict situations. Nevertheless, the assessment of the subtest of proportionality in the narrow sense ultimately hinges on a case-by-case approach.[188] This is illustrated in the *Final Report to the ICTY Prosecutor concerning the NATO's campaign against Yugoslavia*. The *Report* states that "[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective".[189]

6.6. Procedural Requirements for Targeted Killings

6.6.1. Overview

Prior to recourse to lethal force, policy leaders and military planners must undertake scrupulous examinations of the planning and targeting processes. Once the action is carried out, the focus of examinations must turn to the evidence collected afterwards. It can be proposed that such *ex post* appraisal should include damage and impact assessments, if possible, through witnesses and video.[190] With respect to both *ex ante* and *ex post* examinations, the principle of proportionality serves as the most important benchmark.

6.6.2. *Ex ante* Procedural Requirements

In relation to the planning procedure, first, it is crucial to ascertain the necessity grounds. This requires a state to verify that persons to be targeted are those who have committed serious life-threatening hostile acts, and that there is clear evidence that they will continue to do so. In this respect, it can be underscored that persons must not be selected for lethal targeting, simply on the basis of their incitement. The prior investigations of the necessity grounds may be likened to *trial in absentia* of persons who would

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[186] Cohen & Shany, *supra* n. 177, at 316.

[187] *The Public Committee Against Torture in Israel v. The Governmetn of Israel*, supra n. para. 46.

[188] Ibid.

[189] ICTY: *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 39 ILM 1257 (2000), para. 48.

[190] See CUDIH, *supra* n. 1, at 34.

otherwise have to be arrested and prosecuted while equipped with due process guarantees.[191] Second, a state must ensure the compliance with the principle of proportionality in a narrow sense. It is suggested that a state must verify that the means and the methods chosen will not cause excessive loss on the lives and limbs of the persons living in the vicinity of the targeted persons in relation to the concrete military advantage. Third, the LRA subtest ought to be taken into account not only in relation to determinations of the choice of specific modalities of lethal force (means and methods) under IHL rules on conduct of hostilities. It should also be of special relevance to the initial question of normative paradigms, namely, the question on the choice of the applicable legal framework (namely, the option between IHL rules on conduct of hostilities or IHRL rules). The occupying power must always ascertain whether the application of a law-enforcement measure remains a feasible option, even though hostilities have resumed or broken out. Fourth, it may be suggested that the state should take precautionary measures prior to the attack.[192] This element of precaution is of special import to assessing the *mens rea* for war crimes based on intentionally directing attacks against individual civilians not taking direct part in hostilities. The requisite mental element relating to the wilfulness of the conduct may be inferred from the failure to take necessary precautions (as understood within the meaning of Article 57 API concerning the use of available intelligence to identify the target) before and during an attack.[193]

6.6.3. *Post Factum* Procedural Requirements

The "institutional aspects" deriving from the principle of proportionality encompass three specific obligations: (i) the positive duty to carry out effective and independent investigations into circumstances of killing subsequent to the attack; (ii) payment of compensation to victims of mistaken and incidental killings or injuries;[194] and (iii) the duty to investigate alleged war crimes and, if necessary, to prosecute and mete out appropriate punishment to offenders. The ECtHR has fleshed out and refined these institution-based requirements since 1990s as part of its creative policy of broadening the ambit of positive obligations under the right to life.[195] In respect of the compensation requirement, the obligation to pay reparations for individual victims of breaches of IHL rules, as set out in Article 3 of the 1907 Hague Convention IV and Article 91 API, is generally considered to have acquired the status of

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[191] Cohen and Shany, *supra* n. 177 at 317.

[192] Cohen and Shany, supra n. 177 at 317-318. However, it is not clear whether the principle of precautionary measure should be considered to include the duty to give prior warning to a suspect to be targeted.

[193] K. Dörmann , *Elements of War Crimes under the Rome Statute of the International Criminal Court*, (2003) at 132 and 147.

