

Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives.¹⁹⁸

5.7 COMBATANTS

In general, combatants, whether privileged or unprivileged, may be made the object of attack, provided they have not been placed *hors de combat*.

5.7.1 Armed Forces and Groups and Liability to Being Made the Object of Attack. Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities.¹⁹⁹ This is because the organization's hostile intent may be imputed to an individual through his or her association with the organization. Moreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.²⁰⁰

Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack.²⁰¹ For example, combatants who are

63 miles up the Red River Valley from Hanoi that was capable of supplying seventy-five percent of the electricity for Hanoi's industrial and defense needs. Without question, it was a valuable target. ... The Lang Chi hydroelectric facility was attacked by Air Force F-4 Phantoms using LGB [laser-guided bombs] on 10 June 1972. They placed twelve 2000-pound LGB through the roof of the 50-by-100-foot building, thereby destroying the electric generating plant without breach of the dam, despite the fact that the roof of the power plant was 100 feet below the top of the dam.”).

¹⁹⁸ For example, Department of Defense, *Report to Congress: Kosovo/Operation Allied Force, After-Action Report*, 82 (Jan. 31, 2000) (“Following the end of Operation Allied Force, NATO released an initial assessment of their attack effectiveness against a number of targets. These targets destroyed or significantly damaged include: ... • Fifty-seven percent of petroleum reserves; • All Yugoslav oil refineries”); Department of Defense, *Report to the Senate and House Appropriations Committees regarding international policies and procedures regarding the protection of natural and cultural resources during times of war*, Jan. 19, 1993, reprinted as Appendix VIII in Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* 201, 204 (1993) (“Similarly, natural resources that may be of value to an enemy in his war effort are legitimate targets. The 1943 air raids on the Ploesti oil fields in Romania, and the Combined Bomber Offensive campaign against Nazi oil, were critical to allied defeat of Germany in World War II, for example. What is prohibited is unnecessary destruction, that is, destruction of natural resources that has no or limited military value.”).

¹⁹⁹ See, e.g., ICRC AP COMMENTARY 1453 (¶4789) (“Those who belong to armed forces or armed groups may be attacked at any time.”); GREENSPAN, *MODERN LAW OF LAND WARFARE* 57 (explaining that “as members of the armed forces [non-combat military personnel except for medical personnel and chaplains] are legitimate objects of attack by the enemy,”).

²⁰⁰ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009) (noting that “many members of the armed forces who, under different circumstances, would be ‘fighters’ may be assigned to non-combat roles at the time of their apprehension” and that “[t]hese individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure.”), *abrogated on different grounds by Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011).

²⁰¹ W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, *Executive Order 12333 and Assassination*, Nov. 2, 1989, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3411, 3413 (“Combatants are liable to attack at any time or place,

standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.²⁰²

5.7.1.1 *U.S. Practice in Declaring Forces Hostile*. In DoD practice, an armed force or group may be designated as hostile (also known as declaring the force hostile) in rules of engagement. This means that personnel to whom such rules of engagement apply are authorized to attack the members of the group. In DoD practice, the authority to designate a group as hostile has been limited to only certain officials.²⁰³

5.7.2 Categories of Persons Who Are Combatants for the Purpose of Assessing Their Liability to Attack. The following categories of persons are combatants who may be made the object of attack because they are sufficiently associated with armed forces or armed groups:

- members of the armed forces of a State;²⁰⁴
- members of militia and volunteer corps;²⁰⁵

regardless of their activity when attacked. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support; or functioning as staff planners. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such.") (citations omitted).

²⁰² For example, 101st Airborne ROE Card, Iraq (2003), reprinted in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, 1 LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 - 1 MAY 2003) 315-16 (2004) ("1. Fire at all members of forces DECLARED HOSTILE. You may immediately fire upon any force that you know to be hostile. ... **1. Facts:** An enemy unit maneuvers within your weapon range. **Response:** Shoot to eliminate the threat and accomplish the mission. **2. Facts:** An unarmed enemy soldier sees you and does nothing but stare at you. **Response:** Shoot to eliminate the threat. The soldier is a member of a Hostile Force and is lawful target.").

²⁰³ For example, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, A-2, ¶2(b) (June 13, 2005), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 94 (2014) ("Once a force is declared hostile by appropriate authority, U.S. forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3."); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, *Standing Rules of Engagement for US Forces*, A-12, ¶6 (Jan. 15, 2000), reprinted in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, *Rules of Engagement (ROE) Handbook for Judge Advocates* 96 (May 1, 2000) ("6. Declaring Forces Hostile. Once a force is declared hostile by appropriate authority, US units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and as necessary declaring a force hostile is a matter of the utmost importance. All available intelligence, the status of international relationships, the requirements of international law, an appreciation of the political situation, and the potential consequences for the United States must be carefully weighed. The exercise of the right and obligation of national self-defense by competent authority is separate from and in no way limits the commander's right and obligation to exercise unit self-defense. The authority to declare a force hostile is limited as amplified in Appendix A of this Enclosure.").

