

“AND FOR SUCH TIME AS”: THE TIME DIMENSION TO DIRECT PARTICIPATION IN HOSTILITIES

BILL BOOTHBY*

I.	INTRODUCTION	741
II.	ICRC GUIDANCE ON THE TIME DIMENSION TO DPH	744
III.	ANALYSIS OF THE ICRC GUIDANCE	746
	A. <i>Preparatory Acts</i>	746
	B. <i>Deployment and Return</i>	750
	C. <i>Temporal Scope of the Loss of Protection</i>	752
	D. <i>The Revolving Door of Protection</i>	753
	E. <i>Conclusion of Direct Participation</i>	759
IV.	A MORE WORKABLE INTERPRETATION OF CUSTOMARY AND TREATY LAW	762
	A. <i>Temporal Aspect of the Customary Law Rule</i>	762
	B. <i>Temporal Aspect of the Treaty Rule</i>	764
V.	CONCLUSION	767

I. INTRODUCTION

Critical to the law of targeting is the principle of distinction. Under this most fundamental of principles, at all times during military operations a distinction must be maintained between combatants and civilians, and between military objectives and civilian objects. Attacks may only be directed against those who are not civilians and against military objectives and the discrimination rule¹ must be complied with. Despite these rules of law, however, there has been a tendency over the last century and a half for civilians to constitute an increasing proportion of the casualties in armed conflict. There is, however,

* The author is a serving member of the Royal Air Force Legal Branch. The views expressed in this article are those of the author alone and do not necessarily reflect the position of the Royal Air Force, of the U.K. Ministry of Defence, or of the U.K. Government. The author wishes to acknowledge the helpful comments of Professor Charles Garraway on an earlier draft of this article.

1. See Protocol I Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, art. 51(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (defining and prohibiting “indiscriminate attacks”).

a condition which civilians must comply with in order to retain their protected status under the law. They are only protected in this way “unless and for such time as they take a direct part in hostilities.”² The treaty law does not explain the intended meaning of this phrase “direct part in hostilities” and three obvious questions arise: (1) what activities amount to direct participation?; (2) who is a civilian?; and (3) what does the term “for such time as” mean in terms of the periods of time when the protection is lost? The first two issues are both discussed in other articles in the present volume. It is the last question that is the focus of the present article.

The ICRC has issued its recent *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (“Interpretive Guidance”),³ which addressed these questions. The two purposes of the present article are, first, to explain why the ICRC’s explanation of the time dimension to this rule is flawed, and, second, to put forward what I consider to be a more accurate interpretation of the time dimension to this rule as it applies in, respectively, customary and treaty law.

The article will assess what the ICRC has to say in its Interpretive Guidance about the time dimension to direct participation in hostilities (“DPH”). This assessment is divided into a number of sections in which I consider the various elements of that time dimension. After these introductory remarks, I start by considering when civilians lose protection by undertaking acts of preparation for direct participation. In the next section, I look at the periods spent deploying to undertake DPH

2. *Id.* art. 51(3); *see also id.* art. 43(2) (defining “combatant” as having “the right to participate directly in hostilities”). *See generally* Eric Robert Christensen, *The Dilemma of Direct Participation in Hostilities* (May 2009) (unpublished M.P.A./J.D. professional report, University of Texas at Austin), available at <http://ssrn.com/abstract=1398462> (exploring various interpretations of direct participation in hostilities).

3. Int’l Comm. of the Red Cross [ICRC], *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) (prepared by Nils Melzer) [hereinafter DPH Guidance], available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/\\$File/direct-participation-guidance-2009-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf). The publication of the DPH Guidance has been a matter of some controversy. *See* Bill Gertz, *Inside the Ring*, WASH. TIMES, June 18, 2009, at B1 (reporting that a dozen international law experts withdrew their support from the DPH Guidance).

and returning after having engaged in such activity. I then examine the ICRC's declared view that protection is lost only for the duration of a specific act of DPH and the related notion of the "revolving door of protection." In the following section of the article I evaluate when direct participation comes to an end, and thereafter evaluate what the time dimensions are to the rule as it appears, respectively, in customary and treaty law. In the final section, I seek to draw conclusions. The relevant propositions in the guidance are compared with the treaty language, extant guidance, and state practice, particularly that of the United States and of Israel, and, relevant judicial decision-making is taken into account.

There are three main grounds on which the ICRC's analysis in the Interpretive Guidance can be criticized. First, in deciding what actions constitute direct participation, the ICRC interprets the concepts of preparation, deployment, and return too restrictively. Second, by limiting continuous loss of protection to members of organized armed groups with a continuous combat function, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable. Third, at customary law there is no revolving door of protection and thus the ICRC's interpretation of the word "participates" in the treaty rule excessively narrows the notion of DPH by inappropriately excluding the notion of continuous participation.

To clarify the terminology, in this article "DP" means direct participation, "DPH" means direct participation in hostilities, "Interpretive Guidance," or simply "the Guidance," refers to the *ICRC Interpretive Guidance*,⁴ and "ICRC Customary Law Study" refers to the ICRC's Report of the Study into Customary International Humanitarian Law.⁵ "Additional Protocol I Commentary," or "API Commentary," is a reference to the Commentaries on the Protocols Additional to the Geneva Conventions of 1949, issued by the ICRC in 1987.⁶

4. DPH Guidance, *supra* note 3.

5. ICRC, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC Customary Law Study].

6. ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) [hereinafter API Commentary].

The idea that there is a time dimension to DPH is nothing new. In his Code for use by the Union side in the American Civil War, Dr. Francis Lieber denied prisoner of war rights to persons who commit hostilities “without being part . . . of the organized hostile army” and who do so “with intermitting returns to their homes . . . or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers.”⁷ Dr. Lieber concluded that such men should be “treated summarily as highway robbers or pirates.”⁸ So a number of the time aspects to the rule that I will be discussing in the following pages were already exercising the minds of experts in the mid-nineteenth century. Dr. Lieber’s references to intermitting returns and the occasional assumption of peaceful pursuits seem to make the point that, in his view, the preceding hostile activities deprived these individuals of protection on a continuous basis.

Although the notion of DPH is reflected in API, that is not the only instrument in which it appears.⁹ However, this article will generally analyze the term as it is used in API, not least because so many states are now party to that instrument¹⁰ and because the customary rule, though distinct, clearly owes much to the rule in API.

