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CIVILIANS WITH SKIN IN THE GAME: THE *LAW OF WAR* MANUAL'S REJECTION OF THE ICRC GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES

MAJOR CYNTHIA MARSHALL*

Mr. Obama also acknowledged the dilemma the United States and its allies face in Raqqa and other urban areas in Syria and Iraq, noting that the Islamic State “is dug in, including in urban areas, and they hide behind civilians”. . . . Current and former residents of Raqqa, however, say the group’s leaders move constantly, mixing with the civilian population The group’s top leaders work and live in the city, and the bureaucracy they have created to run the self-declared caliphate is based there. There are financial specialists, computer experts, field commanders and as many as 10,000 foot soldiers¹

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 16th Sustainment Brigade, Baumholder, Germany. LL.M., 2016, The Judge Advocate General’s School, U.S. Army, Charlottesville, Virginia; J.D., 2006, Cardozo School of Law; M.A., 1993, Johns Hopkins School of Advanced International Studies; B.A., 1988, Dartmouth College. Previous assignments include Chief of Military Justice, 2D Infantry Division, Camp Casey, Korea, 2016-2017; Executive Officer, Department of Law, USMA, West Point, New York, 2013-2015; Assistant Professor, Department of Law, USMA, West Point, New York, 2012-2015; Defense Counsel, Kandahar, Afghanistan, Camp Arifjan, Kuwait, Baumholder, Germany, 2009-2012; Chief, Client Services, Camp Casey, Korea, 2008-2009; Administrative Law Attorney, Camp Red Cloud, Korea, 2008. Member of the bars of New York, the U.S. Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course. The author gratefully thanks Lieutenant Colonel Joshua F. Berry for his insightful guidance and invaluable assistance with this article.

¹ Matthew Rosenberg & Eric Schmitt, *In ISIS Strategy, U.S. Weighs Risk to Civilians*, N.Y. TIMES (Dec. 19, 2015), <http://www.nytimes.com/2015/12/20/us/politics/in-isis-strategy-us-weighs-risk-to-civilians.html>.

I. Introduction

Urban centers have become the battlefields for contemporary armed conflicts resulting in an unprecedented mingling of civilians and armed actors. To complicate matters, civilians are increasingly participating in these conflicts, from planting explosives to providing intelligence.² While historically civilians have supported war efforts by generating food, weapons, or political support, these actions usually took place away from battlefields.³ In contrast, twenty-first century theaters of operations swarm with civilians providing support to combatants.⁴

Civilians in and around contemporary armed conflicts present a problem to the fundamental principle of international humanitarian law (IHL) requiring warring parties to distinguish between combatants and civilians, as the former are lawful military targets and the latter are immune from direct attack.⁵ Civilians forfeit this targeting immunity if they directly participate in hostilities (DPH),⁶ but DPH is not defined by treaty IHL, nor does State practice or international jurisprudence provide clear instruction on the term's meaning.⁷

The concept of DPH⁸ comes from Common Article 3 of the Geneva Conventions of 1949⁹ and is found in other IHL provisions: For example,

² Trevor A. Keck, *Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare*, 211 MIL. L. REV. 115, 127 (2012).

³ Nils Melzer, *The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 103 AM. SOC'Y INT'L L. PROC. 299, 299 (2009) [hereinafter Melzer, *Clarification*].

⁴ See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 8-9 (2010) [hereinafter Schmitt, *Analysis*] (citing unprecedented numbers of contractors and civilian government employees on the battlefields of Iraq and Afghanistan).

⁵ Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT'L L. & POL. 637, 637 (2010).

⁶ *Id.*

⁷ INT'L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 41 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

⁸ Melzer, *Clarification*, *supra* note 3, at 300.

⁹ "Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely . . ." Geneva Convention for the Amelioration of the Condition of the Wounded

Article 51(3) of Additional Protocol I (API) to the Geneva Conventions says civilians may not be targeted “unless and for such time as they take a direct part in hostilities.”¹⁰ This language is repeated verbatim in Article 13(3) of Additional Protocol II (APII).¹¹ And while the United States has not ratified these protocols, it accepts the DPH language of API and APII as customary international law (CIL).¹² To clarify the meaning of DPH, one would normally look to the International Committee of the Red Cross (ICRC) *Commentary to Additional Protocol I*, but it offers minimal guidance on what is DPH¹³ and for how long a civilian who DPH forfeits targeting protection.¹⁴

To resolve this situation, in 2003 the ICRC launched an informal expert process to research and discuss the interpretation of DPH.¹⁵ The result was the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Interpretive Guidance or the Guidance)*, published in 2009.¹⁶ The *Guidance* both proposed a three prong test for determining what activity constitutes DPH, and defined the duration for which a civilian who DPH loses his targeting protection.¹⁷ For six years the United States did not officially respond to the *Guidance*.

and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T 3114, 75 U.N.T.S. 31.

¹⁰ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3.

¹¹ “Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, U.N. Doc. A/32/144, Annex I. Additional Protocol II applies to non-international armed conflicts. J. Jeremy Marsh & Scott L. Glabe, *Time for the United States to Directly Participate*, 1 VA. J. INT’L L. ONLINE 13, 15 (2011).

¹² *Id.*

¹³ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 618-19 (Yves Sandoz et al eds., 1987).

¹⁴ *Id.*; see also Marsh, *supra* note 11, at 15 (observing the ICRC *Commentary to Additional Protocol I* (API) “offered minimal and unworkable guidance” for interpreting the terms “direct part” and “for such time as”). The notion of DPH is a “notoriously vexing concept.” Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT’L SEC. J. 225, 250 (2014). Debate over the meaning of DPH could fill books. *Id.* at 268.

¹⁵ Melzer, Clarification, *supra* note 3, at 300-01.

¹⁶ ICRC INTERPRETIVE GUIDANCE, *supra* note 7.

¹⁷ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46, 65, 70-71.

On June 12, 2015, the Department of Defense (DoD) published its long awaited *Law of War Manual (LoW Manual or the Manual)*. The *Manual* expressly rejected the *Guidance* and gives its own instruction on what constitutes DPH.¹⁸ The *Manual's* criteria for DPH is more expansive than the ICRC's three prong test, capturing more activity and removing the ICRC's targeting immunity after the second act of DPH.¹⁹ The result is the *Manual* strips civilians²⁰ of their immunity from attack for more activity and for longer periods of time, making stark the risk assessment civilians who put their skin in the game²¹ face in modern armed conflicts.

To demonstrate this, first this article looks at the history of the *Guidance*. This is followed by an analysis of both the *Guidance's* three prong DPH test and the temporal boundaries of its DPH determination. Then this article looks at criticism of the *Guidance* before turning to the *Manual* and examining its criteria for DPH. Lastly, this article concludes by exploring the implications of the *Manual's* rejection of the *Guidance*.

II. Civilians and the ICRC *Interpretive Guidance*

A. The ICRC Expert Group

The purpose behind the ICRC's *Guidance* was to recommend an interpretation of IHL as it relates to DPH.²² The project originated in 2003

¹⁸ U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 4.26.3 at 180, §§ 5.8-5.8.5 at 226-36 (2015, Updated December 2016) [hereinafter DOD LOW MANUAL]. The updated DOD LOW MANUAL changed the section and page numbering of the DPH section but not its content. The updated numbering is used in this paper. This revised *Manual* did seek to "provide greater clarity on the DoD legal view of human shields" (discussed in Part III. B. 3, *infra*). Jennifer M. O'Connor, Gen. Counsel of the Dep't of Def., Speech at New York University School of Law: *Applying the Law of Targeting to the Modern Battlefield* (Nov. 28 2016), in <https://www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>, at 12 (explaining how the *Manual* needs "to be a living document" so as to provide JAGs "clarity on the very tough issues" on which they give advice).

¹⁹ *Id.* at §§ 5.8.3, 5.8.4-5.8.4.2.

²⁰ The Department of Defense *Law of War Manual* refers to civilians who engage in hostilities as "private persons" as that conduct results in forfeiting "many of the protections afforded civilians under the law of war." DOD LOW MANUAL, *supra* note 18, § 4.18.2; *see id.* § 4.18, at 155-58.

²¹ Warren Buffett is credited with coining this metaphor for having an investment in a venture, but he denies doing so. William Safire, *Skin in the Game*, N.Y. TIMES (Sept. 17, 2006), http://www.nytimes.com/2006/09/17/magazine/17wwln_safire.html.

²² ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

when the ICRC and the TMC Asser Institute²³ jointly launched an expert meeting process with the goal of clarifying: (1) who is a civilian for the purpose of the principle of distinction, (2) what conduct equates to DPH, and (3) “what modalities govern the loss of protection against direct attack,” in the context of both international and non-international armed conflicts.²⁴

From 2003 to 2008, the ICRC held five expert meetings of forty to fifty legal experts from academia, the military, governments, and non-governmental organizations, acting in their private capacity.²⁵ The group included experts on IHL from over a dozen countries.²⁶ The expert group utilized a variety of legal sources, including customary and treaty IHL, international jurisprudence, and military manuals.²⁷ According to Dr. Nils Melzer, ICRC Legal Adviser and author²⁸ of the *Interpretive Guidance*, the project’s purpose was not to modify existing IHL rules but to ensure they were being interpreted according to the fundamental principles underlying IHL.²⁹

1. *The Interpretive Guidance Arrives*

In the spring of 2009, the ICRC published the *Guidance*, offering “a balanced and practical solution” to the issue of DPH.³⁰ The document contains three key recommendations: the first defines three constituent elements for determining DPH; the second delineates the beginning and end of DPH; and the third recommends the temporal scope of a civilian’s

²³ The Institute is a non-profit research organization, primarily funded by the Dutch Government. *About the Institute*, ASSER INSTITUTE CENTRE FOR INTERNATIONAL & EUROPEAN LAW, <http://www.asser.nl/about-the-institute> (last visited May 24, 2017).

²⁴ Melzer, *Clarification*, *supra* note 3, at 300.

²⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

²⁶ Bill Gertz, *Terrorists and Laws of War*, WASH. TIMES, June 18, 2009, <http://www.washingtontimes.com/news/2009/jun/18/inside-the-ring-95264632/?page=all>. Some countries represented included Argentina, France and India. *Id.*

²⁷ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9.

²⁸ The *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* acknowledges ICRC Legal Adviser Nils Melzer as its author. ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 8.

²⁹ Melzer, *Clarification*, *supra* note 3, at 301. The ICRC’s *Interpretive Guidance* does not try to change existing international humanitarian law (IHL) rules. *Id.*

³⁰ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9. The *Guidance* “takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL.” *Id.* at 9-10.

loss of protection.³¹ These recommendations apply to both international and non-international armed conflicts.³²

2. *Guidance not Law*

The *Interpretive Guidance* reminds readers it provides guidance, not law, on the notion of direct participation³³ as only States produce “binding law.”³⁴ Yet, as was noted at the third meeting of experts, the *Guidance* could influence States as they developed conventional or customary law addressing DPH.³⁵

B. The Three Constitutive Elements of Direct Participation in Hostilities

To determine what constitutes DPH, the *Guidance* provides a three prong cumulative test consisting of three constitutive elements.³⁶ The test’s first prong requires the harm from the act, or harm likely to result from the act, reach a certain threshold; the second prong requires a direct causal relationship between the act and the expected harm; and the third prong requires a close relation between the act and the hostilities transpiring between parties of the armed conflict.³⁷ As noted by the *Guidance*, these elements are closely related and may overlap with each other.³⁸

³¹ *Id.* at 46, 65, 70-71.

³² Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 698 (2010) [hereinafter Schmitt, *Deconstructing*].

³³ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 6. “[W]hile reflecting the ICRC’s views,” the *Guidance* “is not and cannot be a text of legally binding nature.” *Id.*

³⁴ *Id.* Binding international law is made through State agreements, or State practice followed out of a sense of legal obligation on a certain issue. *Id.*

³⁵ ICRC THIRD SUMMARY REPORT, *supra* note 29, at 6. The “importance and persuasive influence” of the experts was “not to be underestimated [T]he final document could subsequently serve states as guidance with regard to questions to be addressed and the problems to be resolved in developing conventional or customary IHL relevant to” direct participation in hostilities (DPH). *Id.*

³⁶ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46. See Appendix A for a diagram of the *Guidance*’s DPH test.

³⁷ Melzer, *Clarification*, *supra* note 3, at 303.

³⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 46.

1. *The Threshold of Harm Element*

In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.³⁹

The first element requires an action have an adverse effect on the enemy, therefore harm is the decisive criteria.⁴⁰ For an act to qualify as DPH, the harm it produces, or is reasonably expected to produce, must reach a certain threshold.⁴¹ If there was no harm, one uses an objective standard accounting for prevailing circumstances to determine the likelihood of an act causing harm.⁴² Acts against protected persons or objects that do not reach the required threshold of death, injury, or destruction are not DPH, and therefore do not result in a civilian losing his protection against attack.⁴³

Citing to API and the Hague Convention (IV), the *Guidance* explains how acts that do not cause harm “of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of warfare,” nor can they be equated to injuring the enemy, as required to qualify as an act of hostility.⁴⁴ For example, civilians clearing mines placed by an adversary meets this

³⁹ *Id.* at 47.

⁴⁰ Schmitt, *Deconstructing*, *supra* note 32, at 718. This element “appears under-inclusive” by focusing “solely on adverse effect on the enemy” and not addressing action likely “to enhance a party’s military operations or military capacity. . . . [T]he strengthening of the enemy’s capacity can prove as much a concern as the weakening of one’s own forces.” *Id.* at 718-719.

⁴¹ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 47. “This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.” *Id.*

⁴² *Id.* The “threshold determination must be based on ‘likely’ harm, . . . harm which may reasonably be expected to result from an act in the prevailing circumstances.” *Id.*

⁴³ Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831, 862 (2010) [hereinafter Melzer, *Response*].

⁴⁴ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50 (internal citations and quotations omitted) (citing to Article 35 of API and Article 22 of the Hague Convention (IV)). Actions like building roadblocks or interrupting electricity supplies might hurt the public’s security or health, but without an adverse military effect, they would not constitute DPH. *Id.*

threshold of harm element⁴⁵ because the civilians are depriving the adversary of a military advantage.⁴⁶ Still this conduct might not constitute DPH⁴⁷ as the *Guidance* requires an act satisfy two more prongs, the element of direct causation and the element of a belligerent nexus.⁴⁸

2. *The Direct Causation Element*

In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific 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.⁴⁹

An act satisfies the direct causation element when it causes, or may reasonably be expected to cause, “in one causal step,” harm that meets the necessary threshold.⁵⁰ An act that is an integral part of a military operation aiming to inflict the necessary harm satisfies this element.⁵¹ Preparatory steps and deployments to and from the operation are integral parts of the act.⁵²

⁴⁵ *Id.* at 48.

⁴⁶ ICRC THIRD SUMMARY REPORT, *supra* note 35, at 31.

⁴⁷ *See id.* at 31-32. Some *Guidance* experts said minesweeping by civilians posed “no direct threat,” therefore was not DPH. *Id.* at 31. Other experts said minesweeping was DPH as the “removal of mines deprived the adversary of the military advantage related to the mine laying.” *Id.* Some experts believed other factors had to be part of a DPH determination, such as whether the territory was occupied or under military control. *Id.* at 32.

⁴⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50.

⁴⁹ *Id.* at 51.

⁵⁰ *Id.* at 58. For example, assembling or storing of an improvised explosive device (IED) are actions that do not directly cause harm, as they are more than one causal step from the harm, whereas planting and detonating an IED are actions that directly cause harm. *Id.* at 54.

⁵¹ *Id.* For example, a “civilian truck driver of ammunition to an active firing position at the front line” is most likely an integral part of a combat operations, so he is DPH. However, if he were taking “ammunition from a factory to a port for further shipping to a storehouse in a conflict zone,” his actions are too remote from any ensuing harm to constitute DPH. *Id.* at 56. Still, a civilian with a minor role in a group operation can lose his protection if his contribution is integral to the operation producing the required harm. Melzer, *Response*, *supra* note 43, at 865.

⁵² Melzer, *Response*, *supra* note 43, at 865. Preparatory measures are that “of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.” ICRC INTERPRETIVE GUIDANCE,

The *Guidance* adopts a direct causation standard for the relation between the act and resulting harm but creates its own definition for that standard,⁵³ focusing on the difference between direct and indirect causation.⁵⁴ The *Guidance* cites as examples of indirect causation “conduct that merely builds up or maintains the capacity of a party to harm its adversary,” “scientific research and design,” and “the recruitment and training of personnel.”⁵⁵ The *Guidance* notes that only when people are recruited and trained for a “predetermined hostile act” can recruiting and training possibly constitute DPH.⁵⁶ Acts satisfying the first two prongs must additionally meet the third prong of having a belligerent nexus to constitute DPH.⁵⁷

3. The Belligerent Nexus Element

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the

supra note 7, at 65-66. “The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation” *Id.* at 67. Discussed in Part II. C, *infra*.

⁵³ Schmitt, *Deconstructing*, *supra* note 32, at 726. By inventing its own definition of direct causation, the *Guidance* ignored established “understanding of the term, such as that of ‘proximate cause’ used in US tort law.” *Id.*

⁵⁴ *Id.* at 726. Schmitt argues that the direct causation element usefully distinguishes between direct and indirect participation but that “the constitutive element as proffered by the ICRC does not represent a sure-fire formula for unambiguous and unassailable determinations.” *Id.* at 734-35.