²⁰⁴ Refer to § 4.5 (Armed Forces of a State).

²⁰⁵ Refer to § 4.6 (Other Militia and Volunteer Corps).

- participants in a *levée en masse*;²⁰⁶
- persons belonging to non-State armed groups;²⁰⁷ and
- leaders whose responsibilities include the operational command and control of the armed forces or of a non-State armed group.²⁰⁸

5.7.3 Persons Belonging to Non-State Armed Groups. Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.²⁰⁹

5.7.3.1 *Formal Membership*. Formal membership in an armed group might be indicated by formal or direct information or by other types of information.

In some cases, there might be formal or direct information indicating membership in the group. This might include:

- using a rank, title, or style of communication;
- taking an oath of loyalty to the group or the group’s leader;
- wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or
- documents issued or belonging to the group that identify the person as a member, such as membership lists, identity cards, or membership applications.²¹⁰

Although in some cases this type of formal or direct information might be available, in many cases it will not be available because members of these groups seek to conceal their association with that group. In such cases, the following types of information might indicate that a person is a member of a non-State armed group:

²⁰⁶ Refer to § 4.7 (*Levée en Masse*).

²⁰⁷ Refer to § 5.7.3 (Persons Belonging to Non-State Armed Groups).

²⁰⁸ Refer to § 5.7.4 (Leaders).

²⁰⁹ Cf. *Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010) (“The district court seemed to think it important to determine Al-Adahi’s motive for attending the al-Qaida training camp. We do not understand why. Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a *fatwa* announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida.”).

²¹⁰ Cf. *Alsabri v. Obama*, 684 F.3d 1298, 1304-05 (D.C. Cir. 2012) (upholding a district court’s determination that petitioner was part of the Taliban, al-Qaida, or associated forces, including by considering “an English translation of a document appearing to be Alsabri’s application to attend an al Qaeda training camp” and “an English-language translation of a 92-page collection of documents that the government maintains were internal Taliban or al Qaeda records” that “were captured by Coalition forces from the ‘Director of Al-Qa’ida Security Training Office,’”).

- acting at the direction of the group or within its command structure;
- performing a function for the group that is analogous to a function normally performed by a member of a State’s armed forces;
- taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation;²¹¹
- accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access;²¹²
- traveling along specific clandestine routes used by those groups;²¹³ or
- traveling with members of the group in remote locations or while the group conducts operations.²¹⁴

5.7.3.2 *Functional Membership*. Some non-State armed groups might not be organized in a formal command structure, as generally is required for POW status during international armed conflict.²¹⁵ Such groups might lack a formal distinction between those

²¹¹ Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

²¹² Cf. *Alsabri v. Obama*, 684 F.3d 1298, 1306 (D.C. Cir. 2012) (“[I]t is difficult to believe that ‘Taliban fighters would allow an individual to infiltrate their posts near a battle zone unless that person was understood to be a part of the Taliban.’”) (quoting *Alsabri v. Obama*, 764 F.Supp.2d 60, 94 (D.D.C. 2011)); *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (“In two prior cases, this Court has stated that staying at an al Qaeda guesthouse is ‘powerful—indeed ‘overwhelming’—evidence’ that an individual is part of al Qaeda. *Al-Adahi*, 613 F.3d at 1108 (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 873 footnote 2 (D.C. Cir. 2010)) (alterations omitted). The reason for that assessment is plain: It is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake, either by the guest or by the host.”).

²¹³ Cf. *Suleiman v. Obama*, 670 F.3d 1311, 1314 (D.C. Cir. 2012) (“There is no dispute that Suleiman’s travel was initiated at the suggestion of and facilitated by a Taliban recruiter, and that he traveled a well-worn path to Afghanistan frequently used by Taliban recruits. We have stated that such travel may indicate that an individual traveled to Afghanistan to join the Taliban.”) (citing *Al Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010)); *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (“[T]raveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda.”); *Al Odah v. United States*, 611 F.3d 8, 16 (D.C. Cir. 2010) (finding it significant that “Al Odah traveled to Afghanistan on a series of one-way plane tickets purchased with cash in a manner consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda”).

²¹⁴ Cf. *Hussain v. Obama*, 718 F.3d 964, 968-69 (D.C. Cir. 2013) (“Evidence that Hussain bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites — and may very well compel — the conclusion that he was loyal to those forces. We have repeatedly affirmed the propriety of this common-sense inference.”); *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (“Being captured in the company of a Taliban fighter and two al Qaeda members and Osama bin Laden bodyguards 12 miles from Tora Bora in December 2001 might not be precisely the same as being captured in a German uniform 12 miles from the Normandy beaches in June 1944. But it is still, at a minimum, highly significant. And absent a credible alternative explanation, the location and date of Uthman’s capture, together with the company he was keeping, strongly suggest that he was part of al Qaeda.”).