II. ICRC GUIDANCE ON THE TIME DIMENSION TO DPH

Before embarking on the critical assessment that is the purpose of this article, this section summarizes what the Inter-

7. Adjutant Gen.’s Office, U.S. War Dep’t, Instructions for the Government of Armies of the United States in the Field, art. 82, Gen. Ord. No. 100 (Apr. 24, 1863) [hereinafter Lieber Code], available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

8. *Id.* While the text of the Lieber Code does not amount to a source of international law as such, it not being a treaty or other such formal source, it is an important expression by a learned scholar of what the law as then understood amounted to. While the reference to summary treatment is no longer legally accurate, it is instructive to note the mid-19th century view of what is described below as the “revolving door” of protection.

9. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (referring to “active” participation in hostilities).

10. Note, however, that Israel is not party to Additional Protocol I and does not accept the customary law status of the term “for such time as” in the rule. Yoram Dinstein, *The ICRC Customary International Law Study*, 36 *Isr. Y.B. on Hum. Rts.* 1, 11 (2006).

pretive Guidance has to say about the time dimension. The time dimension, for these purposes, includes preparation for direct participation, deployment in order to undertake direct participation, the return after such activity has taken place, and the circumstances in which an individual is no longer regarded as participating directly.

The ICRC links the notion of preparation to the carrying out of a specific act and takes the line that preparatory measures aiming to carry out a specific hostile act qualify as direct participation in hostilities, whereas preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not.¹¹ Deployment is stated by the Interpretive Guidance to amount to direct participation once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. This contrasts with what the Interpretive Guidance says about return from direct participation. "[T]he return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation."¹² The Interpretive Guidance then looks at the temporal scope of the loss by civilians of protected status by virtue of DPH. It concludes that "[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians," and are thus continuously targetable for as long as they maintain a continuous combat function.¹³ The Interpretive Guidance then suggests that direct participation by members of organized armed groups with such continuous combat functions ends when the relevant individuals make some positive act of disengagement or otherwise cease to undertake that function. Conclusive behavior amounting to renunciation of the function is considered by the ICRC to be sufficient for these purposes.¹⁴

Having outlined the broad thrust of the Interpretive Guidance, it is now necessary to examine what it has to say about each of these elements of the time dimension in greater detail.

11. DPH Guidance, *supra* note 3, at 65-66.

12. *Id.* at 67.

13. *Id.* at 70.

14. *Id.* at 72.

III. ANALYSIS OF THE ICRC GUIDANCE

A. *Preparatory Acts*

In the Interpretive Guidance, the ICRC acknowledges that “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.”¹⁵ The Interpretive Guidance then, however, appears to narrow the scope of the preparatory acts which are stated to amount to DPH.

The Interpretive Guidance recognizes that “whether a preparatory measure amounts to direct participation in hostilities depends on a multitude of situational factors” and suggests that the notion of preparation here approximates to “‘military operations preparatory to an attack.’”¹⁶ This rather assumes that the ultimate act will indeed be an attack, which is not of course necessarily so. It is clear that the ICRC is seeking here to narrow the applicability of the concept, but, in my view, “military operations preparatory to the act of direct participation in hostilities” would be a better way of putting it.

The idea of preparatory acts appears in API, article 44(3), which concerns the obligation of combatants to distinguish themselves; such obligation is stated to apply “in a military operation preparatory to an attack.”¹⁷ The API Commentary extends the obligation using the words “or in any action carried out with a view to combat,”¹⁸ making it clear that actions carried out with a view to combat are considered to be synonymous with preparatory acts—a plainly sensible view which I will apply below.

The Interpretive Guidance, however, seeks to introduce a distinction between measures preparatory to hostilities and

15. *Id.* at 65. *But see* Orna Ben-Naftali & Keren R. Michaeli, ‘We Must not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L.J. 233, 279 (2003) (suggesting that there must be a case-by-case assessment of military necessity and of alternative means when preparation for and return from direct participation are being considered); Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW & INEQ. 195, 211-12 (1994) (arguing for a restrictive category of civilians undertaking DPH) .

16. *Id.* (citing Additional Protocol I, *supra* note 1, art. 44(3)).

17. Additional Protocol I, *supra* note 1, art. 44(3).

18. API Commentary, *supra* note 6, ¶ 1692.

preparatory measures that aim to establish the general capacity to carry out hostile acts, asserting, without a convincing basis for doing so, that the latter do not amount to DPH.¹⁹ The loading of ordnance on an aircraft in preparation for a particular sortie is cited by the Interpretive Guidance as preparation that would amount to DPH,²⁰ and this is plainly correct. Indeed the loading of any mission specific stores, fuel, data, etc. would be similarly categorized. The Interpretive Guidance also correctly observes that geographical proximity or temporal proximity to the proposed attack is neither necessary nor sufficient here;²¹ neither is it necessary that the act be indispensable to the execution of the sortie.

Other preparatory measures cited correctly by the Interpretive Guidance as constituting DPH include equipping, instructing, and transporting personnel; gathering intelligence; and preparing, transporting and positioning weapons and equipment if these are carried out as preparation for the undertaking of a specific hostile act.²² The Interpretive Guidance then cites as general preparation, and thus not in the ICRC's view constituting DPH, the purchase, smuggling, production, and hiding of weapons; recruitment and training of personnel; and financial, political, and administrative support to armed actors.²³ It was perhaps unwise of the ICRC to include the "hiding of weapons" example,²⁴ and as the Interpretive Guidance itself accepts, situational factors will be determinative. The training of personnel may also be such a fundamental element in the conduct of certain types of hostility that to exclude it entirely from the scope of DPH may be simply unrealistic. According to the ICRC position, however, a civilian who is a general supporter of an organized armed group without being a member of it, and who smuggles weapons to a fighter's position and conceals them there without taking any other active role in the hostilities, may be regarded as not participating in the hostilities.

19. DPH Guidance, *supra* note 3, at 66.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 66-67.

24. *Id.* at 66.

In an effort to give meaning to the word “direct” in the application of “direct participation in hostilities” to preparatory acts, the Interpretive Guidance claims that civilians should be liable to attack only during “recognizable and proximate preparations,” citing loading a gun as an example.²⁵ This example does little to recognize the complexities of differing types of involvement in modern warfare,²⁶ and may cause some to interpret the notion of DPH too narrowly. Thus, whether an act is capable of being recognized by the opposing party as preparatory to DPH is irrelevant. It is the character of the act itself that is determinative. The word “proximate” is a relative concept, and is more likely to confuse than to clarify.

