ICRC GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES[1]

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1. INTRODUCTION

The principle of distinction in International Humanitarian Law (IHL) obligates those using force in armed conflict to distinguish between lawful and unlawful targets and to direct attacks only against lawful targets. Insofar as objects are concerned, lawful targets are military objectives as defined in Article 52(2) of Additional Protocol I (AP I).[3] Insofar as people are concerned, lawful targets include combatants,[4] participants in a *levee en masse*[5] and civilians taking a direct part in hostilities.[6] Few treaty law provisions concerning the notion of Direct Participation in Hostilities (DPH) exist and those which do lack detail. Moreover, assessments of state practice and customary law, and analysis of DPH in legal literature or case law, at least through the turn of the century, were rare. This general void in treatment of the subject appeared to leave room for differences of opinion regarding DPH.

The need for elaborated guidance on DPH grew significantly in the last decade. Most contemporary armed conflicts are non-international and involve substantial irregular forces and civilians who might be engaged in DPH on at least one, and possibly both sides. In addition, the regular armed forces in many developed states began downsizing and, as a result, were forced to contract out many functions

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1. © W.J. Fenrick, 2010.

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3. This definition is widely regarded as part of customary IHL applicable to all armed conflicts (Rule 8, ICRC Customary IHL Study).

4. For international armed conflicts, combatants are members of the armed forces of a party to the conflict other than medical personnel and chaplains (AP I Art. 43, Art. 4A (1-3) GC III, Rules 3 and 4 ICRC Customary IHL Study). There is no similar provision in the treaty law applicable to non international armed conflicts (AP II and Common Art. 3).

5. Art. 2 HIV R, Art. 4A(6) GCIII, Art. 50(1) AP I.

6. Art. 51(3) AP I, Art. 13(3) AP II, Common Art. 3 (which uses the expression 'persons taking no active part in the hostilities' to describe persons who are exempt from direct attack). See also Rule 6 of the ICRC Customary IHL Study.

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which in the past had been regarded as essentially military. These included logistics, sophisticated technical support, intelligence gathering, communications related to command and control, and even fire control. When armed forces engage in armed conflict, some of the civilians providing such support might be regarded as civilians engaged in DPH.

From 2003 to 2008, the ICRC, in cooperation with the TMC Asser Institute, sponsored a project to analyze and reach agreed conclusions, if possible, on the legal issues related to DPH. The process involved preparation of questionnaires, reports and background papers, and the convening of five expert meetings.[7] As might have been expected, the project explored and analyzed DPH related issues which had, in many cases, not been identified prior to its initiation. Unfortunately, a consensus approach to DPH proved elusive. Even the final report did not, in the view of some of the external experts, adequately reflect the divergent views of the participants. Several asked to be disassociated from the process.[8] Perhaps in part because of this unexpected development, the ICRC deleted the names of the external experts and had its final version of the DPH Guidance adopted by the Assembly of the ICRC on 26 February 2009.[9]

The DPH Guidance is not a legally binding document. It consists of ten recommendations and about fifty pages of related commentary. In the words of the Guidance, it does: 'not endeavour to change binding rules of customary or treaty IHL, but reflects the ICRC's institutional position as to how existing IHL should be interpreted'.[10] The ICRC is an extremely important institution for IHL purposes but its position on DPH will only have an impact on national decision makers concerned with DPH issues to the extent its views are well researched, well thought out, relevant and persuasive.

The expert process and the DPH Guidance focused on three legal questions in order to clarify the DPH issue: (1) Who is a civilian for the purposes of the principle of distinction? (2) What conduct amounts to DPH? (3) What modalities govern the loss of protection against direct attack?[11] The remainder of this note will

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7. Dr. Nils Melzer, an ICRC legal adviser, was responsible for the ICRC's DPH clarification process. He chaired most of the expert meetings and wrote many of the reports and background papers. His Herculean efforts to clarify the notion of DPH were much appreciated by all the participants in the expert meetings.

8. The author disagreed with some of the end product, in particular and quite strongly with Part IX which was concerned with restraints on the use of force in direct attack. He did not, however, request to be disassociated from the project because he was present for all of the meetings and because he holds the view that the ICRC is entitled to come to its own view on IHL issues and that, in so doing, it is not bound to accept the views of some or all members of a group of external experts.

9. Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, published in 90 *IRRC* (December 2008) pp. 991-1047 (hereinafter DPH Guidance). The DPH Guidance and the complete proceedings of the expert process are available online on the ICRC's website <www.icrc.org>.

10. DPH Guidance, *supra* n. 9, p. 991.

11. Ibid., p. 994.

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consider how the DPH Guidance considered each of these questions in turn and will conclude with a brief assessment of the process and of the result.

2. WHO IS A CIVILIAN?

As a general statement, civilians may not be subjected to direct attack whether in international or non international armed conflicts. IHL tends to define 'civilian' by indicating who is *not* entitled to be treated as a civilian. The IHL applicable to the two types of conflict is similar but not identical. It is, therefore, essential to determine who constitutes a civilian separately for each type of conflict.

2.1 **International conflict**

The DPH Guidance defines civilians negatively and provides:

> 'For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levee en masse*[12] are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.'[13]

This definition represents a relatively broad approach to determining who is a member of the *armed forces*. Under AP I, the armed forces consist of 'all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules applicable in armed conflict.'[14] In the Guidance, however, the armed forces more broadly consist of 'all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict'.[15] Thus, for targeting purposes, whether or not the armed forces adequately distinguish themselves from the civilian population or conduct their operations in compliance with IHL is treated as irrelevant. Any other approach would have conferred civilian status in the targeting context on armed actors who fail to distinguish themselves or who regularly violate IHL. This is noted in the Guidance which provides that 'it would contradict the logic of the principle of distinction to place irregular

12. Participants in a *levee en masse* are inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to organize themselves provided they carry arms openly and comply with IHL (Art. 2 H IV R) Such persons are lawful combatants and entitled to take a direct part in hostilities even though they lack the organizational structure of armed forces. They may also, of course, be subject to direct attack.

13. DPH Guidance, *supra* n. 9, p. 997.

14. AP I Art. 43.

15. DPH Guidance, *supra* n. 9, p. 999.

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armed forces under the more protected legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population'.[16]

Under the Guidance, however, a *de facto* or *de jure* linkage with a party to the conflict (a state) is required. Armed actors who lack a state linkage are not, from the perspective of the DPH Guidance, members of the armed forces and therefore not subject to direct attack based on their status alone. Organized armed actors without a state linkage may, nevertheless, be subject to direct attack if they are engaged in a separate non-international armed conflict with state authorities. Force may also be used against them in accordance with law enforcement modalities. The key issue concerning the definition of a civilian for distinction purposes in an international armed conflict is, accordingly, determining who to exclude from the definition because they are members of organized armed groups and therefore members of the armed forces within the broad approach adopted in the Guidance. This issue also arises in non-international conflicts and is more appropriately considered in the next subsection.

2.2 Non-international conflict

As the treaty law applicable to non-international conflict is particularly skeletal and does not explicitly include provisions related to combatant or prisoner of war status, providing guidance on the DPH notion in such conflicts is particularly difficult. The DPH Guidance provides:

> 'all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function').[17]

Implicitly, the 'continuous combat function' test for membership in organized armed groups also applies to organized armed groups under the law for international conflict.

The distinction between civilians and members of organized armed groups is defensible and was generally agreed to by participants in the expert process. The limitation of members of organized armed groups to individuals who have a continuous combat function was, however, a discretionary decision and one which merits discussion. state armed forces comprise a large number of personnel engaged in support activities such as logistics and a relatively small number of personnel who actually engage in combat with enemy forces. The 'tooth to tail ratio' has long been a concern for military commanders. For example during World War

16. Ibid.
17. Ibid., p. 1002.

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II, Canada developed an army of about 600,000 soldiers. The five divisions and the two independent armored brigades it deployed in combat had under 100,000 soldiers, only a proportion of whom were in the combat arms. All 600,000 soldiers, excluding medical personnel and chaplains, however, would have been regarded as combatants at consequential risk of being attacked directly. The downsizing of many armed forces in the post Cold War period has meant that many of the functions performed by military personnel have now been outsourced to civilians. The DPH Guidance for international and for non-international conflicts includes these persons in the category of civilians and excludes them from direct attack unless they engage in DPH.