²¹⁵ Refer to § 4.6.3 (Being Commanded by a Person Responsible for His or Her Subordinates).

members and non-members who nonetheless participate in the hostile activities of the group.²¹⁶

An individual who is integrated into the group such that the group's hostile intent may be imputed to him or her may be deemed to be functionally (*i.e.*, constructively) part of the group, even if not formally a member of the group. The integration of the person into the non-State armed group and the inference that the individual shares the group's intention to commit hostile acts distinguish such an individual from persons who are merely sympathetic to the group's goals.²¹⁷

The following may indicate that a person is functionally a member of a non-State armed group:

- following directions issued by the group or its leaders;²¹⁸
- taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis;²¹⁹ or
- performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.

5.7.3.3 *Dissociation or Renunciation.* A person may not be made the object of attack based on his or her association with a non-State armed group if that association has clearly been severed. Relevant factors in determining when an individual has unambiguously ceased to be a member of a non-State armed group may include:

- whether the individual has formally ceased to be a member of the group, such as by filing relevant paperwork or by otherwise formally renouncing any allegiance to the group;
- whether there are concrete and verifiable facts or persuasive indicia that he or she has affirmatively returned to peaceful pursuits, such as by participating in a reconciliation program and swearing an oath of loyalty to the government; and
- the amount of time that has passed since the person participated in the activities of the group in question, if coupled with other indicia of dissociation or renunciation.²²⁰

²¹⁶ Compare § 4.7 (*Levée en Masse*).

²¹⁷ Compare § 5.8.3.2 (Examples of Acts Not Considered Taking a Direct Part in Hostilities).

²¹⁸ Cf. *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) (“[D]emonstrating that someone is part of al Qaeda’s command structure is sufficient to show that person is part of al Qaeda.”); *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010) (“When the government shows that an individual received and executed orders from al-Qaida members in a training camp, that evidence is sufficient (but not necessary) to prove that the individual has affiliated himself with al-Qaida.”); *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (“Evidence that an individual operated within al-Qaida’s command structure is ‘sufficient but is not necessary to show he is ‘part of’ the organization.’” (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010))).

²¹⁹ Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

²²⁰ Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through*

The onus is on the person having belonged to the armed group to demonstrate clearly and affirmatively to the opposing forces that he or she will no longer participate in the activities of the group.²²¹ Moreover, if persons who have dissociated from an armed group rejoin the group or fail to cease permanently their participation in hostilities, they may be made the object of attack.²²²

5.7.4 Leaders. Military leaders are subject to attack on the same basis as other members of the armed forces. Similarly, leaders of non-State armed groups are also subject to attack on the same basis as other members of the group. There is no objection to making a specific enemy leader who is a combatant the object of attack.²²³

Leaders who are not members of an armed force or armed group (including heads of State, civilian officials, and political leaders) may be made the object of attack if their responsibilities include the operational command or control of the armed forces. For example, as the commander-in-chief of the U.S. armed forces, the President would be a legitimate target in wartime, as would, for example, the Prime Minister of a constitutional monarchy. In contrast, the reigning monarch of a constitutional monarchy with an essentially ceremonial role in State affairs may not be made the object of attack.

In addition to leaders who have a role in the operational chain of command, leaders taking a direct part in hostilities may also be made the object of attack.²²⁴ Planning or authorizing a combat operation is an example of taking a direct part in hostilities.²²⁵

As a matter of practice, attacks on the national leadership of an enemy State have often been avoided on the basis of comity and to help ensure that authorities exist with whom peace agreements may be concluded.

Practice, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 (2012) (“Relevant factors in determining that an individual has ceased to be a member of an organized armed group include the amount of time that has passed since that individual has taken relevant action on behalf of the group in question, and whether he or she affirmatively has disassociated himself or herself from the organized armed group.”).

²²¹ Wolff Heintschel von Heinegg & Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 833, 844-45 (2010) (“Here, the Prosecutor-General takes the opportunity to identify different categories of lawful targets under the law of non-international armed conflict. As regards fighters belonging to a non-State party to the conflict, their qualification as lawful targets is not based on some form of legal status but on the mere fact of their functional integration into an organized armed group. If they are so integrated, they do not qualify as civilians even though they may eventually pursue civilian occupation. They only regain their civilian status if they clearly and irrevocably renounce their function in the organized armed group. Hence, the Prosecutor-General is not prepared to consider Taliban fighters to be lawful targets only insofar and for such time as they take a direct part in armed hostilities.”). Compare § 5.9.3 (Persons Who Have Surrendered).

²²² Refer to § 5.8.4.2 (No “Revolving Door” Protection); § 5.8.4.1 (Permanently Ceased Participation in Hostilities).

²²³ Refer to § 5.4.6.4 (Attacks on Specific Individuals).