Let us, in the context of the example chosen by the ICRC, consider the position of the regular or persistent participant in an armed conflict who is not a member of an organized armed group and is therefore, according to the ICRC position set out in the Interpretive Guidance, a civilian. If this individual, after each engagement, cleans, prepares, and conceals his weapon, thus remaining ready for the next engagement, he should, in my view, be regarded as engaged in preparation through those acts of preparing the weapon and through the continuous act of concealment. Such an interpretation would be consistent with the reference in the API Commentary, cited above, to “any action carried out with a view to combat.”²⁷ Such a person would be directly participating on a continuous basis while the weapon is being held by him in concealment, ready for the next engagement, as he would be doing so explicitly to enable

25. *Id.* at 67 n.182.

26. In modern warfare, networks of individuals are involved in the identification and selection of targets for attack; in the guidance of, for example, air assets to engage those targets; in the loading of ammunition, fuel, mission control data, and other mission essential stores; in the designation of the target to be attacked; and in the firing of the weapon at the target. *See generally* P. W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003). Notions of direct participation that do not address sensibly the differing types of participation of this wide selection of actors will fail to address the realities of modern warfare. *But see* Alexander Orakhelashvili, *The Interaction between Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence?*, 19 EUR. J. INT’L L. 161, 167 (2007) (arguing that “in order to be workable, [the civilian/military] distinction must draw straightforward distinctions in terms of which targets can be attacked and which cannot”).

27. API Commentary, *supra* note 6, ¶ 1692.

himself to remain prepared for that next hostile act. It is clearly correct, as the Interpretive Guidance acknowledges, that the cited examples are at best illustrative and that the relevant circumstances will be decisive. However, the ICRC's attempt again to narrow the DPH notion, this time by introducing the "recognizable and proximate" criterion,²⁸ lacks a convincing basis in law.

Professor Schmitt cites the assembly of improvised explosive devices as an example worthy of discussion. Recalling that the Interpretive Guidance excludes assembly from direct participation, he explains the alternative interpretations—namely, either "an individual who acquires the materials and builds an IED he eventually employs is only directly participating once he begins the final steps necessary to use it," or "the acquisition of the materials necessary to build the device, as well as its construction and emplacement, comprise preparatory measures qualifying temporally as the period of direct participation."²⁹ Applying our API Commentary-derived criterion of "any action carried out with a view to combat,"³⁰ there can be little doubt that the person who assembles an IED with a view to its employment by himself or another on a particular occasion or mission is directly participating while assembling the device. On the other hand, the assembly of IEDs for possible use on unspecified future occasions during unspecified attacks merely creates the capacity to undertake such operations and would not, on this interpretation, be "preparation."³¹

From this discussion we can, I think, draw some conclusions as to which preparatory acts ought properly to be regarded as DPH. It would seem that the important distinction is between acts designed to create the general capacity to un-

28. DPH Guidance, *supra* note 3, at 67 n.182.

29. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. _ (forthcoming 2010) (manuscript at 36, on file with author) [hereinafter Schmitt, *A Critical Analysis*].

30. API Commentary, *supra* note 6, ¶ 1692.

31. *But see* Gherebi v. Obama, 609 F. Supp. 2d 43, 64 n.15 (D.D.C. 2009) (quoting expert witness Gary Solis's declaration that "senior terrorist leaders and terrorist weapons specialists and fabricators should be considered to continually be taking a direct part in hostilities").

dertake military operations³² and acts preparatory to combat. To be preparation, combat must be in the contemplation of the actor at the time of the preparatory act. In this sense, the essential quality in the relevant act is its causal connection with combat.³³ The ICRC is wrong to limit the notion to “military operations preparatory to an attack,” and is also wrong to limit it to preparation for a particular attack. The distinction is finer than that. It is between the generation of a general capacity to undertake military activity and preparation for combat or hostilities.

B. *Deployment and Return*

As stated previously, the Interpretive Guidance opines that “[m]easures preparatory to the execution of a specific act of [DPH], as well as the deployment to and the return from the location of its execution, constitute an integral part of the act.”³⁴ It is suggested in the Interpretive Guidance that a deployment begins when the individual “undertakes a physical displacement” with a view to carrying out a military operation.³⁵ It seems to me, however, that such a displacement will not necessarily be the start of DP. Before the deployment has commenced, there may well have been preparatory acts which themselves constitute DP. If the preparatory acts constitute DP, there is a strong argument for regarding deployments to-

32. The facility where such general preparations are undertaken would of course be a legitimate military objective, and thus liable to attack. The issue being discussed in this part of the text is, quite specifically, whether the individuals so engaged are liable to be targeted, including when away from that facility. They may of course be liable to death or injury as a consequence of the lawful attack of the facility.

33. See Yoram Dinstein, *Distinction and the Loss of Civilian Protection in Armed Conflict*, in INTERNATIONAL LAW AND MILITARY OPERATIONS, NAVAL WAR COLLEGE INT’L L. STUD. NO. 84 183, 189-90 (2008) (“[I]n demarcating the relevant time span in the course of which the person concerned is actually taking part in hostilities, it is permissible to go as far as reasonably possible both ‘upstream’ and ‘downstream’ from the actual engagement.”); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1, 17 (2004) (“To the extent that civilians fulfill the same function as combatants, either in the armed forces or as part of the organization of an ‘illegitimate’ nonstate actor, they are logically subject to targeting under the same provisions of international humanitarian law.”).

34. DPH Guidance, *supra* note 3, at 65.

35. *Id.* at 67.

wards the location where those preparatory acts are to be undertaken as also constituting DP, although there has to be a limit to how far such a cumulative approach can properly be taken. It is not, for example, being suggested that "preparation for a preparatory act" would constitute DP, although the preparation may indeed be a process that itself takes a period of time to undertake or complete. It therefore seems proper to regard deployment with the explicit purpose of doing something preparatory to an act that itself amounts to direct participation in hostilities as amounting to DP.