⁵⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. These are “potentially important” actions but still only indirectly impact the “military capacity or operations” unless they are “an integral part of a specific military operation designed to directly cause the required threshold of harm.” *Id.*

⁵⁶ *Id.* Recruiting and training of personnel “is crucial to the military capacity of a party to the conflict,” but the “causal link with the harm inflicted on the adversary will generally remain indirect.” *Id.* There is an argument civilian fuel truck drivers who generate income for combatants are directly enabling combat activities. See Butch Bracknell, *Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-Based Policy?*, LAWFARE (Nov. 29, 2015, 10:03 AM), <https://www.lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy> (arguing that the actions of civilian fuel truck drivers generating income for the self-proclaimed Islamic State (ISIS) satisfy all three prongs of the *Guidance*'s DPH test).

⁵⁷ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58. This is because the *Guidance*'s three prong DPH test is cumulative. See Appendix A that shows the cumulative nature of the *Guidance*'s three prong DPH test.

conflict and to the detriment of another.⁵⁸

As the *Guidance* explains, treaty law uses the term hostilities to describe actions to injure the enemy or actions directed against the adversary.⁵⁹ The *Guidance* concludes that an action must be specifically designed to inflict harm “in support of a party to an armed conflict and to the detriment of another.”⁶⁰ As the *Guidance* notes, determining if an act has a belligerent nexus poses difficulties, but the determination must be made on information reasonably available and based on objective, verifiable factors.⁶¹

The belligerent nexus element presumes hostilities are “a zero-sum game” where one party has to benefit from the harm suffered by the other.⁶² Actions that directly enhance the military capacity or operations of a party without resulting in direct and immediate harm to the enemy do not satisfy the belligerent nexus element.⁶³ Violence not aimed at harming a party to an armed conflict, or that is not intended to do so in support of another party, does not qualify as DPH.⁶⁴

According to the *Guidance*, this test creates “a reliable distinction” between DPH and conduct that is not part of hostilities,⁶⁵ like criminally

⁵⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58.

⁵⁹ *Id.* The rationale behind the belligerent nexus element comes from API, Article 49(1) that defines “attacks” as “as acts of violence ‘against the adversary.’” *Id.* at n.146.

⁶⁰ *Id.* (emphasis in the original). An action that meets the threshold of harm element and the direct causation element only satisfies the belligerent nexus element if it is “specifically designed” to hurt a party to the conflict and to support another party to the conflict. *Id.*

⁶¹ *Id.* at 63. “In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.” *Id.* at 63-64.

⁶² Schmitt, *Deconstructing*, *supra* note 32, at 736. As Schmitt points out, in today’s complex conflicts, a civilian “might be opposed to both sides of a conflict,” therefore the belligerent element would be “better styled as acts ‘in support of a party to the conflict or to the detriment of another.’” *Id.* (emphasis in the original).

⁶³ *Id.* “[A]rmed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of ‘participation’ in hostilities. . . .” ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 59.

⁶⁴ Melzer, *Response*, *supra* note 43, at 872-73. Unless the violence is enough to result in “a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.” ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 59.

⁶⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 64. The *Guidance*’s DPH test distinguishes between acts that are DPH and acts that occur “in the context of an armed conflict” but are not part of the hostilities. *Id.*

or politically motivated violence against a party to the conflict not designed to benefit an opposing party.⁶⁶ In addition to providing the constitutive elements of direct participation, the *Guidance* addresses the temporal scope of the loss of protection for a civilian whose actions meet its DPH test.

C. The Beginning and End of DPH and the Revolving Door of Protection

A civilian loses his protection and may be targeted for the duration of his DPH,⁶⁷ including the necessary preparation and the deployment to and return from the act's location.⁶⁸ This period covers any integral actions before or after a hostile act, not just the time immediately surrounding the act.⁶⁹ Preparatory measures for an unspecified hostile act or to establish some general capacity for hostilities do not result in the loss of protection.⁷⁰ The period of return from a hostile act ends once a civilian has left the operation and taken some positive act of disengagement, such as putting away his equipment.⁷¹

The *Guidance* states, “[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities”⁷² The result is a civilian loses his protection and regains

⁶⁶ ICRC, SUMMARY REPORT OF FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 51 (Nils Melzer ed., 2006) [hereinafter ICRC FOURTH SUMMARY REPORT] (noting how once the acts of violence directed against one party were “designed to support another party to the conflict,” the actions would qualify as being part of the hostilities) *Id.*

⁶⁷ Melzer, *Clarification*, *supra* note 3, at 305 (distinguishing between the temporary loss of protection for civilians who DPH and the continuous loss of protection for members of state armed forces and organized armed groups).

⁶⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 65. Preparatory measures “cannot be comprehensively described in abstract terms” as there are a “multitude of situational factors involved.” *Id.*

⁶⁹ Melzer, *Clarification*, *supra* note 3, at 305. Integral parts of a specific hostile act include preparatory measures and deployments to and from the act, so the start and end of DPH extends beyond the act's immediate execution. *Id.*

⁷⁰ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 66. Furthermore “it is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before . . . or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution.” *Id.*

⁷¹ *Id.* at 67. Examples of physically separating from the operation include “laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.” *Id.*

⁷² *Id.* at 70 (noting how civilians who DPH do not lose their status as civilians but only temporarily lose their immunity from direct attack).

it after each act, creating a revolving door of protection.⁷³ The purpose of this temporary loss of protection is “to respond to spontaneous, sporadic, or unorganized hostile acts carried out by civilians,”⁷⁴ the justification being a civilian does not represent a military threat between acts of DPH.⁷⁵

While providing a revolving door of protection may make it more difficult to respond to these civilians’ actions, the *Guidance* says this is to protect civilians “from erroneous or arbitrary attack” and is necessary as long as their DPH is only spontaneous, unorganized, or sporadic.⁷⁶ This seeming erosion of the equal application of IHL to parties in the conflict⁷⁷ was just one of the controversial outcomes of the *Guidance*.⁷⁸

D. Not Necessarily the Majority of Experts’ Opinion

The *Guidance* acknowledges it does not necessarily reflect the unanimous or even the majority view of its experts.⁷⁹ Twelve of the experts withdrew their support from the ICRC’s final report in protest, making the news.⁸⁰ Some of the protesting experts thought the final report

⁷³ *Id.* (arguing the “‘revolving door’ of civilian protection” is an integral part of IHL).

⁷⁴ Melzer, *Clarification*, *supra* note 3, at 305 (contrasting this to the permanent loss of protection by members of state armed forces or organized armed groups, regardless if determined by formal or functional criteria).

⁷⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 70. “The ‘revolving door’ . . . prevents attacks on civilians who do not, at the time, represent a military threat.” *Id.*

⁷⁶ *Id.* at 71 (recognizing the impact the revolving door may have on armed forces’ ability to “respond effectively” to civilians who DPH, but arguing for its necessity to protect civilians “from erroneous or arbitrary attack”).

⁷⁷ Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 742, 757 (2010). By acknowledging providing a revolving door of protection handicaps an armed force effectively responding to DPH, the *Guidance* creates a “legal inequality” between opposing parties. *Id.*

⁷⁸ The fiercest criticism was aimed at the *Guidance*’s treatment of the rules and principles of conducting attacks against those who DPH. Schmitt, *Analysis*, *supra* note 4, at 14.

⁷⁹ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 9 (stating how the *Guidance* was “widely informed” by the “expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts”). “As there was no unanimous consent among the experts, it was decided that no list of participating experts would be published.” ICRC, OVERVIEW OF THE ICRC’S EXPERT PROCESS (2003-2008) 4 (2009).

⁸⁰ Citing some of the experts anonymously, *The Washington Times* reported that experts who withdrew their support included a Tel Aviv University law professor, a German professor, and a Dutch IHL specialist, among others. Gertz, *supra* note 26. Experts known to have withdrawn their support include Air Commodore (Retired) William Boothby, Colonel (Retired) W. Hays Parks, Professor Michael Schmitt, and Brigadier General (Retired) Kenneth Watkins. Lieutenant Colonel Walter E. Narramore, *American*

did not appropriately account for military necessity and was prejudiced against it.⁸¹

After publication of the historic⁸² *Guidance*, there was concern that despite being criticized by leading commentators, it would become the “authoritative guidance” on DPH for the international community.⁸³ The worry was unless a prominent military power like the United States responded, the *Guidance* would become binding custom and ripen into CIL.⁸⁴ That worry was laid to rest in when the DoD finally published its *Manual* that explicitly rejected the *Guidance*.