²²⁴ Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

²²⁵ Refer to § 5.8.3.1 (Examples of Taking a Direct Part in Hostilities).

5.8 CIVILIANS TAKING A DIRECT PART IN HOSTILITIES

Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.

5.8.1 Civilians Taking a Direct Part in Hostilities – Notes on Terminology. This manual uses the phrase “direct part in hostilities” to indicate what activities cause a civilian to forfeit his or her protection from being made the object of attack. This usage does not mean that the United States has adopted the direct participation in hostilities rule that is expressed in Article 51 of AP I.

5.8.1.1 “Active” Versus “Direct”. The phrases “active part in hostilities” and “direct part in hostilities” have been used to describe when civilians forfeit their protection from being made the object of attack. As noted above, this manual uses “direct” rather than “active” in this context, although as discussed below, this usage should not be regarded as indicating a substantive difference between “active” and “direct.”

Common Article 3 of the 1949 Geneva Conventions refers to “[p]ersons taking no active part in the hostilities.” AP I and AP II use the phrase “direct part in hostilities.”²²⁶ In addition, AP I uses the phrase “direct part in hostilities” to address other situations apart from the protection of civilians.²²⁷

Although the words *active* and *direct* can mean different things in the English language, the terms have sometimes been treated as the same for the purpose of applying the direct participation in hostilities rule.²²⁸ One of the reasons for treating the terms the same is that although the English language version of the 1949 Geneva Conventions uses “active,” and the English language versions of AP I and AP II use “direct,” the French language versions of these treaties use the same word, “*directement*.”²²⁹ Because the English and French language versions

²²⁶ AP I art. 51(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”); AP II art. 13(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”).

²²⁷ See, e.g., AP I art. 43(2) (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities”); AP I art. 47(2) (“A mercenary is any person who ... [inter alia] (b) Does, in fact, take a direct part in the hostilities ...”).

²²⁸ See, e.g., Prosecutor v. Tadić, ICTY Trial Chamber, IT-94-1-T, *Judgment*, ¶¶614-15 (May 7, 1997) (“The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which: ... (iii) are committed against persons taking no active part in hostilities ... the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.”); Prosecutor v. Akayesu, ICTR Trial Chamber, ICTR-96-4-T, *Judgment*, ¶629 (Sept. 2, 1998) (“‘The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities’. This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of ‘persons taking no active part in the hostilities’ (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, ‘all persons who do not take a direct part or who have ceased to take part in hostilities.’ These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous.”).

²²⁹ GC art. 3, 973 UNTS 289 (“*ne participant pas directement aux hostilités*”).

of the 1949 Geneva Conventions, AP I, and AP II are equally authentic, States negotiating these treaties may not have intended a difference between “active” and “direct.”²³⁰

Another reason for treating the terms “active” and “direct” the same in this context is that they are understood to be terms of art addressing a particular legal standard, and there are a range of views as to what that legal standard means. Thus, there may be different views about what the underlying standard means, even when there is agreement on the appropriate term to describe that standard. Accordingly, there seems to be little value in distinguishing between the two terms for the purposes of applying this legal rule.

5.8.1.2 *AP I, Article 51(3) Provision on Direct Participation in Hostilities.*

Although, as drafted, Article 51(3) of AP I does not reflect customary international law, the United States supports the customary principle on which Article 51(3) is based.²³¹ 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.²³² But some States that are Parties to AP I may interpret and apply Article 51(3) of AP I consistent with the customary international law standard.

5.8.2 Persons to Whom This Rule Applies. For the purpose of applying the rule discussed in this section, “civilians” are persons who do not fall within the categories of combatants listed in § 5.7.2 (Categories of Persons Who Are Combatants for the Purpose of Assessing Their Liability to Attack). Accordingly, for the purposes of this section, “civilians” include:

²³⁰ See, e.g., GC art. 150 (“The present Convention is established in English and in French. Both texts are equally authentic.”); AP I art. 102 (“The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.”); AP II art. 28 (same).

²³¹ See John B. Bellinger, III, Legal Adviser, Department of State, *Unlawful Enemy Combatants*, Jan. 17, 2007, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 915-16 (“While we agree that there is a general principle of international law that civilians lose their immunity from attack when they engage in hostilities, we disagree with the contention that the provision as drafted in AP I [Article 51(3)] is customary international law.”); Michael J. Matheson, Deputy Legal Adviser, Department of State, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 (1987) (“We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities. This corresponds to provisions in articles 51 and 52[of AP I].”).

²³² See, e.g., Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 186 (2012) (“From the operational perspective, the feedback [on the ICRC’s interpretive guidance] was that the report was too rigid and complex, and did not give an accurate picture of State practice or (in some respects) of a practice to which States could realistically aspire.”); *Al-Bihani v. Obama*, 590 F.3d 866, 885 (D.C. Cir. 2010) (Williams, J., concurring) (“The work itself explicitly disclaims that it should be read to have the force of law. . . . Even to the extent that Al Bihani’s reading of the Guidance is correct, then, the best he can do is suggest that we should follow it on the basis of its persuasive force. As against the binding language of the AUMF and its necessary implications, however, that force is insubstantial.”).