The Interpretive Guidance suggests that the return from the execution of a hostile act is complete when "the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons."³⁶ The better view, however, is that these acts can properly be regarded not as concluding participation but rather, as preparatory to the next act of DPH, for the reasons given above. Furthermore, while an act of separation is clearly an integral part of the return from a hostile act, such return is only complete when the "physical displacement" that constitutes such return is itself complete, which would appear likely to occur somewhat later than allowed for in the ICRC analysis. To hold otherwise seems to be fundamentally inconsistent with the explanation the ICRC offers for the word "deployment." This would, again, appear to be a case of the ICRC unnecessarily and unrealistically narrowing the notion of DPH on a basis that does not seem to be required or even implied by the underlying law.

To be DP, the ICRC argues it is critical that deployment and return be integral parts of a specific act constituting DPH.³⁷ The logic of this position is that if preparation is DP on the basis suggested above, deployment for preparatory acts to be undertaken and return thereafter will also be DP. By the same token, preparation for the DPH activity of deploying will also itself amount to DPH. However, in earlier sentences in the same paragraph of the Interpretive Guidance, the ICRC appears to limit the concept of deployment to movement forward with a view to carrying out a military operation and to

36. *Id.* at 67.

37. *Id.* at 68.

restrict return to a return after undertaking a “hostile act.”³⁸ While the status of deployment for, and return after, undertaking an act of preparation would therefore seem to be unclear in the Interpretive Guidance, underlying law would appear to characterize both deployment and return as direct participation so long as the activity with which they are each associated is itself direct participation.

However, not all DPH activities will require deployment in the sense the ICRC uses the term. The position taken in the Interpretive Guidance is that, where no deployment is necessary, such as where the act that is DPH consists of computer operations conducted from the individual’s home, the time during which DPH occurs will be restricted to “the immediate execution of the act and preparatory measures forming an integral part of that act.”³⁹ The addition by the ICRC of the requirement that the preparation be “integral” seems to be another case of the ICRC inappropriately restricting the scope of DPH. Established law would regard preparatory acts, pure and simple, as direct participation.

C. *Temporal Scope of the Loss of Protection*

The Interpretive Guidance produces a black letter text on temporal scope as follows:

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for so long as they assume their continuous combat function.⁴⁰

This is the point where the specific act approach meets the ICRC notion of continuous combat function,⁴¹ and the meeting is, for reasons discussed elsewhere, more of a collision than a seamless joint. Focusing on the time periods during which civilian protection is lost, I will start this part of the dis-

38. *Id.* at 67-68.

39. *Id.* at 68.

40. *Id.* at 70.

41. See Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 655-57 (2010).

discussion by looking at the continuous loss of civilian protection. This, according to the ICRC's black letter formulation, only happens when the individual has a continuous combat function within an organized armed group.⁴² In this regard the associated commentary within the Interpretive Guidance is somewhat ambiguous. The statement that "members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function" is followed by the assertion that "where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group."⁴³ So in the latter version, reference to a continuous combat function is missing.

The appropriateness of the requirement that the combat function be continuous is discussed elsewhere in this volume.⁴⁴ For the present purposes, it suffices to note that persons who lose protected status by virtue of their membership of an organized armed group remain unprotected on a continuous basis for as long as that membership persists. The ICRC argues that this is the only basis for such continuous deprivation of protection (and that it only applies to those with a continuous combat function), while in all other cases, a civilian who directly participates in the hostilities only loses protection while doing so. In my view, this narrows excessively the class of those who lose protection on a continuous basis and the result is a distortion of the balance inherent in international law.

D. *The Revolving Door of Protection*

The ICRC position, reflected in the Interpretive Guidance, is that the "revolving door" of protection is the natural consequence of the treaty provisions.⁴⁵ Thus, because civilians are stated in the treaties to enjoy protection "unless and for such time" as they directly participate, the ICRC regards such

42. DPH Guidance, *supra* note 3, at 70.

43. DPH Guidance, *supra* note 3, at 71-72.

44. Watkin, *Opportunity Lost*, *supra* note 41, at 655-57.

45. DPH Guidance, *supra* note 3, at 70 ("The 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL.").

direct participators, who remain part of the civilian population, as having their protection temporarily suspended during periods of DPH. They contrast such civilians with “members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict,” adding that “the behaviour of individual civilians depends on a multitude of constantly changing circumstances and, therefore, is very difficult to anticipate.”⁴⁶

In my view, there are a couple of implicit assumptions embedded in this, which are potentially deceptive. The first, implicit assumption is that the functions of members of organized armed groups are not as liable to change as those of directly participating civilians. While the role of some such members may well be fixed over time, it is dangerous to imply that all such members necessarily have functions that are permanent. Secondly, while the behavior of some civilians may change, the roles of others may well be regular and consistent in support of a party to the conflict. This suggests that the distinction in status between civilians who persistently directly participate and members of organized armed groups, on which the ICRC bases its analysis of the temporal dimension, may well be flawed.

It is clearly correct to assert that civilians who directly participate do retain civilian status. They do not become members of the armed forces by virtue of that participation,⁴⁷ nor are they members of a *levee en masse*.⁴⁸ Rather, they are civilians who are doing something that is inconsistent with the status of civilian, which may, depending on the nature of the act, render them a clear danger to the opposing party to the conflict. They are persons who, whether from free choice or oth-

46. *Id.* at 70-71.

47. See Additional Protocol I, *supra* note 1, art. 43 (defining “armed forces”).

48. Members of a *levee en masse* are civilians who are regarded as belligerents (combatants in modern parlance) provided they satisfy the Hague Convention conditions, and then only for such time as they satisfy those conditions. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulations Respecting the Laws and Customs of War on Land, art. 2, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (“The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves . . . shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.”).

erwise, have decided to participate directly in the hostilities. It is their decision to participate that renders them liable to attack.⁴⁹

So the next question to consider is whether civilians who repeatedly participate directly in hostilities regain protected civilian status during the intervals between such participatory acts. This is what lies at the core of the revolving door proposition to which the ICRC is wedded and which is reflected in the Interpretive Guidance.⁵⁰ Having drawn a distinction between members of organized armed groups and civilians who directly participate, the Interpretive Guidance seeks to justify the notion of the revolving door of protection as follows:

As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian's protection against direct attack each time his or her engagement in hostile acts ends. Until the civilian in

49. Schmitt, *A Critical Analysis*, *supra* note 29 (manuscript at 21, on file with author). The UK Manual expresses the matter in consequential terms—i.e., if the civilian directly participates, he loses his immunity. The use of the present tense is indicative of the temporal element of article 51(3) and the consequential terms in which the matter is put there are indicative of the approach taken in the present paragraph. See UK MINISTRY OF DEFENSE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* ¶ 5.3.2 (2004).