III. The DoD *LoW Manual* Takes the Field

A. DoD Practice and the Rejection of the *Interpretive Guidance*

The *Manual*'s purpose is to “provide information on the law of war to DoD personnel,” declaring it only represents the DoD's views as to what the law is,⁸⁵ and provides “legal rules, principles . . . with respect to DoD practice.”⁸⁶ Under the “Special Status of the ICRC” section, the *Manual* rejects the ICRC's *Guidance* and says the *Manual* has an opposing view.⁸⁷

Indifference: The Lack of U.S. Response to Evolutions in the Law of Armed Conflict and How it Should be Addressed, ARMY LAW., Oct. 2015, at 12, 14 n.23.

⁸¹ The *Guidance*'s handling of DPH skewed the delicate balance of IHL towards humanity, sacrificing military necessity. Schmitt, *Analysis*, *supra* note 4, at 6. The document generally failed “to fully appreciate the operational complexity of modern warfare,” and the three prong DPH test had “serious shortcomings with respect to both law and military common sense.” Schmitt, *Deconstructing*, *supra* note 32, at 699.

⁸² Narramore, *supra* note 80, at 12 (calling the *Guidance* “one of the most important modern statements on the law of armed conflict”).

⁸³ Marsh, *supra* note 11, at 14. “In the absence of state response,” the *Guidance* “is becoming the authoritative guidance on defining and interpreting DPH,” despite published criticism by “leading commentators.” *Id.* Those commentators include Bill Boothby, W. Hays Parks, Michael Schmitt, and Kenneth Watkin. *Id.* at n.5.

⁸⁴ *See id.* (highlighting the need for an official United States response because of the ICRC's “unique role in shaping customary international law; the important nexus between direct participation in hostilities and ongoing U.S. military operations; and the need for legal legitimacy in conducting those operations”). *Id.*

⁸⁵ DoD LoW MANUAL, *supra* note 18, § 1.1.1. “[T]his manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.” *Id.*

⁸⁶ *Id.*, § 1.1.2.

⁸⁷ *Id.*, § 4.26.3, at 180. “For example, the United States has not accepted the ICRC's study on customary international humanitarian law nor its ‘interpretive guidance’ on direct participation in hostilities.” *Id.*

How opposing that view is becomes clear in the *Manual's* treatment of DPH.

The *Manual* begins addressing DPH by reasserting the United States has neither adopted the API, Article 51 rule⁸⁸ nor thinks API, Article 51(3) is CIL.⁸⁹ The *Manual* acknowledges parts of the *Guidance* are consistent with CIL but notes much of it is not.⁹⁰ Then the *Manual* gives an abstract definition of the minimum requirements for DPH elaborated by five considerations followed by examples,⁹¹ as described next.

B. The Minimum Requirements for DPH and Five Categories of Consideration

According to the *Manual*, a civilian is DPH if at a minimum his actions, “by their nature and purpose,” are intended to harm the enemy, are “an integral part of combat operations,” or if his actions “effectively and substantially contribute to the adversary’s ability to conduct or sustain combat operations.”⁹² “[G]eneral support” by a civilian to a State’s war effort, like purchasing war bonds, does not constitute DPH.⁹³ The *Manual* emphasizes that a DPH determination is highly contextual and gives five

⁸⁸ *Id.*, § 5.8.1 (using the term DPH “does not mean that the United States has adopted” the API, Art. 51 DPH rule).

⁸⁹ *Id.*, § 5.8.1.2. “[A]s drafted, Article 51(3) of AP I does not reflect customary international law . . .” *Id. Contra* Jordan J. Paust, *Egregious Errors and Manifest Misconceptions in the 2015 DOD Law of War Manual*, U OF HOUSTON LAW CENTER NO. 2016-W-1, 24 (Feb 10, 2016) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712004 (stating the *Manual* is wrong, that Article 51(3) of API does reflect customary international law, and the *Manual* “attempts to expand the test regarding who is DPH” in error, such that it “will not protect U.S. military personnel from responsibility under international law”).

⁹⁰ DoD LOW MANUAL, *supra* note 18, at § 5.8.1.2. “. . . the United States supports the customary principle on which Article 51(3) is based. Similarly, although parts of the ICRC’s interpretive guidance on the meaning of direct participation in hostilities are consistent with customary international law, the United States has not accepted significant parts of the ICRC’s interpretive guidance as accurately reflecting customary international law.” *Id.* (footnotes omitted).

⁹¹ This was the method originally envisioned by the *Guidance* expert group, but they had doubts “an abstract definition, with or without a list of examples” could cover all “conceivable situations and whether it could sufficiently reflect the complexity of the legal issues at stake.” ICRC THIRD SUMMARY REPORT, *supra* note 35, at 5.

⁹² DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 228-29 (footnote omitted).

⁹³ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 229.

categories to consider when evaluating a civilian's actions.⁹⁴

1. Degree of Harm by Act

The first consideration is the degree of harm a civilian's act causes the opposition's people or objects.⁹⁵ The *Manual* examines if the act is the proximate cause of death, damage, or injury to the opposing party or their objects.⁹⁶ Alternatively, the *Manual* looks at the act's likeliness to adversely affect the opposition's military operations or military capacity and to what degree.⁹⁷

Unlike the *Guidance*, the *Manual* does not place a threshold requirement of "death, injury or destruction" for harm to "persons or objects protected against direct attack."⁹⁸ By asking what degree an action is the "proximate or 'but for' cause of death, injury or damage to persons or objects belonging to the opposing party,"⁹⁹ the *Manual* integrates the idea captured by the direct causation element of the *Guidance*'s DPH test. As to activity against the military, the wording of the *Manual* and *Guidance* are very similar, therefore capturing the same acts.

While the *Manual* implies a high threshold of harm, meeting that threshold is not a requirement, allowing more actions to be DPH than the *Guidance*'s first element. Also, the *Manual* classifies acts that meets this criteria as DPH, whereas the *Guidance* requires activity meeting its threshold of harm element to also satisfy its direct causation and belligerent nexus elements.¹⁰⁰

2. Degree of Connection Between Act and Hostilities

Next, the *Manual* examines the degree of connection between an act and hostilities, giving no parameters of how closely connected the act

⁹⁴ *Id.* For example, context variables include "the weapons systems or methods of warfare employed by the civilian's side in the conflict." *Id.*

⁹⁵ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230.

⁹⁶ *Id.* (examining whether the act is "the proximate or 'but for'" cause of the harm).

⁹⁷ *Id.* (examining "the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party").

⁹⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 47.

⁹⁹ DoD LOW MANUAL, *supra* note 18, at § 5.8.3, at 230.

¹⁰⁰ See ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 50 (reiterating the requirement of all three elements).

needs to be.¹⁰¹ The *Manual* directs attention to the act's proximity in time or geography to hostilities, or alternatively, the act's degree of connection to military operations.¹⁰² This is in sharp contrast to the *Guidance*'s direct causation prong that disqualifies activity more than "one causal step"¹⁰³ from the harm done. Without such a limitation, the *Manual* qualifies more actions as DPH so long as the act meets the minimum criteria.¹⁰⁴

For example, the *Guidance* only categorizes the acts of recruiting and training as DPH if those activities are for "a predetermined hostile act."¹⁰⁵ Whereas the *Manual* would look at when or where the recruiting and training took place relative to hostilities to determine if these activities are DPH.¹⁰⁶ Likewise the *Guidance* does not consider the preparatory steps of purchasing components, assembling, or storing improvised explosive devices (IED) as DPH, as these actions are more than one causal step from the harm (the direct steps being planting and detonating the IED).¹⁰⁷ The *Manual* would classify these preparatory steps as DPH depending on their connection in time or place to hostilities.

3. Purpose Underlying Act

Another consideration is "the specific purpose underlying the act," which the *Manual* refines by asking if the purpose is to "advance the war aims of one party to the conflict to the detriment of the opposing party."¹⁰⁸ This consideration is similar to the *Guidance*'s belligerent nexus element but potentially includes more activity as the *Manual* does not require that the purpose include achieving the "required threshold of harm."¹⁰⁹

Under this category, civilian mine clearers would be DPH if they were

¹⁰¹ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230. The *Manual* gives no indication what degree of connection is unreasonable. *See id.*

¹⁰² *Id.* The *Manual* does not give any examples to demonstrate when an act's degree of connection in time or geography, or connection to military operations is too great to be considered DPH. *See id.*

¹⁰³ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. Discussed in Part II. B. 2, *supra*.

¹⁰⁴ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 228-29. Discussed in Part III. B, *supra*.

¹⁰⁵ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53.

¹⁰⁶ *See* DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230 (looking to degree of connection in time or geography of the act to hostilities).

¹⁰⁷ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 54. While these actions may be connected "through an uninterrupted causal chain of events" to the resulting harm, "they do not cause that harm directly." *Id.*

¹⁰⁸ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230.