Organized armed groups participating in both international and non-international conflicts are also comprised of both fighters and support personnel. One might expect organized armed groups to contain a higher 'tooth to tail ratio' with a higher percentage of fighters than state armed forces even in the current era of down-sizing. The percentage of support personnel will, nevertheless, be substantial. An additional problem in applying the principle of distinction to organized armed groups is that membership in such groups will often be difficult to determine because of the absence of uniforms, identification cards, or formal affiliation procedures. Moreover, such organized armed groups may have loosely affiliated or unaffiliated non-military wings which mobilize political support. They may also receive moral, logistical and other support from the general population in the areas where they operate. The general population does not become a lawful target simply because it provides moral, logistical and other support to an organized armed group any more than it does if it provides such support to state armed forces.

Bearing in mind that civilians who accompany state armed forces are not lawful targets unless they engage in DPH, where should the line be drawn for persons accompanying or belonging to organized armed groups? One approach might be to hold that anyone who is a member of an organized armed group, except for medical personnel and chaplains, is not a civilian and may be subjected to direct attack. If this course is adopted, membership in an armed group would be treated in the same way as membership in state armed forces. This is, conceivably, a defensible approach but it is likely to result in increased civilian casualties because of the difficulty of identifying who belongs to the group.

The DPH guidance adopts a stricter approach and holds that only those members of organized armed groups whose continuous function it is to take a direct part in hostilities (those who have a continuous combat function) should be excluded from the category of civilian and subject to potential direct attack at all times. In other words, members of organized armed groups are treated more favorably than members of state armed forces in so far as a smaller percentage of them may be lawfully subjected to direct attack. . On the other hand, of course, at least in international armed conflict, members of state armed forces do have combatant privilege (the right to take a direct part in hostilities) and an entitlement to prisoner of war status on capture which members of organized armed groups lack. Further,

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conceivably, state armed forces could place themselves in the same situation by increased contracting out of services, not necessarily a desirable approach. In any event, civilians accompanying organized armed groups, including members of organized armed groups who do not have a continuous combat function, may be subject to direct attack if they do engage in DPH and, as with civilians accompanying state armed forces, their activities or location may expose them to an increased risk of incidental death or injury.

2.3 Private contractors and civilian employees

The increasing tendency of parties to armed conflicts to employ private contractors and civilian employees in traditional military roles was one of the major factors generating interest in clarifying the notion of DPH. As the various experts exchanged views, however, it became apparent that developing special rules for such persons was not appropriate. The great majority of private contractors and civilian employees were not employed in DPH related roles. They had no continuous combat function. For those who were or might be employed in DPH related roles, the position adopted in respect of DPH for other civilians was considered appropriate. As a result, the approach taken in the DPH Guidance, with the agreement of all experts, was to simply adopt the approach that private contractors and civilian employees were entitled to protection from direct attack unless and for such time as they engaged in DPH. It was observed, however, that such persons might be exposed to an increased risk of incidental death or injury because of their activities or work location even if they did not engage in DPH.[18] The specific problem in respect of private military contractors prompted a separate initiative by the Swiss government in cooperation with the ICRC which resulted in the Montreux Document.[19]

3. WHAT IS DIRECT PARTICIPATION IN HOSTILITIES?

There is no definition of DPH in the relevant treaties[20] and no clear interpretation emerging from State practice or international jurisprudence. The approach taken in the DPH Guidance is to regard the notion of DPH as referring to specific acts carried out by individuals and this approach appears to be quite defensible.[21]

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18. Ibid., p. 1009.

19. The Montreux Document on Pertinent Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict was agreed upon by 17 participating states at Montreux on 17 September 2008. The document is available at the ICRC website <www.icrc.org>. It is not a legally binding instrument. It does, however, recapitulate international legal obligations related to IHL and applicable to states involved with such companies and the companies themselves and also indicates best practices for the use of such companies.

20. *Supra* n. 6.