50. See NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 348 (2009) (“[This] interpretation can . . . be deduced from the ICRC Commentary when it equates direct participation in hostilities with ‘acts of war’, refers to ‘act of participation’, and restricts the ensuing loss of protection to the period where a civilian represents a concrete ‘danger’ to the adversary.”). For critical accounts of the “revolving door” principle, see, e.g., Watkin, *supra* note 33, at 17 (“Concern has long been expressed over the idea of such a ‘revolving door’ of protection.”) (citing W. Hays Parks, *Air War and the Law of War*, 31 A.F. L.REV. 1, 118-20 (1990)); Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, p. 510, available at <http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf> (“If civilians could repeatedly opt in and out of hostilities, combatants victimized by their activities will quickly lose respect for the law, thereby exposing the civilian population to a whole greater danger.”). The ICRC itself has previously resisted the “revolving door” interpretation. See API Commentary, *supra* note 6, ¶ 1677 (“[A]ny concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organisation such as [the armed forces of a Party to a conflict] becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case until he is permanently demobilized by the responsible command . . .), whether or not he is in combat, or for the time being armed.”).

question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence.⁵¹

Crucially, in a footnote to, and no doubt as suggested justification for, this narrative, the ICRC cites the API Commentary as follows:

If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.⁵²

The phrase “for as long as his participation lasts” in the API Commentary text implies a period of time and sits rather uncomfortably with the Interpretive Guidance notion that loss of protection comes and goes with each individual act. Rather, the API Commentary formulation suggests, or at least implies, that while the civilian persists in participating in the hostilities he will lose protection. The API Commentary interpretation makes sense, moreover, because during the period of such persistent participation, that civilian has chosen to become part of the fight. The cited extract from the Commentary refers to the civilian being a danger, and some types of direct participation may indeed be characterized in these terms. However, other types, such as loading fuel on an aircraft, do not involve the civilian himself in the direct employment of violence, so it is better, in my view, to discuss this issue in terms of the decision of the individual to participate, rather

51. DPH Guidance, *supra* note 3, at 71. Professor Schmitt concludes that such an approach “has thrown the military necessity-humanitarian considerations balance wildly askew,” a conclusion with which it is hard to disagree. Schmitt, *A Critical Analysis*, *supra* note 29 (manuscript at 37, on file with author). For an argument in support of this narrow approach, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. OF INT’L L. 171, 193 (2005) (examining the position expressed by Professor Antonio Cassese before the Israeli Supreme Court in the Targeted Killings Case that the phrase “for such time as . . . must be given a narrow meaning. It is only while the persons are actually engaged in carrying out their hostile acts that they may be targeted”).

52. API Commentary, *supra* note 6, ¶ 4789; see also GEOPHREY BEST, WAR AND LAW SINCE 1945 255 (1997) (“[I]n the event of their . . . taking part in guerrilla warfare . . . they can go back to being civilians afterwards.”).

than seeking to rationalize the response by reference to danger or risk. The intervals between the persistent participator's activities are likely, really, to be preparation for the next act of DP.⁵³ When the persistent participation ends, however, there is no longer any military advantage to be derived from attacking him although the opposing party to the conflict may not be aware of this change in circumstance. Certainly, however, once there has been a sufficient act of disengagement or a sufficient period of non-participation since the last act of DP, as to which see below, his protected status is properly re-established. In short, the interpretation of the API Commentary given in this paragraph is to be preferred to that put forward in the Interpretive Guidance.

The ICRC acknowledges in the Interpretive Guidance that the notion of the revolving door makes it more difficult for opposing armed forces to respond effectively to the direct participation of civilians in hostilities.⁵⁴ This is indeed correct, not least because it would create legal inequality between the opposing parties, thus eroding the international law assumption that the law applies equally to each party to the conflict. Having made this acknowledgment, the ICRC then asserts, again without specific or at least adequate evidence or justification, that the revolving door approach remains necessary "to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganised or sporadic basis."

Here again, the ICRC text leaves the question open how the persistent civilian participator is to be regarded. The

53. See Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQ. L. 179, 195 (2004) ("[I]n war, much broader, blanket license to kill the enemy is granted: soldiers and officers can be killed while asleep, while doing office work, or while out on maneuvers. There is most decidedly no requirement to refrain from shooting at enemy soldiers until ascertaining that they are about to strike and hence must be stopped. With respect to high-ranking officers, this point is even clearer, as they can rarely be said to pose any immediate danger.").

54. DPH Guidance, *supra* note 3, at 71. Williams draws attention to the legal challenges that this revolving door posed for coalition forces in Iraq, NATO-led forces in Afghanistan, and Russian Federation and Georgian forces in Abkhazia and South Ossetia when making targeting decisions. Dewi Williams, *The Often-Vexed Question of Direct Participation in Hostilities: A Possible Solution to a Fraught Legal Position?*, 2 J. OF POL. & L. 1, 3-4 (2009).

ICRC's use of "or" in this passage implies that in its view the revolving door only applies if the participation was either spontaneous, unorganized, or sporadic. An alternative implication is that the ICRC is using these terms synonymously. Participation in hostilities by members of an organized armed group with a continuous combat function may, however, be sporadic. If the ICRC view is that unorganized but regular DP by civilians still involves the application of the revolving door, this is also likely to be unacceptable to states, not least because of the unnecessarily ambiguous position it creates for their armed forces who, whether their primary role is infantryman or cook, can legitimately be targeted at all times during an armed conflict.

In this regard, the United States's position on the time dimension to DPH should be considered.⁵⁵ The U.S. entirely rejects the notion of the revolving door of protection, on the basis that repeated participation in hostilities interspersed with claims of civilian status endangers law of armed conflict protection of civilians who do not so participate. The U.S. would take repeated participation into account in determining whether the individual is in fact continuously engaged and thus loses protection on a continuous basis. In my view, the correct approach is to distinguish between, first, isolated and sporadic acts by civilians and, second, repeated or persistent acts of DPH. Only the former would involve resumption of protected status after the act of DPH,⁵⁶ while the latter would involve continuous loss of protected status while such persistent or repeated involvement in hostilities continues.

55. This understanding of the U.S. position is based on private correspondence between the author and W. Hays Parks in September and October 2009.