¹⁰⁹ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 58.

trying to deprive an adverse party of the military advantage of their mines, to the benefit of an opposing party.¹¹⁰ Likewise, voluntary human shields¹¹¹ would be DPH if they were purposely trying to hinder the war aims of one party to advance an opposing party.¹¹² Again, according to the *Manual*, an activity that satisfies this category qualifies as DPH, unlike the *Guidance's* requiring the act also satisfy its threshold of harm and direct causation prongs.

4. Military Significance of Act to War Effort

The *Manual* considers an activity's military significance¹¹³ by examining: (1) the degree the activity helps a party to the conflict against

¹¹⁰ For example, the civilian minesweepers employed by the British during the Dardanelle campaign to clear mines placed by the Turks were DPH. Cf. ICRC THIRD SUMMARY REPORT, *supra* note 35, at 31.

¹¹¹ The 2015 *Manual* did not distinguish between voluntary and involuntary human shields. Adil Ahmad Haque, *Off Target: Selection, Precaution, and Proportionality in the DoD Manual*, 92 INT'L L. STUD. 31, 64 (2016) [hereinafter Haque, *Off Target*]. The updated 2016 *Manual* does not make clear that "voluntary human shielding may itself" be DPH. Adil Ahmad Haque, *Human Shields in the (Updated) Dept of Defense's Law of War Manual*, JUST SECURITY (Dec. 15, 2016, 8:01 AM), <https://www.justsecurity.org/35589/human-shields-updated-dept-defenses-law-war-manual/>. Furthermore, "battlefield realities typically make it impossible to divine whether or not the persons in an area controlled by the enemy are voluntarily or involuntarily taking part in hostilities." Charles J. Dunlap, *No Good Options against ISIS Barbarism? Human Shields in 21st Century Conflicts*, 110 AJIL UNBOUND 311, 313 (2016), <https://www.cambridge.org/core/article/div-class-title-no-good-options-against-isis-barbarism-human-shields-in-21-span-class-sup-st-span-century-conflicts-div/FEABC5AA76F50213C2C79F6815BEB2B7> (last visited March 15, 2017).

¹¹² DoD LoW MANUAL, *supra* note 18, at § 5.12.3.4 (stating the "use of human shields violates the rule that civilians may not be used to shield, favor, or impede military operations. . . . Based on the facts and circumstances of a particular case, the commander may determine that persons characterized as voluntary human shields are taking a direct part of hostilities"). For example, if civilian fuel tanker truck drivers for ISIS were "deliberately attempting to protect their trucks from attack" they "may be deemed" to be DPH. Beth Van Schaack, *Targeting Tankers—and Their Drivers—Under the Law of War* (Part 2), LAWFARE (Dec. 3, 2015, 9:30 AM), <https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2/>. "[H]ow can it be said that someone knowingly, actively, and—especially—voluntarily attempting to shield an otherwise legitimate military target from attack" is doing anything other than DPH, and as a matter of law should lose protection from attack. Charles J. Dunlap, Jr., *A Squarable Circle?: The Revised DoD Law of War Manual and the Challenge of Human Shields*, JUST SECURITY (Dec. 15, 2016, 8:06 AM), <https://www.justsecurity.org/35597/squarable-circle-revised-dod-law-war-manual-challenge-human-shields/> (emphasis in original) [hereinafter Dunlap, *Revised*].

¹¹³ DoD LoW MANUAL, *supra* note 18, § 5.8.3, at 230.

its opposition;¹¹⁴ (2) if the value of the act to a fighting party is equal or greater than acts regularly thought of as DPH;¹¹⁵ or (3) if the opposing party is significantly threatened by the act.¹¹⁶

Because the *Guidance* has no similar category, and because this category neither requires the opposition suffer harm nor looks at the degree of connection to hostilities, this category holds the greatest potential to capture activity as DPH that the *Guidance* would not.¹¹⁷ For example, the *Manual* considers it DPH when civilian scientists research and develop weapons programs “vital to a nation’s national security or war aims.”¹¹⁸ The *Guidance*, on the other hand, says scientific research is not DPH unless it is a preparatory measure for a concrete military operation.¹¹⁹

5. Degree Act is Inherently or Traditionally Military

Lastly, the *Manual* looks at the degree an act is seen as inherently or traditionally military, meaning is the act usually performed by military personnel, such as “combat, combat support, and combat service support functions.”¹²⁰ By including combat service support functions, this category acknowledges the importance of logistics to the conduct of military operations, something the *Guidance* does not.¹²¹ This category

¹¹⁴ *Id.* (determining “the degree to which the act contributes to a party’s military action against the opposing party”).

¹¹⁵ *Id.* (evaluating “whether the act is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities”).

¹¹⁶ *Id.* (asking “whether the act poses a significant threat to the opposing party”).

¹¹⁷ See Ryan Santicola, *War-Sustaining Activities and Direct Participation in the DOD Law of War Manual*, LAWFARE (Dec. 15, 2015, 10:16 AM), <https://www.justsecurity.org/28339/war-sustaining-activities-direct-participation-dod-law-war-manual/> (arguing the *Manual*’s “reference to ‘contributions to military action’ in the context of DPH appears to open the door on directly targeting these activities” that rise above general war support). *But see* Paust, *supra* note 88, at 25 (arguing the “DOD should abandon the erroneous attempt to expand DPH status to those who merely ‘contribute’ to an enemy’s ‘ability’ to conduct and sustain combat”).

¹¹⁸ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230, n.245 (citing examples of civilian scientists with the Manhattan Project and those working at the Peenemunde, Germany, rocket sites).

¹¹⁹ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 53. See also *id.* at n.123; ICRC FOURTH SUMMARY REPORT, *supra* note 66, at 48-49.

¹²⁰ DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 230-31.

¹²¹ 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, 685 (2010). The *Guidance*’s “focus on the tactical level of war” for its DPH determination “does not match the realities of how warfare is conducted.” *Id.* The

also classifies making decisions on “the conduct of hostilities, such as determining the use or application of combat power” as DPH.¹²²

By including combat service support functions and not requiring harm, this category classifies acts as DPH that the *Guidance* would not. For example, civilians providing the logistical support for IED and suicide bombers by scouting potential targets and providing safe houses would qualify as DPH under this category.¹²³ While the *Manual* and *Guidance* differ in what they categorize as DPH, their greatest divergence is the duration for which a civilian who directly participates more than once in hostilities loses his immunity.

C. Duration of Liability of Attack: Targetable Until Permanently Ceases DPH

The *Manual* declares that a civilian who has permanently ceased DPH may not be targeted because there is no military necessity to do so.¹²⁴ The *Manual* makes clear that a civilian who participates in an isolated event of DPH is not a lawful target after that single event.¹²⁵ The implication is that after a civilian directly participates at least twice in hostilities, he is targetable until he permanently ceases participation, a determination to be made in good faith,¹²⁶ requiring case specific fact analysis.¹²⁷ Unlike the *Guidance*, the *Manual* does not give civilians who repeatedly participate

Guidance would likely characterize combat service support functions as being more than one step removed from hostilities. Discussed in Part I.B.2, *supra*.

¹²² DoD LOW MANUAL, *supra* note 18, § 5.8.3, at 231.

¹²³ See *id.* § 5.8.3, at 229, n.243 (describing the vital role of logistical support for IED and suicide-bomber cells).

¹²⁴ *Id.* § 5.8.4 (acknowledging a range of views on the topic exist, and in “the U.S. approach, civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them”).

¹²⁵ *Id.* at § 5.8.4.1, at 234. There is no military necessity to target a civilian who does not repeatedly DPH. *Id.*

¹²⁶ See *id.* §§ 5.8.4.1-5.8.4.2, at 234-35. While the *Manual* never states a second act of DPH removes a civilian’s targeting protection until he permanently ceases DPH, one can deduce this is the result after a non-isolated, i.e. second, act of DPH. *Id.*

¹²⁷ *Id.* § 5.8.4. “There is thus no escaping examination of each and every case.” *Id.* n.259 (citing the Israeli Supreme Court from HCJ 769/02 Public Committee against Torture in Israel v. Government of Israel, 62(1) PD 507, ¶40 (2006) (Isr.)). While “[a]ffirmatively opting-out” may be a difficult standard, as “the person chose to opt-in to his targetable status” by DPH, it is reasonable he be responsible for demonstrating “he has opted-out.” Colonel Randall Bagwell & Captain Molly Kovite, *It Is Not Self-Defense: Direct Participation in Hostilities Authority at the Tactical Level*, 224 MIL. L. REV. 1, 34 (2016).

in hostilities a revolving door of protection.¹²⁸ The *Manual* notes how revolving door protection gives civilians who DPH an advantage over lawful combatants, possibly increasing the risk for uninvolved civilians.¹²⁹ The *Manual's* position is reasonable in an era of non-international armed conflicts where determining membership in non-State armed groups is challenging due to the lack of uniforms or the active concealment of membership.¹³⁰

A civilian who repeatedly participates in hostilities represents a danger to opposing forces,¹³¹ possibly as much as any non-uniformed, non-State hostile group member, regardless of any “continuous combat function,”¹³² and therefore should remain targetable.¹³³ After a civilian has repeatedly DPH, the pause between hostile acts includes preparing for the next act.¹³⁴ It is the civilian’s repeated decision to participate in the fight¹³⁵ that justifies his forfeiting immunity from direct attack until he permanently divests from hostilities—until he no longer poses the threat of a part-time combatant. Having defined the differences between the *Guidance's* and

¹²⁸ DOD LOW MANUAL, *supra* note 18, §§ 5.8.4, at 234; 5.8.4.2, at 235-36. The United States’ practice of IHL does not include giving “‘revolving door’ protection.” *Id.* § 5.8.4.2. There is no revolving door of protection in customary international law. Boothby, *supra* note 77, at 743.

