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Fight, Forge, and Fund: Three Select Issues on Targeting of Persons

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Fight, Forge, and Fund: Three Select Issues on Targeting of Persons

*Colonel Dr. Eran Shamir-Borer**

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I. INTRODUCTION

Armed confrontations between states and non-state actors have received greater profile in recent years, regenerating debates over who may be targeted during hostilities. Questions relating to membership in the armed forces of non-state actors and the participation of civilians in hostilities have been given new life as the interpretation and application of the law of armed conflict (LOAC) are reassessed in light of the realities of conflicts such as those in Syria, Iraq, Lebanon, Yemen, and Gaza.

The twenty-first century has already produced a significant volume of perspectives on these questions. National and international courts have considered them in several cases, with the 2006 Israeli Supreme Court case *Public Committee Against Torture in Israel v. Government of Israel (Targeted Killings)* capturing a particularly prominent place in this discussion.¹ Academic publications have

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1. HCJ 769/02 Pub. Comm. Against Torture v. Gov't of Israel 2 IsrLR 459 (2006) (Isr.) [hereinafter Targeted Killings Case].

likewise dealt with this issue, many of them following the discussion encouraged by the International Committee of the Red Cross (ICRC) Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (ICRC Interpretive Guidance).² Of most importance, however, are the views expressed by states in various publications, usually in their military manuals: Canada (2001),³ the United Kingdom (2004),⁴ Australia (2006),⁵ Mexico (2009),⁶ Colombia (2009),⁷ France (2012),⁸ Germany (2013),⁹ Norway (2013),¹⁰ Israel (2015),¹¹ and the United States (2015).¹²

In this brief Article, I shall focus on a few specific issues that, in my mind, have particular relevance for contemporary and future armed conflicts, and with respect to which the debate is still ongoing: (a) the notion of “functional membership” in the armed forces of a non-state actor; (b) whether civilians employed in research and development projects qualify as direct participants in hostilities; and (c) whether civilians engaged in certain financial activities qualify as direct participants in hostilities.

2. NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009) [hereinafter INTERPRETIVE GUIDANCE].

3. OFFICE OF THE JUDGE ADVOCATE GEN., B-GJ-005-104/FP-021, JOINT DOCTRINE MANUAL: LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS § 406 (2001).

4. JOINT DOCTRINE & CONCEPTS CTR., JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT §§ 5.4.1, 15.6.5 (2004).

5. DEP’T OF DEF., AUSTRALIAN DEFENCE DOCTRINE PUBLICATION 06.4: LAW OF ARMED CONFLICT § 5.27 (2006).

6. SECRETARIA DE LA DEFENSA NACIONAL, MANUAL DE DERECHO INTERNACIONAL HUMANITARIO PARA EL EJÉRCITO Y F.A.M. (2009) [MANUAL OF INTERNATIONAL HUMANITARIAN LAW FOR THE ARMY AND THE AIR FORCE].

7. MINISTERIO DE DEFENSA NACIONAL, MANUAL DE DERECHO OPERACIONAL: MANUAL FF.MM 3-41 PÚBLICO 47-51 (2009) [MANUAL OF OPERATIONAL LAW].

8. MINISTÈRE DE LA DÉFENSE, MANUEL DU DROIT DES CONFLITS ARMÉS 31 (2012) [MANUAL OF THE LAW OF ARMED CONFLICTS]. It should be noted that the Manual stipulates that it “n’a qu’une valeur indicative et ne peut en aucun cas être considéré comme un texte de référence ayant force juridique.” *Id.* at 4 (explaining the manual is only meant to be informative and not legally binding).

9. FED. MINISTRY OF DEF., JOINT SERVICE REGULATION (ZDV) 15/2: LAW OF ARMED CONFLICT MANUAL §§303, 1308 (2013).

10. FORSVARSDEPARTEMENTET, MANUAL I KRIGENS FOLKERETT 51-58 (2013) [MANUAL OF THE LAW OF WAR].

11. STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS ¶¶ 264-70 (2015), <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> (last visited Mar. 17, 2018) [<https://perma.cc/8V42-TRAW>] (archived Mar. 17, 2018) [hereinafter 2014 GAZA CONFLICT].

12. DEP’T OF DEF., LAW OF WAR MANUAL § 5.7 (2016) [hereinafter DOD MANUAL]. The Manual only reflects the positions of the Department of Defense, although it was written with the support of additional departments.