56. See PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, HARVARD UNIVERSITY, IHL AND CIVILIAN PARTICIPATION IN HOSTILITIES IN THE OPT 12 (2007) (proposing a series of questions to help assess the lawfulness of an attack on a civilian: "Was this attack targeting a particular individual or was it an indiscriminate attack? . . . Was the particular individual engaged in the use of force or otherwise providing a direct contribution to the use of force? . . . Was this direct participation or contribution taking place over time or was the participation only sporadic or unpredictable?").

E. *Conclusion of Direct Participation*

As we have seen, the Interpretive Guidance stipulates that protected civilian status is regained after each act of DP by all those persons who are not members of the armed forces or members of organized armed groups and who have participated directly in the hostilities, whether on a sporadic, repeated, persistent, or other basis. According to the ICRC Guidance, it is only members of organized armed groups with a continuous combat function that are continuously targetable. The individuals in this exceptional class must make some positive act of disengagement, failing which they remain continuously liable to be attacked under the ICRC interpretation.⁵⁷

The U.S., in the context of a discussion of the customary position, not specifically under article 51(3), concludes that when such repeated participation takes place, an act of affirmative disengagement would be necessary in order to establish that the person concerned is no longer a direct participant in the hostilities.⁵⁸ Professor Schmitt contemplates, as an alternative to the affirmative act of withdrawal, an extended period

57. This accords with the Canadian understanding, based on private correspondence between the author and Brig. Kenneth Watkin, JAG of Canada, during September and October, 2009. The current draft of the Canadian Operational Law Manual, reads: "Members of an organized armed group can be targeted until such time as they cease to belong to the armed group. Membership lasts until affirmative disengagement from the group in a manner objectively recognizable to the adversary. A determination that a member has disengaged from an organized armed group should be based on concrete, objectively verifiable facts and on the standards of good faith and reasonableness in the prevailing circumstances." NATIONAL DEFENCE AND THE CANADIAN FORCES, OFFICE OF THE JUDGE ADVOCATE GENERAL, DRAFT JOINT DOCTRINE MANUAL: LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-024 (forthcoming 2010) (on file with author). This text would seem to balance the application of the law between the opposing parties to the conflict and thus to improve the chance that those involved in the conflict will respect the law. The prior version of the Joint Doctrine Manual is available at http://www.forces.gc.ca/jag/publications/Training-formation/LOAC-DDCA_2004-eng.pdf.

58. See, for example, the reference to "any person who has committed a belligerent act, or has directly supported hostilities in aid of enemy armed forces." *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52 (D.D.C. 2009). The fact of having so acted in the past is cited by the U.S. Government's Memorandum as justifying detention. *Id.* at 53.

of non-participation.⁵⁹ It can in my view properly be argued that those who have exposed themselves to the risk of direct attack by virtue of the acts they have decided repeatedly to undertake should bear the burden that the adverse party may, absent a clear act of disengagement, misunderstand their current status in the conflict. While it must always be possible for the civilian direct participator to re-establish protected civilian status, it is clearly necessary that reasonable steps be taken with a view to ensuring that the new status is correctly understood by the adverse party. In the context of some conflicts, far-reaching action by the individual may be necessary to achieve this.

Importantly, however, the requirement for such action supports the importance of the difference in status which, in turn, serves to underline the fundamental importance in international law terms of the distinction between those who are liable to be attacked, and those whom the adverse party must respect and protect from attack.⁶⁰ In my view, if an error is

59. Schmitt, *A Critical Analysis*, *supra* note 29 (manuscript at 37-38, on file with author). Professor Schmitt cites the U.S. District Court for the District of Columbia, hearing a habeas corpus case, on the question of the status of an individual as a member of an organized armed group. In *Al Gingo v. Obama*, 626 F. Supp. 2d 123 (D.D.C. 2009), the court held that to “determine whether a pre-existing relationship sufficiently eroded over a sustained period of time, the Court must, at a minimum, look to the following factors: (1) the nature of the relationship in the first instance; (2) the nature of the intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody.” *Id.* at 129. The Court found that a prior relationship with al Qaeda/Taliban had been severed. *Id.* Williams questions whether it is right that an individual whose participation was some time in the past should remain liable to attack throughout a lengthy conflict, preferring a case-by-case approach. Williams, *supra* note 54, at 6. He suggests the elimination of the temporal element. *Id.* The purpose of the present article is, however, to discuss the law as it is, including, as it does, the time dimension.

60. While there is no presumption known to law that a civilian is not participating in a conflict, the adverse party must take all feasible precautions—that is, do everything practicable or practically possible—to ensure that the objective, namely the person concerned, is a military objective. AP1, *supra* note 1, art. 57(2)(a)(i); UK Manual, *supra* note 49, ¶ 5.32.2. Consider, for example, the discussion of a possible “presumption in favor of the government’s evidence,” and indeed of a shifting onus of proof, discussed in the context of “enemy combatant proceedings” in *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-534 (2004). See also *Gherebi*, 609 F. Supp. at 64 n.15 (“The onus

made and a civilian who was a direct participator is attacked when he is no longer participating, this will be a wrongful act but not a criminal one. The mistake of fact will negate intent and knowledge.⁶¹ So an attacker must take reasonable steps to ensure that the object of attack remains a lawful target at the time when the attack will be carried out, that is, in the case of a direct participator, that he continues to be a direct participator. Once that individual has directly participated in the hostilities, however, the risk that such reasonable precautions will not reveal that the direct participator has renounced that role rests with the individual concerned. If it is, however, known that the individual is no longer participating directly and that he has resumed "protected civilian" status, he must no longer be made the object of attack and should be respected and protected.

The U.S. position recognizes that clear and objectively verifiable facts will be required to demonstrate the act of disengagement, and that decisions in this respect, as with so much of international law, must be based on good faith. The U.S. position is therefore that pending such an overt act of disengagement, the repeated or persistent participant remains targetable at all times irrespective of the activity he is engaged in at any particular time, and the suggested requirement for objective verifiability reflects the obvious need that the opposing party be convinced of the change that is taking place.

The important linkage between mutual confidence between adversaries and international law compliance lies at the root of this U.S. position which reflects, in my view, a correct interpretation that applies not only to the customary rule, which of course binds the U.S., but also to the article 51(3) rule, which does not.

should therefore rest on the detaining party to establish that the civilian in question has actually participated in hostilities.”).