¹²⁹ DOD LOW MANUAL, *supra* note 18, at § 5.8.4.2, at 236. “The United States has strongly disagreed with . . . international law that, if accepted, would operate to give the so-called ‘farmer by day, guerilla by night’ greater protections than lawful combatants” as it “would risk diminishing the protection of the civilian population.” *Id.*

¹³⁰ *See id.* § 4.18.4.1, at 158 (noting members of non-State armed groups “may seek to conceal their association with the group”); *see also id.* § 17.5.1.1 (commenting “non-State armed groups often seek to blend in with the civilian population”). For example, Al-Qaeda “does not have conventional forces” and hides “among civilian populations.” *Id.* n.92 (citation omitted) (quoting Harold Koh, Legal Advisor, Department of State, in 2010).

¹³¹ Boothby, *supra* note 77, at 755-56.

¹³² The *Guidance's* position is that members of organized armed groups in non-international armed conflict may only be targeted if they have a continuous combat function. Otherwise they are considered civilians not subject to attack. ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 36. As this topic is beyond the scope of this paper, *see* Watkin, *supra* note 122, at 641.

¹³³ *See* ICRC, SUMMARY REPORT OF FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 36-37 (Nils Melzer ed., 2008). According to some of the experts, “in operational reality, soldiers” would not “accept that civilians could repeatedly ‘opt in’ and ‘opt out’ of the conduct of hostilities,” but would see their actions as “a continuous mode of direct participation in hostilities.” *Id.* at 36.

¹³⁴ Boothby, *supra* note 77, at 757. “The intervals between the persistent participator’s activities are likely, really to be preparation for the next act of DP [direct participation].” *Id.*

¹³⁵ *See id.* at 756 (noting how “persistent participation” indicates a choice “to become part of the fight”).

the *Manual's* DPH criteria, and the length of time which targeting immunity is forfeited by those who DPH, next this article looks at the implications of these differences in theory and in combat.

IV. Implications of the *LoW Manual's* Rejection of the *Interpretive Guidance*

A. The *Manual* Calls More Activity DPH and Removes Targeting Immunity After Second Act

The *Manual's* criteria for DPH is more expansive than the *Guidance's*. The *Manual* captures all the activity covered by the *Guidance's* DPH test and more by: (1) not requiring the opposition suffer harm; (2) not having a one causal step limit for activity to be direct; (3) having an amorphous "military significance" category; and (3) including combat support activities. Yet the *Manual's* five categories of consideration overlap, such that an act would likely qualify as DPH under multiple categories.¹³⁶ This means the difference between the amount of activity captured by the *Manual's* DPH determination and the *Guidance's* is not as great as it first appears. In fact, because all the DPH examples provided by the *Manual*¹³⁷ also qualify as DPH using the *Guidance's* DPH test, one concludes there is a general consensus about the minimal requirements of DPH.

This general consensus highlights that the greatest difference between the *Manual* and the *Guidance* is the length of time a citizen who repeatedly DPH remains a lawful target.¹³⁸ According to the *Manual*, after a second act of DPH, a citizen remains a target until he renounces his participation, whereas the *Guidance* returns a civilian's targeting immunity to him each time he uses the revolving door of protection. Now the question remains, how might these differences between the *Guidance* and the *Manual* impact battlefield operations?

¹³⁶ See Appendix B for examples of how an act would qualify as DPH under multiple *Manual* considerations.

¹³⁷ DoD LoW MANUAL, *supra* note 18, § 5.8.3.1, at 231-32 (listing examples of "Taking a Direct Part in Hostilities"). See Appendix C for how the *Manual's* DPH examples also satisfy the *Guidance's* DPH test.

¹³⁸ See Appendix D that compares when a civilian loses targeting immunity according to the *Guidance* as contrasted to the *Manual*. *Cf.* Bagwell, *supra* note 127, at 31 (commenting how the greatest divergence between the *Guidance* and *Manual* is the analysis of actions "temporarily or geographically remote from actual fighting," and how such analysis is "generally unnecessary . . . at the tactical level" as there both approaches would reach the same DPH conclusion).

B. Impact on of *LoW Manual*'s DPH Criteria on Combat Operations

While it is difficult to determine which States¹³⁹ have adopted any or all of the *Interpretive Guidance*,¹⁴⁰ the *Guidance* has already impacted combat operations, such as NATO's rules of engagement in Afghanistan,¹⁴¹ likely increasing the challenges of inter-operability of coalition operations.¹⁴² For example, what happens when coalition forces face a civilian whose actions qualify as DPH under the *Manual* but not under the *Guidance*, like an IED builder who does not have a planned attack but is connected to hostilities? The IED builder is immune from attack by forces following the *Guidance*'s DPH test, therefore U.S. forces will bear the risks involved in targeting him. Likewise when coalition forces identify a civilian who has DPH at least twice: After that civilian has disengaged from the hostile act, he is immune from attack by forces

¹³⁹ The *Guidance* has been translated into French, Spanish, Chinese and Arabic, and the ICRC has proactively promoted it to militaries and governments. ICRC, REP. 31-10-2011, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 42 (2011). It is still early to determine to what extent the *Guidance* has influenced military manuals and shaped rules of engagement. Modirazdeh, *supra* note 14, at 270.

¹⁴⁰ See Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 188 (2015) [hereinafter Schmitt & Watts]. For example the Colombian Manual of Operational Law draws upon the *Guidance*'s concept of restricting the use of force to that which is necessary, as similarly did the Israeli High Court. Melzer, *Response*, *supra* note 46, at 909-12. *But see* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 793 (2010) (arguing the High Court's decision in *The Public Committee against Torture in Israel v. The Government of Israel* is unique to that country's "geography, history, circumstances, and threats," such that the *Guidance*'s reliance on it misrepresents existing law).

¹⁴¹ Schmitt & Watts, *supra* note 140, at 186 (stating that the *Guidance* has influenced "military training for a number of NATO States and has affected the content of NATO rules of engagement in Afghanistan" while giving no specifics). *But see* Bagwell, *supra* note 127, at 35 (describing how the NATO rules for engagement did not state "when the authority to attack would terminate," but in combat this "did not prove to be an issue," as at the tactical level "the difference between the ICRC and U.S. approaches on when direct participation ends had no practical effect").

¹⁴² Geoffrey S. Corn, *Mixing Apples and Hand Grenades: The Logical Limits of Applying Human Rights Norms to Armed Conflict*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 52, 91 (2010). *Cf.* RICHARD EKINS ET AL, CLEARING THE FOG OF LAW: SAVING OUR ARMED FORCES FROM DEFEAT BY JUDICIAL DIKTAT 22 (2015) (noting the application of the European Convention on Human Rights (ECHR) posed a legal obstacle for military cooperation for the U.K. and U.S. in Afghanistan, as the U.K. could only give detainees to NATO countries who were parties to the ECHR).

utilizing the *Guidance*, but U.S. forces may still target him until he permanently divests from hostilities. This means in conflicts where civilians participate in hostilities, U.S. forces will likely shoulder more of the responsibility, and peril, of missions against those who DPH.

Coalition partners using different DPH criteria will also reach different proportionality assessments when evaluating targets voluntarily shielded by civilians.¹⁴³ Under the *Guidance*, depending on the circumstances, voluntary human shields protecting a military object will likely not qualify as DPH.¹⁴⁴ Whereas the *Manual* would classify their actions as DPH because of the specific purpose underlying their act,¹⁴⁵ or because of their act's military significance, such that they would not be collateral damage accounted for in proportionality assessments.¹⁴⁶ As these examples show, it is likely that U.S. forces will bear more of the burden, both in blood and treasure, than those coalition partners utilizing the *Interpretive Guidance*.