[194] Cohen and Shany, *supra* n. 177, at 317-318.

[195] See, for instance, *Gül v. Turkey*, Judgment of 14 December 2000, paras. 84-95; and *Nachova v. Bulgaria*, Judgment of 26 February 2004.

customary international law.[196] This was confirmed in the *Targeted Killings* case, where the Israeli Supreme Court stressed the need for compensation for victims of illegal targeted killings.[197]

6.6.4. The Duty of Effective Inquiries into Circumstances of Killing

The duty of effective investigation into circumstances of killing is fully established in the case-law of ECHR.[198] Yet, opinions may be divided as to the extent to which such duties of effective inquiries are imposed on an occupying power in occupied territories.[199] The rational basis of this duty becomes even murkier when the occupied territories become beset with eruptions of active violence of such intensity that crosses the threshold for triggering the application of IHL rules on conduct of hostilities. In the *Targeted Killing* case, the Israeli Supreme Court decisively stressed the need to perform "independent" and "thorough", *post factum* inquiries into the precision in identifying the target and the circumstances of the attack. In this regard, the Court extensively referred to the case-law of the ECHR,[200] and to the doctrinal discourse.[201]

To assuage the concern that requiring retroactive review of factual circumstances of *all* doubtful lethal incidents in a combat zone might unduly compromise the tactical and operational capacity of armed forces, it may be argued that this duty is limited only to those lethal attacks, which are alleged, on well-founded grounds, to be unlawful. Clearly, the cases of wrong targeting may lead to state civil responsibility for reparations on the ground of the duty of the state to *respect, protect, fulfil and ensure* the right to life of the victims. In addition, the extensive collateral civilian casualties may, while raising serious doubt over proportionate nature of the attack, shift the heavy onus of proof to the State authorities. What is even more polemical is the question whether this positive duty of effective inquiries can be established in areas outside the State's territorial control during the extra-territorial operations of targeted killings taking place in trans-boundary NIAC. It is generally claimed that this duty should not extend to situations of IAC occurring in non-occupied territories, which are governed by the IHL rules on conduct

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[196] A. Cassese, *International Law*, at 419 and 423; and *International Criminal Law* (2007), at 345.

[197] *The Public Committee Against Torture in Israel v. The Government of Israel*, supra n.para. 40.

[198] See A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).

[199] See also CUDIH, *supra* n. 1, at 34.

[200] ECtHR, *McCann v. UK*, Judgment of 27 September 1995, A 324, at 161 and 163; *McKerr v. UK*, 34 EHRR 553, at 559 (2001).

[201] H. Duffy, The "War on Terror" and the Framework of International Law (2005), at 310; Cassese, at 419; C. Warbrick, "The Principle of the European Convention on Human Rights and the Responses of State to Terrorism", *EHRLRev* 287, at 292 (2002).

of hostilities.[202] Insofar as States do not entertain the requisite territorial and/or personal control, it is practically impossible to conduct any effective investigations.[203]

6.6.5. The Duty to Prosecute and Punish Responsible Soldiers and Their Superiors

Some comments are necessary on the requirement to prosecute and punish responsible soldiers or their superiors in case the disproportionate impact of targeted killings is judged to reach the threshold of war crimes.[204] There are two possible rules which can cause war crimes in case of targeted killing: (i) war crimes based on "[I]ntentionally directing attacks… against individual civilians not taking direct part in hostilities" within the meaning of Article 8(2)(b)(i) ICC Statute; and (ii) war crimes based on "[I]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians…which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". As regards the first genre of war crimes, the fact that a state has undertaken rigorous *ex ante* appraisal can generally rule out the *deliberate* nature of the attack against civilians that would otherwise be tantamount to war crimes. On the other, more painstaking inquiries are needed into the second type of war crimes, the identification of which may be more plausible.