21. DPH Guidance, *supra* n. 9, p. 1013.

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3.1 **Constitutive elements**

The DPH Guidance provides that, in order to qualify as DPH,

> 'a specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); (and) (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).'[22]

Any act which is reasonably expected to cause harm of a military nature will meet the threshold requirement. Such acts might include killing or wounding military personnel, damaging military objects, or interfering with military deployments, logistics or communications. Clearing mines placed by an adversary, interference with military computer networks and transmitting tactical targeting information for an attack are also examples of acts meeting the threshold of harm. The threshold of harm can also be met by attacks directed against civilians, civilian objects or military hospitals, all of which are entitled to protection against direct attack. For example, the sniper attacks on civilians in Sarajevo during the conflict in the former Yugoslavia would meet the threshold.

The Guidance distinguishes DPH from general support of the war effort and from participation in war-sustaining activities. Design, production and shipment of weapons, for example, would not be regarded as DPH because there is no direct causal link between such activities and the likely harm inflicted. Had the definition of DPH in the Guidance been left without reference to specific examples, it may well have been regarded as acceptable by many military experts. Regrettably, the Guidance provides two examples of groups excluded from DPH on the basis of not meeting the direct causation requirement. Both examples are likely to create substantial difficulties for military IHL experts. The first category of excluded persons are those involved in recruitment and training of personnel and the second, those involved in the assembly or storage of improvised explosive devices (IEDs). Persons involved in such activities are likely to be considered particularly important targets. Should direct attacks on them be regarded as unlawful? It would seem counter-intuitive to conclude that recruiters and trainers, because they did not meet the direct causation requirement, would not be considered to be engaging in DPH. Similarly, those involved in the production and storage of IEDs might better be regarded as belonging in the same category as those providing tactical intelligence instead of equating them with workers in munitions factories.

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22. Ibid., p. 1016.

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The DPH Guidance does however take account of the complexity of many military operations. It regards conduct which causes harm in conjunction with other acts, such as target identification and marking or the analysis of tactical intelligence, as satisfying the threshold of harm. In this context, the DPH Guidance discusses two specific examples. Civilian drivers of ammunition trucks would be regarded as engaging in DPH if they were driving trucks to a firing position in the front line as this would be an integral part of ongoing combat operations. Transporting munitions far behind the lines would, by contrast, not meet the threshold of harm. In the latter case, the truck would be a military objective but the civilian driver would not be engaged in DPH and probable death or injury to the driver would have to be taken into account in the proportionality assessment. The second example discussed involves voluntary human shields; in other words where civilians attempt to shield military objectives by placing themselves around the military target. The DPH Guidance accepted that such civilians would be incurring an increased risk of incidental death or injury because of their voluntary presence near military objectives.

There was an attempt to distinguish between two situations involving human shields. In close combat ground operations, particularly in urban areas where civilians attempt to give physical cover to fighting personnel or to impede the movement of opposing forces, they would, most likely, be regarded as engaging in DPH. On the other hand, in situations where civilians have voluntarily placed themselves around or on military objectives which might be subject to air or artillery attack, they would not be regarded as engaging in DPH. The voluntary human shield issue raises difficult issues and there are those who suggest that such persons should always be regarded as engaging in DPH. Nonetheless, it may often be difficult to determine if the persons acting as human shields are acting voluntarily and it is also difficult to envisage excluding unarmed civilians who do not pose a threat to attacking forces from the civilian side of the proportionality equation. Indeed, one might pose the question: is death or injury to civilians engaging in DPH regarded as conferring a military advantage? Can one envisage a situation where it is considered desirable to maximize casualties among civilians acting as voluntary human shields? The answer to the latter question must be 'no'.