There is another foreseeable outcome of this division of labor between the U.S. forces and those following the *Guidance's* DPH test. As U.S. forces may directly attack civilians who repeatedly DPH in between those acts—when it appears they merit targeting protection—it will be easy for uninformed observers to accuse the United States of killing innocent civilians.¹⁴⁷ In an era of social media,¹⁴⁸ whomever kills someone not

¹⁴³ If “based on the facts and circumstances” a commander determines voluntary human shields are DPH, they need not be part of the proportionality assessment. See DOD LOW MANUAL, *supra* note 18, § 5.12.3.4.

¹⁴⁴ ICRC INTERPRETIVE GUIDANCE, *supra* note 7, at 56-57. A woman physically shielding shooters with her robes is DPH. *Id.* at 56 n.139. But when voluntary human shields pose a legal as opposed to physical obstacle, “the causal relation between their conduct and resulting harm remains indirect” such that they are not DPH. *Id.* at 57.

¹⁴⁵ Discussed in Part III. B. 3, *infra*.

¹⁴⁶ Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 326 (2009). See also ICRC, SUMMARY REPORT OF SECOND EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 15 (Nils Melzer ed., 2004).

¹⁴⁷ See Nash Jenkins, *U.S.-Led Air Strikes Targeting ISIS Kill 26 Civilians in Syria*, *Activists Say*, TIME (Dec. 8 2015), <http://time.com/4140046/syria-airstrikes-coalition-civilians/> (reporting a “monitoring group’s” accusation that a U.S.-led coalition air strike on December 7, 2015, “killed only civilians”). But see Jamie Crawford, *Coalition Forces Kill ISIS Leader Connected to Paris Attack*, CNN (Dec. 30, 2015, 5:15 AM), <http://www.cnn.com/2015/12/29/politics/isis-leader-connected-to-paris-attack-killed-by-coalition-forces/> (describing U.S.-led coalition airstrikes that killed “multiple figures within ISIS senior leadership,” including on December 7, 2015).

¹⁴⁸ See Charles J. Dunlap, Jr., *The DoD Law of War Manual and Its Critics: Some Observations*, 92 INT'L L. STUD. 85, 94 (2016) (twenty-first century information

readily identifiable as a combatant is quickly accused of war crimes.¹⁴⁹ Such accusations may diminish public support for any U.S. war effort.¹⁵⁰ These battlefield repercussions of the *Manual's* rejection of the *Guidance* are important, but the potential impact of the *Manual* on developing IHL is also worth examining.

C. Shaping State Practice and Shaping International Law

While the *Manual* is neither law nor *opinio juris*,¹⁵¹ it serves as evidence of the United States position on IHL.¹⁵² Specifically, because the *Manual* guides DoD personnel—personnel who represent the United States—in determining what constitutes DPH, the *Manual* will shape international law.¹⁵³ This is because State agents “enjoy unique relevance in the formation and interpretation of international law and LOAC [law of

technologies allow belligerents to “rapidly and effectively exploit” deaths of human shields) [hereinafter Dunlap, *Critics*]. Cf. *Campaign of Exposing Israeli Crimes via Social Media*, FACEBOOK, <https://www.facebook.com/Exposing.Israeli.Crimes> (last visited Mar. 2, 2017). (vowing “to raise the Western world’s consciousness to the reality hidden by mainstream media,” with postings, photos, and videos alleging Israeli war crimes).

¹⁴⁹ See Jenkins, *supra* note 147; cf. Michele Kelemen, *Was Kunduz Attack A War Crime? Legal Analysts Say It's Difficult To Prove*, NPR (Oct. 8, 2015, 3:08 PM), <http://www.npr.org/sections/parallels/2015/10/06/446109292/was-kunduz-attack-a-war-crime-legal-analysts-say-its-difficult-to-prove> (reporting after U.S. forces bombed a hospital in Kunduz, Afghanistan, the Executive Director of Doctors Without Borders said “[w]e’re under the clear presumption that a war crime has been committed”).

¹⁵⁰ Cf. Dunlap, *Critics*, *supra* note 148, at 92 (remarking on the “truly unprecedented sensitivity to any civilian casualties” in current operations) (emphasis in original). ”). See also Dunlap, *Revised*, *supra* note 112 (speculating that the 2015 *Manual's* handling of human shields “was too blunt,” leaving “the unwarranted impression that the U.S. was not sensitive enough to civilian losses,” so was revised).

¹⁵¹ DoD LOW MANUAL, *supra* note 18, § 1.1.1. But see John Dehn, *The DOD Law of War Manual's Potential Contribution to International Law*, JUST SECURITY (July 16, 2015, 9:10 AM), <https://www.justsecurity.org/24675/dod-law-war-manuals-potential-contribution-international-law/> (proposing the DoD’s disclaimer should not “detract from the effect of the Manual as an expression of *opinio juris*”). See also Dunlap, *Critics*, *supra* note 148, at 117 (speculating the *Manual* will “quickly become considered the definitive statement of the United States on the LoW [law of war]”). Contra Haque, *Off Target*, *supra* note 111, at 83 (arguing “the *Manual* cannot be assumed to reflect U.S. *opinio juris* or to generate customary international law”).

¹⁵² See Schmitt & Watts, *supra* note 140, at 212. As they often reflect operational and policy concerns, military manuals are not *opinio juris* but are evidence of a State’s position on IHL. *Id.*

¹⁵³ See Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT’L L. 210, 226 (2013) (explaining how state practice shapes traditional international law).

armed conflict],”¹⁵⁴ therefore increasing the *Manual's* influence on how other countries interpret DPH.¹⁵⁵

Even if it is the *Guidance's* interpretation of DPH that shapes other countries' practices, such that its three prong DPH test and revolving door of protection ripen into CIL, the *Manual* should establish the basis of a U.S. persistent objection.¹⁵⁶ As evidence of the DoD's objection to the *Guidance*, and as instruction to DoD personnel on how to identify DPH, the *Manual* should prevent the United States from being bound by any alternate DPH interpretation in CIL.¹⁵⁷

V. Conclusion

When compared to the *Guidance*, the *Manual* qualifies more activity as DPH and strips a civilian who has repeatedly DPH of immunity from attack until he permanently divests from hostilities. By doing so, the *Manual* makes stark the life versus death risk evaluation a civilian faces by choosing to participate in armed conflict. Fairness demands this risk be clear to civilians, as those who choose to DPH are a mortal danger to the combatants who have knowingly assumed the risk of death in conflict.¹⁵⁸ A civilian who decides to DPH should have no illusions about

¹⁵⁴ Sean Watts, *Reviving Opinio Juris and Law of Armed Conflict Pluralism*, JUST SECURITY (Oct. 10 2013), <https://www.justsecurity.org/1870/reviving-opinio-juris-law-armed-conflict-pluralism-2/>. States make and use IHL the most, therefore they should be the ones shaping its content. *Id.*

¹⁵⁵ See Dunlap, *Critics*, *supra* note 148, at 118 (remarking it is likely that other nations will consider the *Manual* “the most influential document of its genre” because of the United States' experience fighting complex, twenty-first century conflicts). See also Dehn, *supra* note 152 (arguing that the DoD's “long history” of applying the law of war should mean the *Manual* is influential in shaping international law).

¹⁵⁶ Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 150-51 (1996). To not be bound by a forming customary rule, a state must object early in the rule's formation and continue to object consistently, as silence is considered consent. *Id.* See Narramore, *supra* note 80, at 18 (increasing the expression of the U.S. position on evolving IHL issues establishes a foundation “to assert persistent objector status”).

¹⁵⁷ See John B. Bellinger, III & William J. Haynes II, *A US Government Response to the ICRC Study Customary International Humanitarian Law*, INT'L REV. OF THE RED CROSS, Vol. 89 No. 866, 443, 446-447 (2007). The authors fault the ICRC's undue reliance on military manuals as a source of evidence of a State's *opinio juris*, making the *Manual's* express rejection of the *Guidance* more important to IHL. *Id.*

¹⁵⁸ See generally Schmitt, *Analysis*, *supra* note 4, at 6 (balancing military necessity and humanity requires IHL to recognize no country would “accept norms that place its military success, or its survival, at serious risk”). Parks, *supra* note 140, at 772-73 (describing the

the repercussions of his choice.¹⁵⁹ Yet the *Guidance's* three prong DPH test and revolving door of protection incentivize civilians to participate in combat by minimizing the gamble they take with targeting immunity. Whereas the *Manual* makes the risk of DPH clear to civilians. By doing so, it is the *Manual* that makes the modern battlefield safer for civilians who do not DPH.