It may be argued that as opposed to civil liability of a State for breaches of Article 51(5)(b) API, the drafters of the Rome Statute deliberately set a higher threshold for determining individual criminal responsibility for war crimes in relation to excessive collateral damage of attacks under Article 8(2)(b)(iv) ICC Statute. This may be corroborated by the addition of the words "clearly" and "overall" to the treaty-based rule which is provided in Article 51(5)(b) API. First, the drafters of Article 8(2)(b)(iv) ICC Statute added the adverb "clearly" before an adjective "excessive" in relation to war crimes based on attack causing disproportionate damage, the text corresponding to Article 51(5)(b) API.[205] Second, they

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[202] Compare Melzer, *supra* n. 6 at 138-9 (concerning the duty of a State actively to protect the right to life of individuals outside its territorial jurisdiction). See also Kretzmer, *supra* n. 11 at 185.

[203] Indeed, Ben-Naftali and Michaeli argue that "considerations of fairness and expediency require that States should not bear responsibility for indirect or unforeseen consequences of their actions in areas outside their control": Ben-Naftali and Michaeli (2003-2004), *supra* n. 5 at 64. See also O. Ben-Naftali and Y. Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories", (2003-2004) 37 *Israel L.Rev* 17, at 64; Kretzmer, *supra* n.11 at 184-5; and Melzer, *supra* n. 6 at 138; and F. Hampson and I. Salama, "The Relationship between Human Rights Law and International Humanitarian Law", working paper submitted to the UN Commission on Human Rights, 21 June 2005, UN Doc. E/CN.4/Sub.2/2005/14, para. 92.

[204] For detailed discussion on this matter, see O. Ben-Naftali, "A Judgment in the Shadow of International Criminal Law", (2007) 5 *JICJ* 322.

[205] Cohen & Shany, supra n. at 319. See also Dörmann, *supra* n. 193 at 166 and 169.

also diluted the element of collateral damage or injury by allowing "overall".[206] Indeed, many western powers have expressed their understanding that the military advantage anticipated from the attack indicates the advantage considered *as a whole* and not from isolated or specific parts of the attack.[207] However, this view ought to be qualified by the argument that the words "clearly" and "overall" introduced in Article 8(2)(b)(iv) ICC Statute does not change existing law.[208] Along this line, the ICRC representative at the Rome Conference in 1998 stated that:

> The word "overall" could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974-1977 Diplomatic Conference that led to Additional Protocol I to the 1949 Geneva Conventions and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of Additional Protocol I, the inclusion of the word "overall" is redundant.[209]

The question whether or not the word "overall" is superfluous or capable of elevating the threshold of determining a war crime under Article 8(a)(b)(iv) needs to be clarified by the future practice of the ICC.

Aside from an individual soldier carrying out an attack, a commander may incur war crimes liability based on the negligence-based threshold of *mens rea*,[210] unless s/he is at pains to undertake a "robust" and "effective" *ex ante* review" of a measure to liquidate a targeted person.[211] Departing from Article 86 API, Article 28 ICC Statute draws distinction between military commanders and civilian superiors, subjecting the latter to a more rigorous standard of *mens rea* based on conscious disregard of information on the occurrence of core crimes. The *ICRC's Customary IHL Study* endorses this distinction as reflective

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[206] Dörmann, *supra* n. 193 at 166 and 169.

[207] See the statements made by Australia, Belgium, Canada, Germany, Italy, Netherlands, New Zealand, Spain, and UK: as cited in: Dörmann, *ibid*., at 170-171. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, (2004), at 87, para. 5.33.5.

[208] Dörmann, *ibid*., at 169-170.

[209] UN Doc. A/CONF.183/INF/10 of 13 July 1998; as cited in: Dörmann, *ibid*., at 169-170.

[210] This doctrine may be considered as a special form of accomplice liability: W.J. Fenrick, "Article 28 - Responsibility of Commanders and Other Superiors", O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, (1999), at 515-522, at 517.