The final element of DPH concerns belligerent nexus. The act must be designed to directly cause the threshold of harm in support of one party to a conflict and to the detriment of another. Belligerent nexus is to be distinguished from subjective intent. Violent crimes committed for reasons unrelated to the conflict lack belligerent nexus as do acts of inter-civilian violence. According to the DPH Guidance, the following activities would lack belligerent nexus: (i) defence of self or others against violence prohibited under IHL; (ii) exercise of power or authority over persons or territory including the perpetration of war crimes outside the conduct of hostilities; and (iii) participation in civil unrest such as political demonstrations or riots which express dissatisfaction with the territorial or detaining authorities. The self defence exception avoids the possibility of civilians defending themselves against immi-

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nent risk of death, as occurred during the Rwanda genocide, being regarded as involved in DPH. Clearly such persons must fall outside the scope of DPH. The exercise of power exception means that civilian camp guards at extermination camps, such as Auschwitz, would not be regarded as taking a direct part in the hostilities. That being said, using force against such individuals would be justified as a matter of law enforcement or in order to defend those being detained in the camp.

3.2 **Beginning and end of DPH**

The DPH Guidance provides:

> 'Measures 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.'[23]

The related commentary emphasizes that the preparatory acts must be linked to a specific act and not to general preparatory measures aimed at establishing a general capacity to carry out hostile acts. As examples of preparatory measures which would constitute DPH if carried out in connection with a specific act, the commentary lists: equipping, instructing and transporting personnel; gathering intelligence, and preparing, transporting, and positioning weapons. As examples of general preparatory measures which would *not* constitute DPH, the commentary lists: purchasing and producing weapons; recruiting and training personnel; and providing financial, administrative or political support to armed actors. Both deployment to and return from the execution of a specific act of DPH constitute an integral part of the act of DPH. The identification of the end point of the return from the location of the act of DPH would be a question of fact but could include considerations of such things as physically separating from the operation, the storing or hiding of the weapons used, and the resumption of normal civilian activities.

4. MODALITIES GOVERNING LOSS OF PROTECTION

Four recommendations relate to the modalities governing loss of protection. These address the temporal scope of the loss of protection; precautions and presumptions in situations of doubt; restraints on the use of force in direct attack; and the consequences of regaining civilian protection. Of these, the provision concerning restraints on the use of force in direct attack is by far the most contentious and it will be given separate consideration below.

The Guidance recommends that civilians engaged in DPH lose their entitlement to protection against direct attack for the duration of each DPH act only. The re-

23. Ibid., p. 1031.

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lated commentary states, '[t]he revolving door of civilian protection is an integral part, not a malfunction of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat'.[24] By contrast, members of organized groups, presumably including those in international as well as in non international armed conflicts, lose their protection for 'as long as they assume their continuous combat function.'[25]

One of the most important recommendations in the Guidance, and one of the most widely accepted, is that concerned with situations of doubt. The provision reads, '[a]ll feasible precautions must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person must be presumed to be protected against direct attack'.[26] Target identification is a particularly difficult problem in situations where civilians might be engaged in DPH but the issue must be squarely faced and addressed in good faith. Indeed, accurate target identification, together with good faith application of the principle of proportionality, should resolve most of the use of force problems generated by the engagement of civilians in DPH. In the view of this writer, it renders unnecessary the DPH Guidance recommendation concerning restraints on the use of force in direct attack.

The final recommendation in the DPH Guidance states:

> 'International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.'[27]

By analogy, this recommendation would also apply to those members of state irregular armed forces who fail to qualify for the combatant privilege or prisoner of war status in international armed conflict. As attacking military objectives and killing or wounding enemy soldiers in combat are not violations of international law, such acts by civilians engaged in DPH must be criminalized under domestic law to constitute prosecutable offences.

4.1 **Restraints on the use of force in direct attack**

The DPH Guidance recommends:

> 'In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may

24. Ibid., p. 1035.
25. Ibid., p. 1034.
26. Ibid., p. 1037.
27. Ibid., p. 1045.

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> arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.'[28]

Quite clearly, IHL does impose restraints on specific means and methods of warfare. Further, although one may debate whether IHL is or is not a *lex specialis* which completely occupies the field where the use of force in armed conflict is concerned,[29] neither the experts consulted nor the ICRC addressed any legal regime other than IHL when considering DPH. For that reason, a qualifying phrase concerning the potential impact of other branches of law is appropriate.

The part of the recommendation which generated intense discussion and considerable disagreement concerned the provision that reads,

> 'the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate purpose in the prevailing circumstances.'