61. See Rome Statute of the International Criminal Court art. 30(1), UN Doc. A/CONF.183/9, 37 I.L.M. 1002 (July 17, 1998) (“Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”). See generally KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: SOURCES AND COMMENTARY (2003).

IV. A MORE WORKABLE INTERPRETATION OF CUSTOMARY AND TREATY LAW

In the next two sections, I move on from the Interpretive Guidance and seek to develop a workable interpretation of the time dimensions of, respectively, the customary law rule and the rule reflected in AP1.

A. *Temporal Aspect of the Customary Law Rule*

Taking the customary law rule first, although the ICRC, in its Customary Law Study, found a rule that includes the term “and for such time as,”⁶² it should be noted that some states do not accept that those five words form part of a customary rule on direct participation.⁶³ Attention should, however, be drawn to the decision of the Israeli Supreme Court in the Targeted Killings Case.⁶⁴ In that case, the Court noted that Israel is not party to AP1, but expressed itself satisfied with the ICRC position that the rule in article 51(3) has customary status.⁶⁵ The Court cited the reference in Common Article 3 of the 1949 Geneva Conventions to the protected status of persons “taking no active part in the hostilities.”⁶⁶

The Government of Israel, in its submission to the Court, noted that customary law expressly determines that it is permissible to harm a civilian who takes a direct part in hostilities and asserted that “[r]egarding the period of time during which such harm is permitted, there is no restriction.”⁶⁷ The Israeli Supreme Court specifically rejected this declared position of the Israeli Government, concluding that all parts of article 51(3) are customary.⁶⁸

62. ICRC Customary Law Study, *supra* note 5, Rule 6 at 19.

63. For a brief discussion of Israel’s position on this issue, see Human Rights Council, *Report of the United Nations Fact Finding Mission on the Gaza Conflict*, at 132 n.290, delivered to the General Assembly, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009).

64. HCJ 769/02 Pub. Comm. against Torture in Israel v. Gov’t of Israel [2005] IsrSC 57(6) 285.

65. *Id.* ¶ 30.

66. *Id.*

67. *Id.* (citing Supplement to summary submitted on behalf of State Attorney, 26 January 2004).

68. *Id.* In making this determination, the court considered the military manuals of the UK, France, Holland, Australia, Italy, Canada, Germany, the U.S. Air Force and New Zealand. Authorities include Marco Roscini, *Target-*

It is clear, of course, that the time element in article 51(3) binds all states party to API.⁶⁹ This controversy as to customary status is therefore only of practical relevance to states not party to API. Moreover, the state practice, including military manuals, official pronouncements, and battlefield conduct, of states that are party to API will tend to be in accordance with the treaty's requirements as a matter of treaty compliance, and will thus have little to say about the exact terms of the distinct customary rule. It is the practice of states not party to API that is therefore of fundamental importance in determining whether the treaty rule has become a customary rule.⁷⁰ With that in mind, I shall now consider the position taken by the U.S., which has not become party to API.

The U.S. position—that civilians who are not members of organized armed groups lose protection only for the approximate duration of direct participation—is therefore instructive. The U.S. rejects the notion, discussed *supra*, of a revolving door of protection, and concludes that repeated participation can be considered in determining whether such persons are in fact continuously engaged in hostilities. The Government of Israel would also reject the revolving door notion on similar grounds. It is difficult to accept that the declared position of a P5 state that is still, arguably, the world's only superpower should be ignored when the precise terms of the customary rule are being assessed, although the U.S. position will not necessarily be determinative on the point. The "approximate

ing and Contemporary Aerial Bombardment, 54 INT'L & COMP. L. Q. 411, 418 (2005); Vincent-Joel Proulx, *If the Hat Fits Wear It, If the Turban Fits Run For Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L. J. 801, 879 (2005); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 53 (2000).

69. At the time of writing, 169 states are party to API. ICRC, *International Humanitarian Law – State Parties / Signatories*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P> (last visited Mar. 12, 2010).

70. See Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, in 322 HAGUE RECUEIL DES COURS 265, 268 (2008) (“[A]n ICRC exhortation itself cannot be viewed as a building-block of custom. Furthermore, if the ICRC’s appeal elicits no positive response from States, at best it must be deemed ineffectual and at worst it is an indication and at worst it is an indication *a contrario* that States do not consider themselves bound by the strictures advocated by the ICRC.”).

duration” approach does, however, recognize that there is a time dimension to the customary rule. The positions of the U.S. and Israel, and the Israeli High Court decision, are all of considerable importance in determining the temporal dimension to the customary rule.

It is accordingly at least arguable that under customary law the following obtain: first, that civilians who directly participate lose their protected status for the approximate period of their participation; second, that there is no revolving door of protection at customary law; and third, that where there is evidence of repeated participation, this can properly be used as the basis for a determination that an individual is continuously engaged in hostilities, including during the intervals between the particular acts that constitute participation in the hostilities, with the result that the individual is continuously liable to be attacked during the period of such persistent or repeated participation.

B. *Temporal Aspect of the Treaty Rule*

Having addressed the temporal aspect of the customary law rule, we must now consider the temporal aspect of the treaty rule. The customary and treaty rules are not necessarily expressed in identical terms, and a customary rule always, as a matter of law, remains distinct from any treaty rule addressing the same issue. It is thus proper that we consider the temporal aspects of each rule independently. The discussion that follows will focus on the API article 51(3) provision, considering in turn the relevant observations in the Interpretive Guidance.

We should consider the matter by reference to the treaty language and in accordance with Vienna Convention principles, and should ask whether state practice sheds light on the matter.⁷¹ As I have noted, the ICRC sees the revolving door feature as an integral part, not as a malfunction, of international humanitarian law,⁷² noting that it prevents attacks on civilians who do not, at the time, present a military threat but failing to point out that it also prevents attacks on civilians who have repeatedly participated and who may well be about to participate again directly, so long as they no. I prefer the origi-

71. This is one of those aspects of the DPH Guidance that causes some international lawyers profound disquiet.

72. DPH Guidance, *supra* note 3, at 70.

nal version here have yet to commence deployment forward, or a preparatory act, for that purpose.