[211] Cohen & Shany, *supra* n. 177 at 320.

of customary IHL.[212] Despite these, the present writer considers that non-military (civilian) superiors must live up to the same standard of negligence to account for war crimes committed under their subordinates.[213]

6.7. Concluding Remarks on the Principle of Proportionality

The *Targeted Killings* judgment of the Israeli Supreme Court has highlighted the possibility of harmonizing the modality of the proportionality appraisal under IHL and IHRL in respect of the right to life.[214] The LRA subtest has been fully endorsed as one of the essential components of the standard of proportionality applicable even to the context of conduct of warfare. This audacious step marks a great departure from many other cases decided by the Israeli Supreme Court, which have sometimes been characterised by formalistic and restrictive interpretation at the expense of Palestinians and Israeli civil rights petitioners.

Gowlland-Debbas argues that the [international humanitarian] "law regulating the conduct of hostilities" entails "a grim 'balancing' or 'equation' between military necessity and human suffering, shrouded in euphemisms such as collateral damage".[215] Similarly, there is concern voiced by human rights lawyers about the unsavoury role of military commanders in undertaking the appraisal of proportionality

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[212] On this matter, the ICRC's *Customary IHL Study* follows the dichotomized approach of the ICC Statute, Article 28: Henckaerts & Doswald-Beck, *supra* n. 19, at 561-562.The standard "conscious disregard" which is applicable to non-military superiors is akin to the notion of gross negligence. This has been confirmed by the ICTR, *Kayishema and Ruzindana*, Judgment of 21 May 1999, Trial Chamber, para. 228.

[213] The doctrine of command responsibility whose origin can trace back long before WWII in national military laws, and which was firmly enunciated in post-WWII war crimes trials (UK, Military Court at Wuppertal, *Rauer* case; US, Military Tribunal at Nuremberg, Von Leep ((The High Command Trial)) case; and *List* ((Hostages Trial)) case; US, Supreme Court, *Yamashita*, US Military Tribunal at Manila etc), is fully incorporated in Articles 86(2) and 87 API. The implication of the Tokyo Tribunal's judgment suggests the possibility of applying this doctrine by analogy to non-military superiors: B. Rölling & C.F. Ruter, *The Tokyo Judgment*, 446-458; as cited in: Fenrick (1999), supra n. 210 at 517.

[214] A. Cohen and Y. Shany, *supra* n. 177, at 313. They point out that "This merger of proportionality tests under national law and IHL may be linked to the growing influence of IHL of human rights law": ibid., at 313. See also O. Ben-Naftali and Y. Shany, "Living in Denial: The Application of Human Rights in the Occupied Territories", (2003-2004) 37 *Israel Law Review* 17.

[215] V. Gowlland-Debbas, " The Right to Life and Genocide: The Court and an International public Policy", in: L. Boisson de Chazournes & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, (1999), at 335.

concerning "incidental loss" of civilian lives in case of (often aerial) attacks,[216] as stipulated under Article 51 (5)(b) API. The effect of this is to enable the military powers, big or small, to engage in intentionally launching an attack against military objectives, without entertaining much of moral qualm or anxiety over a possible war crime prosecution before the ICC.[217]

7. Conclusion

The foregoing examinations lead to the conclusion that so-called targeted killing must be regarded as *prima facie* unlawful. There is no justifying this lethal method *as a policy.*[218] This method of lethal force entails a serious corrosive effect on the foundation of democracy and the rule of law. A considerably onerous burden is placed on States prepared to exercise this method.[219] Ben-Naftali and Michaeli stress that the targeting states must discharge the burden of establishing two main aspects: (i) whether "there is an extremely high probability that the individual poses a significant risk" to the security of the targeting State; and (ii) whether less injurious means are not material feasible.[220] The imposition of the burden as to the LRA test suggests the most intense form of *ex ante* review. Even so, despite such presumption of illegality, it is exceptionally allowed to have recourse to this method in tightly demarcated circumstances. The State must then comply with the following stringent conditions:[221]