- members of the civilian population;²³³
- persons authorized to accompany the armed forces;²³⁴ and
- members of the merchant marine and civil aircraft of parties to a conflict.²³⁵

5.8.2.1 *Persons Belonging to Hostile, Non-State Armed Groups*. Some States may choose to characterize persons who belong to hostile, non-State armed groups that do not qualify for status as lawful combatants as “civilians” who may not be attacked unless they are taking a direct part in hostilities. However, these States may also characterize the act of joining and remaining a member of an armed group that is engaged in hostilities as a form of taking a direct part in hostilities that continuously deprives these individuals of their protection from being made the object of attack.²³⁶

The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as “civilians” to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.²³⁷ Either approach may yield the same result: members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*. However, practitioners, especially when working with coalition partners, should understand that different legal reasoning is sometimes applied in reaching that result.

5.8.3 “Taking a Direct Part in in Hostilities”. Unlike the treaty definition of “military objective” for objects,²³⁸ the United States is not a Party to a treaty with a comparable provision defining taking a direct part in hostilities for the purpose of assessing what conduct renders civilians liable to being made the object of attack.

At a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy.²³⁹ Taking a direct part in hostilities extends beyond merely engaging in combat 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

²³³ Refer to § 4.8.1.5 (General Usage of “Civilian” in This Manual).

²³⁴ Refer to § 4.15 (Persons Authorized to Accompany the Armed Forces).

²³⁵ Refer to § 4.16 (Crews of Merchant Marine Vessels or Civil Aircraft).

²³⁶ Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 193 endnote 22 (2012) (“As discussed below, there is a range of views on whether individuals who pass the membership threshold lose their civilian status (and are therefore unprivileged belligerents) or remain civilians but are deemed to be continuously taking a direct part in hostilities and accordingly continuously lose their protections from being made the object of attack.”).

²³⁷ Refer to § 5.7.3 (Persons Belonging to Non-State Armed Groups).

²³⁸ Refer to § 5.6.3 (Objects That Are Military Objectives).

²³⁹ ICRC AP COMMENTARY 619 (“Thus ‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”).

conduct or sustain combat operations.²⁴⁰ However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort, such as by buying war bonds.²⁴¹

Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context, such as the weapon systems or methods of warfare employed by the civilian's side in the conflict.²⁴² For example, in some contexts, training and logistical support may be viewed as taking a direct part in hostilities, while in other contexts it might not.²⁴³ The following considerations may be relevant:²⁴⁴

²⁴⁰ See GUENTER LEWY, *AMERICA IN VIETNAM* 232 (1978) ("We know that on occasion in Vietnam women and children placed mines and booby traps, and that villagers of all ages and sexes, willingly or under duress, served as porters, built fortifications, or engaged in other acts helping the communist forces. It is well established that once civilians act as support personnel they cease to be noncombatants and are subject to attack.").

²⁴¹ Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 (2012) ("With respect to determining what it means to take 'direct part in hostilities,' as a threshold matter there seems to be a common view that direct participation in hostilities stands in contrast to support by a general population to a nation's war effort. Civilians who are contributing to a nation's war effort accordingly do not by dint of this alone lose their protection.").

²⁴² See Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report*, 35 (2005) ("Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.").

²⁴³ For example, Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 680-81 (2010) ("For example in Iraq, it has been noted, 'IED and suicide-bomber cells are essentially combatant units themselves,' where the most technically skilled bomb builder 'also doubles as a training instructor.' Further, 'bombers do not 'just turn up to their target'. They need a logistical infrastructure, which consists of individuals ... who provide everything from reconnaissance of the potential target ... to the provision of a safe house and food, and the explosives-laden vehicle or suicide belt.' ... To limit direct participation to persons who place or detonate explosives is an artificial division of what is fundamentally a group activity. ... The person who is key in planning and facilitating such deadly attacks must be a valid target as a direct participant in hostilities ...") (first and second ellipses in original).