As the *Manual's* more expansive interpretation of DPH allows for maximum operational flexibility,¹⁶⁰ the judge advocate should recognize this flexibility comes with added scrutiny. The wise judge advocate will keep the *Guidance's* three prong test in mind to further buttress DPH decisions that the ICRC would not qualify as such. Specifically, in situations where a civilian's activity does not constitute DPH under the *Guidance* but does under the *Manual*, a judge advocate should make a case leaving no doubt how a civilian is directly participating in the fight. By being aware of the differences between the *Manual* and *Guidance*, the judge advocate will be best prepared to defend DPH targeting decisions, especially in multinational or NATO environments. By clarifying that those with skin in the game are DPH, the *Manual* has maintained the balance between military necessity and humanity that form the foundation of IHL.

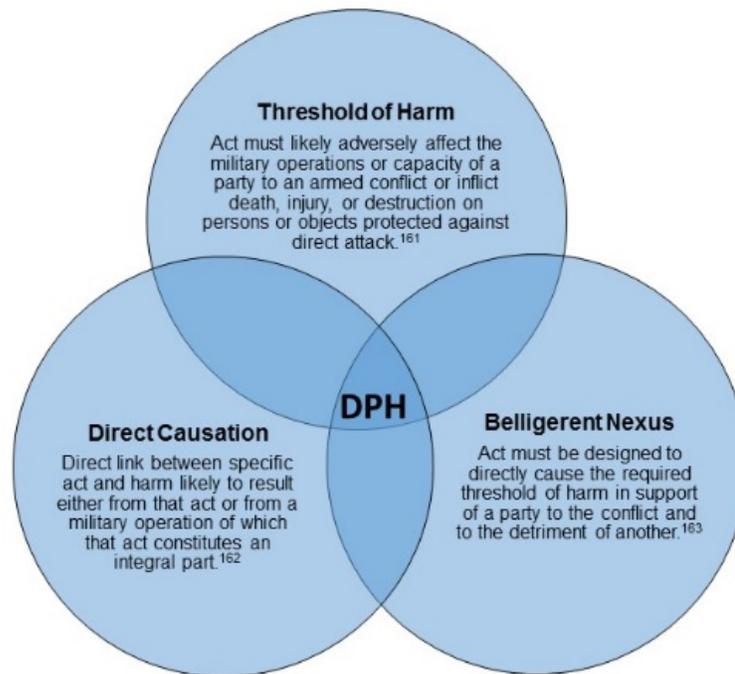
principal of discrimination being "based upon mutual responsibilities," including a civilian's not using his protected status "to engage in hostile acts").

¹⁵⁹ See Boothby, *supra* note 77, at 756-57 (framing the issue in terms of an individual's decision to participate, not the danger or risk of his specific act).

¹⁶⁰ See Richard B. Jackson, Spec. Assistant to the U.S. Army Judge Advocate General for Law of War Matters, Capstone Lecture for The Judge Advocate General's Legal Center and School's 64th Graduate Course: LOAC Update (Dec. 4, 2015) (remarking the *Manual* allows for maximum operational ability).

Appendix A: The ICRC's *Interpretive Guidance's* Three Constitutive Elements of Direct Participation in Hostilities (DPH)

The *Interpretive Guidance's* three prong DPH test is cumulative such that activity constitutes DPH only by satisfying all three constitutive elements, indicated at the intersection of the elements below.



¹⁶¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 47 (Nils Melzer ed., 2009) [hereinafter INTERPRETIVE GUIDANCE].

¹⁶² *Id.* at 51.

¹⁶³ *Id.* at 58.

Appendix B: The *Law of War Manual's (LoW Manual)* Five Categories of Relevant Considerations. “At a minimum, taking a DPH includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. . . .and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”¹⁶⁴

Acts Qualifying as DPH Under Multiple Categories

DPH Criteria	Improvised explosive device maker or storer	Voluntary human shield	Recruiter or trainer of suicide bombers	Civilian removing mines from minefield
1. The degree to which the act causes harm to the opposing party’s persons or objects; is the proximate or “but for” cause of death, injury, or damage to persons or objects belonging to the opposing party; or is likely to affect adversely the military operations or capacity of the opposition. ¹⁶⁵	X		X	X
2. The act is temporally or geographically near the fighting; or the degree to which the act is connected to military operations. ¹⁶⁶	X	X	X	
3. [T]he specific purpose underlying the act, such as whether it is intended to advance the war aims of one party to the detriment of the opposing party. ¹⁶⁷	X	X	X	X
4. [T]he military significance of the activity to the party’s war effort, the degree to which the act contributes to a party’s military action against the opposition; is of comparable or greater value to a party’s war effort than acts that are commonly regarded as taking a direct part in hostilities; and poses a significant threat to the opposing party. ¹⁶⁸	X	X	X	X
5. [T]he degree to which the activity is viewed inherently or traditionally as a military one; whether it is traditionally performed by military forces in conducting operations against the enemy; or whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power. ¹⁶⁹			X	X

¹⁶⁴ U.S. DEP’T. OF DEF., LAW OF WAR MANUAL § 5.8.3 at 228-29. (2016) [hereinafter DoD LoW Manual].

¹⁶⁵ *Id.* at 230.

¹⁶⁶ *Id.*

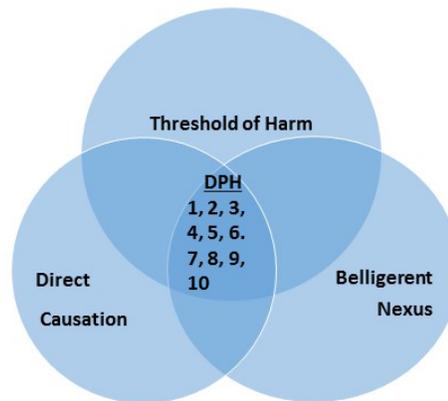
¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 230-3

Appendix C: The Ten DPH Examples from the *LoW Manual*

The DPH examples listed in the *Manual* also meet the *Interpretive Guidance's* three prong DPH test, indicating a general consensus as to what constitutes minimum DPH conduct.



1. Manning an anti-aircraft gun, acting as a bodyguard for an enemy combatant.¹⁷⁰
2. Acting as a member of a weapons crew.¹⁷¹
3. Engaging in an act of sabotage.¹⁷²
4. Emplacing mines or improvised explosive devices.¹⁷³
5. Preparing for combat and returning from combat.¹⁷⁴
6. Planning, authorizing, or implementing a combat operation against the opposing party.¹⁷⁵
7. Acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike, mortar attack, or ambush.¹⁷⁶
8. Acting as a guide or lookout for combatants conducting military operations.¹⁷⁷
9. Delivering ammunition to the front lines in close geographic or temporal proximity to their use.¹⁷⁸
10. Outfitting and preparing a suicide bomber to conduct an attack in close geographic or temporal proximity to its use.¹⁷⁹

¹⁷⁰ DOD LOW MANUAL § 5.8.3.1 at 231.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 5.8.3.1 at 232.

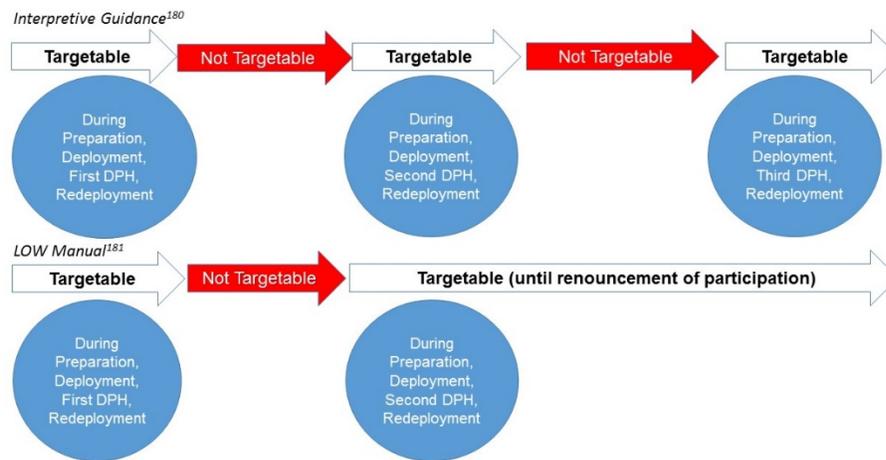
¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

Appendix D: Comparison of the *Interpretive Guidance's* and *LoW Manual's* Duration of Targeting Immunity

The starkest difference between the *Interpretive Guidance* and the *Manual* is the *Interpretive Guidance* provides protection between a civilian's DPH, whereas the *Manual* strips a civilian of immunity from attack after his second DPH until he permanently ceases participation.



¹⁸⁰ See INTERPRETIVE GUIDANCE, *supra* note 1, at 65-67, 70-71.

¹⁸¹ See DoD LoW MANUAL, *supra* note 4, §§ 5.8.4-5.8.4.2 at 234-36.