(i) this is undertaken in an area where the occupying power does not exercise effective control that would allow it to take reasonable measures of arresting and detaining the individual;

(ii) the occupying power has already requested the transfer of the individual from an authority that exercises control over the relevant area, but the relevant authority is either unwilling or unable *genuinely* to cooperate to take necessary action;

(iii) the individual has engaged in serious, life-threatening, hostile acts either against the occupying authorities (both military and administrative personnel) in occupied territories, or against civilians in the territory of the occupying power, and the occupying power is given reliable intelligence indicating his/her intention to commit such hostile acts; and

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[216] L. Doswald-Beck & S. Vité, "International Humanitarian Law and Human Rights law", (1993) 293 IRRC 94, at 109; and A.E. Cassimatis, "International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law", (2007) 56 ICLQ 623, at 629.

[217] In this light, it may be questioned whether it is a coincidence that the United States played a crucial role in inserting a qualifying adverb "clearly" before the term "excessive" in assessing such incidental loss of civilian lives under the war crimes provision of the Statute of the International Criminal Court (Article 8(2)(b)(iv)).

[218] Ben-Naftali and Michaeli, *supra* n. 5 at 290.

[219] *Ibid.*

[220] *Ibid.*

[221] See CUDIH, *supra* n. 1, at 32.

(iv) the inadequacy of less extreme measures to counter the threat.

Koskenniemi contends that "However desirable it might be to discard the difference between peace and armed conflict, the exception that war continues to be to the normality of peace could not be simply overlooked when determining what standards should be used to judge behaviour in those (exceptional) circumstances".[222] Lindroos emphasizes the contextual appraisal in determining a specific rule governing the deprivation of life under IHL and human rights, noting that both bodies of international law concern the protection of individual persons, but "in different circumstances".[223] From a critical legal studies' standpoint, David Kennedy argues that:

> …to maintain the claim to universality and neutrality, the human rights movement pays little attention to background social and political conditions which will determine the meaning a right has in particular contexts, rendering the evenhanded pursuit of "rights" vulnerable to all sorts of distorted outcomes.[224]

Bearing in mind such fundamental differences in underlying rationales of IHRL and IHL, one can highlight the importance of specific *contextual* assessment to determine the most protective standards and principles derived from the assertive convergence of human rights and IHL.[225] It is against the background of such shifting but converging boundaries of IHRL and IHL that not only the legally complex nature of targeted killing, but also its morally highly disturbing and dubious features, continue to loom large in the mind of international lawyers. It is to be hoped that the more assertive interplay between IHL and IHRL lead to the emergence of a more coherent normative framework adequately equipped to

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[222] ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, Finalized by Martti Kokenniemi, A/CN.4/L.682, 13 April 2006, at 57, para. 104.

[223] A. Lindroos, "Addressing Norm Conflicts in Fragmented Legal System: The Doctrines of *Lex Specialis*", (2005) 74 *Nordic JIL 27* at 42, and 44. She observes that:

> *Prima facie*, it may appear that both areas of law aim at protecting human beings under different circumstances, of which war could be viewed as the special circumstance. Still, both areas of law have *specific and quite distinct aims and normative scopes*, and therefore, stating which is altogether special remains a complicated issue.

Ibid., at 44, emphasis added. See also Koskenniemi (2006), *Report of the Study Group of the ILC*, at 53, paras. 96-97.

[224] D. Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004), at 12. See also A.M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?", (2007) 18 EJIL 1, at 7, 16-17, 19, 25, 31 and 33.

[225] Lindroos, *supra* n. 223, at 48 and 62.

deal with volatile and turbulent occupation scenarios. It is submitted that such a normative framework ought to contribute to enhanced effectiveness in safeguarding rights of civilians in occupied territories without compromising the vital security interests of the occupying power in addressing the perilous challenge amply posed by irregular armed organized groups.