²⁴⁴ Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 ("Any determination that a civilian is taking part in hostilities (and thus loses immunity from being made the object of attack) will be highly situational and needs to be made by a decisionmaker taking the following considerations into account: • Nature of the harm: Is the individual's activity directed at (i) adversely affecting one party's military capacity or operations or enhancing the capacity/operations of the other, or (ii) killing, injuring or damaging civilian objects or persons? • Causation/integration between action and harm: Is there a sufficiently direct causal link between the individual's relevant act and the relevant harm, or does the act otherwise form an integral part of coordinated action resulting in that harm? (Although it is not enough that the act merely occurs during hostilities, there is no requirement that the act be only a single causal step removed from the harm.) • Nexus to hostilities: Is the individual's activity linked to an ongoing armed conflict and is it intended either to disadvantage one party, or advance the interests of an opposing party, in that conflict? ... There is also a range of views about whether each of the foregoing three factors must be present in order to make a determination that an individual is directly participating in hostilities (or whether a 'totality of the circumstances' approach should govern), Moreover, there is a range of views concerning the

- the degree to which the act causes harm to the opposing party's persons or objects, such as
 - whether the act is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or
 - the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as
 - the degree to which the act is temporally or geographically near the fighting; or
 - the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
 - whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party's war effort, such as
 - the degree to which the act contributes to a party's military action against the opposing party;
 - 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;²⁴⁵
 - whether the act poses a significant threat to the opposing party;
- the degree to which the activity is viewed inherently or traditionally as a military one, such as
 - whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and

relevance of geographic and temporal proximity of an individual's actions to particular hostile acts in ongoing hostilities.”).

²⁴⁵ W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, *Executive Order 12333 and Assassination*, Nov. 2, 1989, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3411, 3416 (“Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation’s national security or war aims. Thus, more than 900 of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.”).

combat service support functions);²⁴⁶ or

- whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.

5.8.3.1 *Examples of Taking a Direct Part in Hostilities.* The following acts are generally considered taking a direct part in hostilities that would deprive civilians who perform them of protection from being made the object of attack. These examples are illustrative and not exhaustive:

- taking up or bearing arms against the opposing party, or otherwise personally trying to kill, injure, or capture personnel or damage material belonging to the opposing party,²⁴⁷ such as
 - defending military objectives against enemy attack (*e.g.*, manning an antiaircraft gun, acting as a bodyguard for an enemy combatant);²⁴⁸
 - acting as a member of a weapons crew;
 - engaging in an act of sabotage; or
 - emplacing mines or improvised explosive devices;
- preparing for combat and returning from combat;
- planning, authorizing, or implementing a combat operation against the opposing party, even if that person does not personally use weapons or otherwise employ destructive force in connection with the operation;²⁴⁹

²⁴⁶ Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1, 17 (2004) (“The argument that civilians are protected unless engaged in overtly aggressive acts like carrying weapons may be particularly difficult to maintain where armed groups are technically accorded civilian status by virtue of not being considered lawful combatants. To the extent that civilians fulfill the same function as combatants, either in the armed forces or as part of the organization of an ‘illegitimate’ nonstate actor, they are logically subject to targeting under the same provisions of international humanitarian law.”).

²⁴⁷ 2006 AUSTRALIAN MANUAL ¶5.36 (“Civilians are only protected as long as they refrain from taking a direct part in hostilities. ... Civilians bearing arms and taking part in military operations are clearly taking part in hostilities;”); ICRC AP COMMENTARY 618-19 (¶1943) (“It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.”).

²⁴⁸ 2004 UK MANUAL ¶5.3.3 (“Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so.”).

²⁴⁹ See Public Committee against Torture in Israel, *et al. v. Government of Israel, et al.*, HCJ 769/02, Israel Supreme Court Sitting as the High Court of Justice, ¶37 (Dec. 11, 2005) (“We have seen that a civilian causing harm to the army is taking ‘a direct part’ in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the ‘direct’ part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the

- providing or relaying information of immediate use in combat operations, such as
 - 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;²⁵⁰ and
 - acting as a guide or lookout for combatants conducting military operations;²⁵¹
- supplying weapons and ammunition, whether to conventional armed forces or non-state armed groups, or assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use,²⁵² such as
 - delivering ammunition to the front lines; or
 - outfitting and preparing a suicide bomber to conduct an attack.

5.8.3.2 *Examples of Acts Not Considered Taking a Direct Part in Hostilities.* The following acts are generally not considered taking a direct part in hostilities that would deprive civilians who perform them of protection from being made the object of attack. These examples are illustrative and not exhaustive:

- mere sympathy or moral support for a party's cause;
- general contributions made by citizens to their State's war effort (*e.g.*, buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces);
- police services (*e.g.*, police officers who maintain public order against common criminals

person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).”).

²⁵⁰ 2013 GERMAN MANUAL ¶518 (“Accordingly, civilians who perform concrete actions that constitute direct participation in hostilities (*e.g.* conducting military operations, transporting weapons and ammunition to combat units, operating weapon systems, transmitting target data that leads immediately to the engagement of a military objective, etc.) can be engaged as military objectives while performing such actions.”).

²⁵¹ *For example*, 101st Airborne ROE Card, Iraq (2003), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, I LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 - 1 MAY 2003) 315, 316 (2004) (“**7. Facts:** Your unit comes under fire, you notice a young civilian woman who appears to be pointing to the location where friendly troops are concealed, based on her actions, those locations are then targeted. **Response:** Shoot to eliminate the threat ...”).