In my view, an alternative interpretation of the treaty language is equally valid. According to this alternative view, the temporal element in the provision lies both in the phrase "unless and for such time" and in the word "participates." The phrase does indeed suggest that it is only during such participation that protected status is lost. The notion of participation is not, however, necessarily limited to the duration of individual acts. Its dictionary definition of "be involved in, take part"⁷³ is equally applicable, in my view, either to individual acts or to groups or sequences of activity spread over a period. Recalling the Vienna Convention requirement that the ordinary meaning be given to the language used,⁷⁴ there seems to be no basis for excluding an interpretation that the word "participate" used here is capable of encompassing individual events (in the case of the person who only acts on isolated or sporadic occasions) and at the same time of indicating continuous loss of protection for the individual who is a persistent or repeated direct participator. If an individual engages in a single and isolated act which constitutes DP, the period of loss of protected status will be confined to the period when that act is undertaken, to periods of deployment forward to undertake the act and return thereafter, to periods of preparation for the act, and for the deployment, and to no other periods. If, however, a person engages in repeated acts of DPH, there is an evident artificiality in regarding that individual as having protected status during the intervals in between. Experience shows that during those periods a further act of direct participation by the persistent participator is likely to be in prospect, and the likelihood is that during those intervals he will be preparing himself for the next act, checking his equipment, obtaining any additional equipment or stores he may require, communicating with like-minded or otherwise involved individuals, refining his plan and so on. While some such activities may be DP in their own right, the more important point is that a person who is so engaged cannot be equated with a civilian who remains uninvolved in the conflict. To do so is to place at

73. CONCISE OXFORD ENGLISH DICTIONARY 1043 (11th ed. 2006).

74. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

risk the respect, based on law, to be accorded to the civilian population. The ICRC in the Interpretive Guidance denies, however, that the fact that a civilian has repeatedly taken a direct part in hostilities allows a reliable prediction as to future conduct.⁷⁵

While I concede that where there is doubt as to civilian status, there is at international law a presumption of such status,⁷⁶ there is no presumption that civilians are not directly participating. A party to the conflict can only base a determination whether a person on the opposing side is so participating on its interpretation of the information from all sources that is reasonably available to it at the time of making that determination, as the United Kingdom has stated.⁷⁷ So the targeting party will in practice make a decision based on available information. There will inevitably be gaps and inaccuracies in that information, and no decisions in war are ever based on certainties. That recognition lies at the core of the UK statement. Decision makers thus inevitably have to base decisions in part on inference. Some experts during the DPH meetings argued that such a determination should only be reached if the information on which it is based can be proved to be reliable. These experts, however, failed to appreciate that commanders may not know at that time that the information on which they rely is unreliable. The better view is that such decisions must be made in good faith, that no presumption of non-participation arises, and that inferences will inevitably be drawn based on information as to previous conduct. It is probably also right to say that the decision maker must use his best endeavors in making this decision. This logically follows from the required precautions in article 57(2) of API.

Continuing with the treaty interpretation exercise, the preamble to API does refer, at tiret 3, to the need to “reaffirm and develop the provisions protecting the victims of armed conflicts.” Some may reflect that it is difficult to equate those

75. DPH Guidance, *supra* note 3, at 71.

76. API, *supra* note 1, art. 50(1).

77. *See* Ratification of the Additional Protocols by the United Kingdom of Great Britain and Northern Ireland, 322 Int'l Rev. Red Cross 186 (1998), at (c) (“Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”).

who participate repeatedly in the armed conflict with the term "victims" as used here. Subject to that observation, the preamble does not appear to assist us.

The relevant provisions of API appear in sections that are concerned with the protection of civilians, which naturally raises the question: Which of the stated interpretations is most consistent with achieving effective civilian protection? Here again, views differ. The repeated participant is to be contrasted with the innocent, that is uninvolved and thus protected, civilian. Interpreting the language in a way that increases the risks to the innocent, uninvolved civilian must conflict with the object of the treaty. Despite ICRC assertions in the text that the interpretation they put forward achieves greater protection of innocent, uninvolved civilians, the U.S. has put forward a powerful argument that the ICRC approach creates an imbalance between exposure to attack of armed forces and direct participants, an imbalance that may erode respect for the law and thus enhance risk in the long term to civilians. It is of course for the armed forces themselves to maintain discipline, including compliance with applicable law, but that may be harder to achieve in view of this perceived unfairness.

V. CONCLUSION

From this analysis I draw five principal conclusions. First, the Interpretive Guidance is wrong to limit the preparatory acts that involve a loss of protected status to preparation for an attack; the ICRC compounds this error by further restricting the notion to preparation for a particular attack. Second, when the Interpretive Guidance discusses deployment to and return after direct participation, the ICRC interpretation of what amounts to DP is far too restrictive. Third, by restricting the definition of civilians capable of continuous loss of protection to those who are members of organized armed groups with a continuous combat function, the ICRC prejudices the important balance between military need and humanitarian interest inherent in international law. Fourth, the correct position at customary law is that civilians who directly participate lose their protected status for the approximate period of that participation, there being no revolving door of protection, and that repeated participation can be the basis of a determi-

nation that the individual is continuously engaged and thus continuously liable to attack. Fifth, the ICRC interpretation of the word “participates” in the treaty rule excessively narrows the notion of DPH by inappropriately excluding the notion of continuous participation.

For these reasons, the Interpretive Guidance, in its treatment of the time dimension to the DPH rule, should be considered with some care. To interpret the time period during which a directly participating civilian is liable to be attacked too narrowly risks producing law that will be regarded by states’ armed forces as impractical or worse, and which may therefore be ignored. The notion of DPH is, however, central to the core objective of IHL to protect victims. It is therefore critical that the notion be interpreted in a way that makes sense on the modern battlefield and will be applied by all states, or at the very least by most states, when engaged in armed conflict. Thus the time dimension to the rule must permit the targeting of those who, whether voluntarily or otherwise, choose to participate on a persistent or regular basis in the conflict, whether they are or are not members of organized armed groups. Moreover, members of such groups should be continuously targetable if they have a combat function, continuous or otherwise.

The points of detail in the relevant parts of the Interpretive Guidance with which I disagree have been set out in this article. In closing, however, I wish to note that the publication of the Interpretive Guidance has been a most important event, and that by doing so the ICRC has most helpfully focused and advanced debate in relation to this most difficult issue. While academics will continue to discuss these matters, it is the practice and views of states that will be ultimately determinative in forming an enduring interpretation of the time dimension to DPH. In that regard, it is likely that battlefield practice of states is likely to prove the most decisive such determinant.