It should be noted that this clause purports to apply to use of force against all legitimate targets. It is not limited to the use of force against civilians engaged in DPH.[30] The rationale for the clause as provided in the commentary states:

> 'In the absence of express regulation, the kind and degree of force permissible against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underline and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted. Considerations of military necessity and humanity neither derogate from nor override the specific provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.'[31]

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28. Ibid., p. 1040.

29. L. Doswald-Beck, 'The Right to Life in Armed Conflict: Does International Humanitarian Law Provide All the Answers', 88 *IRRC* (December 2006) p. 881.

30. It should be noted that this issue was inserted into the discussion process very late, that it was not discussed or thought about adequately, and that it was not applicable exclusively to civilians engaged in DPH. When the issue was first raised during an expert meeting, one of its proponents appeared to be of the view that there were, or should be, specific rules concerning the use of force against civilians engaged in DPH. One might argue that restrictions on the use of force which were specific to attacks directed against civilians engaged in DPH should have been considered during the expert process and, perhaps, included in the Guidance. It is suggested, however, that the general issue of restrictions on the use of force against all legitimate human targets was not one which it was necessary to discuss or to purport to resolve within the DPH process.

31. DPH Guidance, *supra* n. 9, p. 1041. The footnote relevant to this paragraph in the Guidance referred to provisions contained in several national military IHL manuals. The supporting quotations from the manuals were accurate. As one who has been involved in drafting a national manual, I believe most persons involved in drafting such manuals would be disconcerted to see such quotations taken out of context and used to support the recommendation in the DPH Guidance.

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The Guidance commentary continues:

> 'What kind and degree of force can be regarded as necessary in an attack against a particular target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.'[32]

According to the commentary, in large scale combat between organized and well equipped armed groups the application of the principles of military necessity and humanity is unlikely to require additional restrictions on the use of force beyond those already required by specific IHL provisions. In occupied territories and during non-international armed conflicts, however, they may do so. The commentary proceeds to cite an example of where a large number of civilians deliberately prevent passage of governmental ground forces in pursuit of an insurgent group. In such a situation, the civilians would be engaging in DPH but it would probably be unnecessary to attack the civilians directly in order to get through the human barrier. The commentary accepted that armed forces could not be expected to take additional risks in order to capture armed adversaries but suggested that it would defy basic notions of humanity to refrain from giving such adversaries an opportunity to surrender when there was no manifest necessity for the use of lethal force. It applauded the words of Jean Pictet:

> 'If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.'[33]

As a statement of policy, the words of Jean Pictet and the related DPH Guidance recommendation and commentary are humane and unobjectionable. Indeed, if these words had simply been put forth as a statement of ICRC policy which the ICRC encouraged others to adopt, those involved in the expert process would probably have regarded them as a matter of little concern. Unfortunately, they were presented as an interpretation of the law.

According to the DPH Guidance, either: (1) all direct attacks must be assessed in terms of the underlying principles of military necessity and humanity in addition to the rules of customary or treaty IHL, or (2) all direct attacks against individuals must be assessed in terms of military necessity and humanity because there are no applicable rules of customary or treaty IHL. Both propositions are debatable. With reference to the first proposition, one is not entitled to have one's legal cake and eat

32. Ibid., p. 1042.

33. J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Nijhoff 1985) p. 75.

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it too. It is widely accepted that considerations of military necessity cannot be invoked to override rules of customary or treaty IHL. Where rules of customary or treaty law are concerned, military necessity is relevant only when it is included in the rule. The suggestion that actions must be assessed in terms of military necessity and humanity to supplement existing IHL would represent a regressive step that could result in the reinstatement of discredited doctrines such as *kreigsraison*. With reference to the second proposition, it is agreed that, in the absence of existing IHL rules, actions must be assessed in terms of the underlying principles of military necessity and humanity. It is suggested, however, that there are existing rules of customary law that can be derived from state practice. There is unambiguous state practice to demonstrate that armed forces have, over the centuries, directed attacks against legitimate human targets without regard to minimum use of force rules, except as an integral element of the proportionality test, and that states have regarded such acts as lawful.[34] The fact that such provisions are not referred to in the ICRC CIHL Study or in IHL treaty provisions is simply irrelevant, as these are concerned essentially with restrictions not permissions. Moreover, bearing in mind the highly desired military benefits of surprise, the fact that military personnel do not have an unlimited choice of weapons, the fact that most weapons used in combat are designed to disable or kill combatants, and the limited time available for combat decision making, it is unlikely that a legal norm purporting to require soldiers to capture or wound lawful human targets would be viable. That being said, one can certainly envisage situations, particularly in occupied territory or in non-international armed conflicts, where, for reasons of policy, military personnel will be directed to take risks to ensure proper target identification or to limit incidental casualties or even to limit death or injury inflicted on opposing forces.