²⁵² *See, e.g.*, United States v. Hamdan 6 (Dec. 19, 2007), *reversed on different grounds*, 696 F.3d 1238 (D.C. Cir. 2012) (“The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations [in the nearby town of Takta Pol and the more distant Kandahar]. ... Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of ‘direct participation.’”).

during armed conflict);²⁵³

- independent journalism or public advocacy (*e.g.*, opinion journalists who write columns supporting or criticizing a State's war effort);²⁵⁴
- working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State;²⁵⁵ or
- providing medical care or impartial humanitarian assistance.²⁵⁶

Although performing these activities does not make a person liable to being made the object of attack, performing these activities also does not immunize a person from attack if that person takes a direct part in hostilities or is otherwise lawfully made the object of attack.

5.8.3.3 *Taking a Direct Part in Hostilities and Standards for the Use of Force in Self-Defense*. In the practice of the United States, the U.S. armed forces have been authorized to use necessary and proportional force in self-defense in response to hostile acts or demonstrated hostile intent.²⁵⁷

In some cases, hostile acts or demonstrated hostile intent may also constitute taking a

²⁵³ Refer to § 4.23.1 (Police as Civilians).

²⁵⁴ Refer to § 4.24.1 (Status of Journalists – Generally Civilian). Cf. ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶47 (Jun. 13, 2000) (“Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.”).

²⁵⁵ BOTHE, PARTSCH, & SOLF, NEW RULES 303 (AP I art. 51, ¶2.4.2.2) (noting that during international armed conflict, “workers in defense plants or those engaged in distribution or storage of military supplies in rear areas, do not pose an immediate threat to the adversary and therefore would not be subject to deliberate individual attack”). However, these individuals assume the risk of incidental injury as a result of attacks against those factories. Refer to § 5.12.3.3 (Civilian Workers Who Support Military Operations In or On Military Objectives).

²⁵⁶ Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict, ¶I, attachment to Ash Carter, Secretary of Defense, *Memorandum re: Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict*, Oct. 3, 2016 (“Medical care during armed conflict is an activity that is fundamentally of a neutral, humanitarian, and non-combatant character.”).

²⁵⁷ For example, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, ¶6b(1) (June 13, 2005), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 95 (2007) (“Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.”); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, *Standing Rules of Engagement for US Forces*, Enclosure A, A-1 (Jan. 15, 2000), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA, OPERATIONAL LAW HANDBOOK 102 (2006) (“US forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.”).

direct part in hostilities. However, hostile acts and demonstrated hostile intent in some respects may be narrower than the concept of taking a direct part in hostilities. For example, although supplying weapons and ammunition in close geographic or temporal proximity to their use is a common example of taking a direct part in hostilities, it would not necessarily constitute a hostile act or demonstrated hostile intent.

On the other hand, hostile acts and demonstrated hostile intent in some respects may be broader than the concept of taking a direct part in hostilities. For example, the use of force in response to hostile acts and demonstrated hostile intent applies outside hostilities, but taking a direct part in hostilities is limited to acts that occur during hostilities. Thus, the concept of taking a direct part in hostilities must not be understood to limit the use of force in response to hostile acts or demonstrated hostile intent.

In the practice of the United States, offensive combat operations against people who are taking a direct part in hostilities have been authorized through specific rules of engagement.

5.8.4 Duration of Liability to Attack. There has been a range of views about the duration for which civilians who have taken a direct part in hostilities forfeit protection from being made the object of attack.²⁵⁸

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. Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection. There may be difficult cases not clearly falling into either of these categories, and in such situations a case-by-case analysis of the specific facts would be needed.²⁵⁹

5.8.4.1 Permanently Ceased Participation in Hostilities. If a civilian has permanently ceased participation in hostilities, then that person must not be made the object of attack because there is no military necessity for doing so.²⁶⁰ The assessment of whether a person

²⁵⁸ See, e.g., Nils Melzer, *Background Paper – Direct Participation on Hostilities under International Humanitarian Law – Expert Meeting of Oct. 25-26, 2004* 34 (“At one end of the spectrum were experts who preferred narrowly defining temporal scope and favoured strictly limiting loss of protection to the period where DPH is actually being carried out. At the other end were experts who said that, once a person had undertaken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack. However, opinions varied greatly and could not easily be divided into two groups supporting distinct positions.”).

²⁵⁹ Public Committee against Torture in Israel, *et al. v. Government of Israel, et al.*, HCJ 769/02, Israel Supreme Court Sitting as the High Court of Justice, ¶40 (Dec. 11, 2005) (“These examples point out the dilemma which the ‘for such time’ requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the ‘revolving door’ phenomenon, by which each terrorist has ‘horns of the altar’ (1 Kings 1:50) to grasp or a ‘city of refuge’ (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the ‘gray’ cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case.”).