5. ASSESSMENT OF PROCESS AND RESULT

The ICRC has a right to use any process it chooses to develop its preferred legal position on an IHL issue. It could, for example, develop an opinion relying entirely on the views of its own lawyers. The ICRC is also entitled to pay such regard as it wishes to the views of external experts, and it is entitled to choose the experts it wants to involve in a consultative process. The author was involved in all of the expert meetings convened by the ICRC and the Asser Institute. He was not privy to discussions within the ICRC. As one of the participating external experts, it was his impression that the ICRC officials involved in developing the DPH Guidance assigned more importance to developing what, in their view, was an accurate and

34. The dogmatism of the above assertion is tempered by the fact that the author has not gathered the necessary empirical evidence to support it. It is, however, substantiated to a degree by wide and relevant reading over the years. One might object to the assertion by observing that there is customary law that prohibits torture even if it is too frequently practiced. That is true, but states deny they practice torture. They do not deny it is prohibited.

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comprehensive interpretation of the law relevant to the DPH issue and less importance to developing an interpretation of the law which would win agreement by consensus, particularly if such consensus could only be obtained by omitting discussion of some points on which general agreement was impossible and by softening the sharp edges on other points. Helpful omission of the unessential and occasional reliance on creative ambiguity does tend to foster consensus and there are times when consensus is desirable. Consensus is particularly important when the institution developing guidance on a legal issue wishes to persuade decision makers in other institutions to accept and apply that guidance. Bearing in mind that many of the experts involved in the DPH expert process were either relatively senior advisers to national governments or established experts in IHL whose writings might be expected to have some influence, it is unfortunate that more effort was not devoted to obtaining general agreement on the DPH issue, even if the end result had been a document with fewer recommendations and a few ambiguities.

No document will ever be perfect in the eyes of all concerned parties. The areas in the DPH Guidance which appear to have generated most controversy concerned the composition of armed groups (whether they should be limited to persons engaged in DPH on a continuous basis); the application of the definition of DPH (whether it should include IED makers and those involved in storing IEDs); and the restraints on the use of force in direct attack (whether the existing provisions were adequate or whether there was a continuing requirement to also assess the use of force in accordance with the principles of military necessity and humanity). The issue of restraints on the use of force in direct attack as addressed in the DPH Guidance goes far beyond the DPH issue itself. It does merit further discussion. It is suggested, however, that it could not have been resolved acceptably within the confines of the DPH expert discussions and that it was unnecessary to attempt to resolve it within the DPH Guidance. Deletion of the relevant recommendation or a rewording to simply refer to the limits imposed by IHL on specific methods and means of warfare and the possible limits imposed by other branches of international law would have resulted in a major step towards consensus. A little more reliance on creative ambiguity towards the composition of organized armed groups and on whether or not persons involved in the production and storage of IEDs were engaging in DPH would also have contributed to a possible consensus.

The ICRC is to be commended for making possible an extended and thoughtful discussion on DPH, an extremely important IHL issue. The DPH Guidance, together with the various papers and comments generated by the expert process will contribute to much better informed decision making on DPH issues in future. One can expect the DPH Guidance to have a substantial persuasive effect outside the ICRC. It is unlikely the guidance will be adopted in totality by all legal advisers to foreign ministries and defence departments. These legal advisers will use those parts of the DPH Guidance which they find persuasive and discard the rest. The recommendation and commentary in the guidance concerning restraints on the use of force in direct attack, unfortunately, will probably be the part most frequently discarded.

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