²⁶⁰ Refer to § 2.3 (Humanity).

has permanently ceased participation in hostilities must be based on a good faith assessment of the available information.²⁶¹

For example, a civilian might have engaged in an isolated instance of taking a direct part in hostilities. This isolated instance is likely to have involved multiple acts, because taking a direct part in hostilities normally includes deploying or moving to a position of attack and exfiltrating from an attack.²⁶² However, if this participation was an isolated instance that will not be repeated, then no military necessity for attacking that person exists after he or she has ceased taking a direct part in hostilities. Accordingly, the civilian must not be made the object of attack after he or she has ceased taking a direct part in hostilities. However, there may be other legal consequences from this isolated instance of participation. For example, such civilians may, depending on the circumstances, be detained, interned, or prosecuted because of these actions.²⁶³

5.8.4.2 *No “Revolving Door” Protection.* The law of war, as applied by the United States, gives no “revolving door” protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time.²⁶⁴ Thus, for example, persons who are assessed to be engaged in a pattern of taking a direct part in hostilities do not regain protection from being made the object of attack in the time period between instances of taking a direct part in hostilities.²⁶⁵

²⁶¹ Refer to § 5.3 (Assessing Information Under the Law of War).

²⁶² Refer to § 5.8.3.1 (Examples of Taking a Direct Part in Hostilities).

²⁶³ Refer to § 4.18 (Private Persons Who Engage in Hostilities).

²⁶⁴ See also Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 689 (2010) (“Further, on one level the term ‘revolving door’ evokes the idea of a form of carnival shooting gallery, where soldiers must wait until an opponent pops out from behind a door to be shot at. At some point, the credibility of the law begins to be undermined by suggesting an opponent can repeatedly avail themselves of such protection.”).

²⁶⁵ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 692 (2010) (“However, given the lack of credibility associated with the term, there can be no ‘revolving door’ of protection. After the first involvement, any subsequent act demonstrating direct participation would start to provide the basis to believe that there is the beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities. Repetitious participation can be considered in determining if such persons are in reality continuously engaged in hostilities. When such participation occurs, affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities.”). Cf. Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 741, 765-66 (2010) (“In my view, an alternative interpretation of the treaty language is equally valid. According to this alternative view, the temporal element in the provision lies both in the phrase ‘unless and for such time’ and in the word ‘participates.’ ... If, however, a person engages in repeated acts of DPH, there is an evident artificiality in regarding that individual as having protected status during the intervals in between. Experience shows that during those periods a further act of direct participation by the persistent participator is likely to be in prospect, and the likelihood is that during those intervals he will be preparing himself for the next act, checking his equipment, obtaining any additional equipment or stores he may require, communicating with like-minded or otherwise involved individuals, refining his plan and so on. While some such activities may be DP in their own right, the more important point is that a person who is so engaged cannot be

A “revolving door” of protection would place these civilians who take a direct part in hostilities on a better footing than lawful combatants, who may be made the object of attack even when not taking a direct part in hostilities.²⁶⁶ The United States has strongly disagreed with posited rules of international law that, if accepted, would operate to give the so-called “farmer by day, guerilla by night” greater protections than lawful combatants.²⁶⁷ Adoption of such a rule would risk diminishing the protection of the civilian population.

5.8.5 Civilians Who Take a Direct Part in Hostilities and the Law of War. Although the concept of direct participation in hostilities may be discussed in contexts besides targeting, such as in the context of criminal liability or detention, there are often significant differences between “taking a direct part in hostilities” for targeting purposes and the standards used for assessing whether a civilian may be detained or prosecuted.

For example, whether someone may be made the object of attack for taking a direct part in hostilities is different from whether he or she may be prosecuted for his or her actions. In some cases, domestic criminal liability for support to enemy armed groups is much broader than what acts constitute “taking a direct part in hostilities.”

Similarly, the authority to detain enemy persons during wartime extends beyond detaining those who have taken a direct part in hostilities.²⁶⁸

5.9 PERSONS PLACED HORS DE COMBAT

Persons, including combatants, placed *hors de combat* may not be made the object of attack. Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape:

- persons in the power of an adverse party;
- persons not yet in custody, who have surrendered;
- persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and
- persons parachuting from aircraft in distress.

5.9.1 Hors de Combat – Notes on Terminology. *Hors de combat* is a French phrase that means “out of the battle.” It is generally used as a term of art to mean persons who may not be made the object of attack because they are out of the fighting and who therefore must be treated humanely.

equated with a civilian who remains uninvolved in the conflict. To do so is to place at risk the respect, based on law, to be accorded to the civilian population.”).

²⁶⁶ Refer to § 5.7.1 (Armed Forces and Groups and Liability to Being Made the Object of Attack).

²⁶⁷ Refer to § 4.18.3 (Private Persons Who Engage in Hostilities – Lack of the Privileges of Combatant Status).

²⁶⁸ Refer to § 4.8.3 (Civilians – Detention); § 4.4.2 (Combatants – POW Status During Detention).