II. "FUNCTIONAL MEMBERSHIP" IN THE ARMED FORCES OF A PARTY

Hostilities are normally waged between the armed forces of the parties to an armed conflict, whether they are states or non-state actors (in the latter case, the armed forces are often called "organized armed groups").¹³

Under the traditional rules of LOAC, members of armed forces are lawful targets of attack.¹⁴ When an armed conflict occurs between states, determining membership is regularly based on the premise that individuals in a state's armed forces wear uniforms and display fixed emblems. Accordingly, when a determination establishes that an individual is wearing a military's uniform, or that the individual signed up for the military, that individual may be targeted without further investigation.¹⁵ In such a scenario, it does not even matter what the individual's exact role in the armed forces is, since there is no requirement for the individual to actually engage in combat to be a lawful object of attack.¹⁶

Now, the ICRC Interpretive Guidance rejects the possibility of assessing targetability on the basis of formal membership in non-state armed forces on the assumption that such membership "is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards."¹⁷ The ICRC goes even further by arguing:

In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to "membership" within the meaning of IHL. In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family. In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly

13. See, e.g., INTERPRETIVE GUIDANCE, *supra* note 2, at 27–28. However, the term "organized armed group" sometimes refers to the non-state party as a whole, including its civilian components. See, for example, Prosecutor v. Tadić, Case No IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić]. For clarity, this Article will therefore use the term "armed forces."

14. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257, ¶ 78 (July 8).

15. Cf. Richard Baxter, *Human Rights in War*, 31 BULL. AM. ACAD. ARTS & SCI. 4, 9–10 (1977) ("In the past it has been assumed that members of the armed forces declare themselves to be combatants by wearing uniform and carrying arms openly.")

16. See, e.g., Morten Ruud, *The Term Combatant: An Analysis*, 24 MIL. L. & L. WAR REV. 425, 428 (1985); United Nations, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ¶ 36, www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (last visited Mar. 14, 2018) [<https://perma.cc/UTT7-7SSH>] (archived Mar. 14, 2018).

17. INTERPRETIVE GUIDANCE, *supra* note 2, at 32–33.

difficult to distinguish between a non-State party to the conflict and its armed forces.¹⁸

The ICRC's sweeping rejection of targetability on the basis of formal membership in non-state armed forces in all circumstances is actually quite perplexing. There are certainly instances in which non-state armed forces are more organized than state armed forces.¹⁹ Yet, the ICRC is only willing to accept targetability on the basis of membership for the latter, since there are instances in which the former are less organized than state armed forces. To add to the perplexity, the ICRC admits in the context of dissident armed forces that if "they remain organized under the structures of the State armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well."²⁰ If there is an exception for such non-state armed forces, why should others be treated differently?²¹ Finally, and most importantly, states and scholars alike accept the idea that formal membership in the armed forces of a non-state actor may be established.²²

18. *Id.* at 33.

19. For example, in 2014, it was argued that "ISIS is better organized, supplied and led than the Iraqi Army or the Sunni tribal militias." See Oliver North, *The Good News that Nobody Knows*, FOX NEWS (Nov. 3, 2014), www.foxnews.com/opinion/2014/11/03/good-news-that-nobody-knows.html (last visited Mar. 14, 2018) [<https://perma.cc/6EF6-39DB>] (archived Mar. 14, 2018); see also, e.g., The Sudan People's Liberation Army Act (2009); NICHOLAS BLANFORD, WARRIORS OF GOD: INSIDE HEZBOLLAH'S THIRTY-YEAR STRUGGLE AGAINST ISRAEL 111 (2011) (referring to Hezbollah's "arduous induction process"); cf. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 118–19 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005). It is not clear whether the ICRC's analysis would differ if it were to accept that in reality there are non-state armed forces which have formal and organized structures, equivalent to the way memberships is established within state armed forces.

20. INTERPRETIVE GUIDANCE, *supra* note 2, at 32.

21. Moreover, it is questionable whether the groups envisioned by the ICRC—those of "informal and clandestine structures"—which purportedly give weight to its assumption that non-state armed forces are often not sufficiently organized to treat them under the paradigm of formal membership, would even meet the organizational condition for the existence of a NIAC. Cf. Tadić, *supra* note 13, ¶ 70; G.I.A.D. Draper, *The Geneva conventions of 1949*, 114 RECUEIL DES COURS 59, 89–91 (1965); Eric David, *Le concept de conflit armé : enjeux et ambiguïtés*, in PERMANENCE ET MUTATIONS DU DROIT DES CONFLITS ARMÉS 55, 57–64 (Vincent Chetail ed., 2013).

22. See, e.g., MANUEL DU DROIT DES CONFLITS ARMÉS 31 (2012); 2014 GAZA CONFLICT, *supra* note 11, ¶ 264; THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 4 (Michael N. Schmitt, Charles H.B. Garraway & Yoram Dinstein eds., 2006); COMMENTARY ON THE ADDITIONAL PROTOCOLS TO THE GENEVA CONVENTIONS §4789 (Jean Pictet et al. eds., 1987); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 690–691 (2009) [hereinafter Watkin Opportunity Lost]; Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, 71 INT'L L. STUD. 39, 54 (1998); Brian J. Egan, *International Law, Legal Diplomacy, and the Counter-ISIL Campaign*, U.S. DEPT OF STATE (Apr. 1, 2016), <https://2009-2017.state.gov/s/l/releases/>

Indeed, many states and scholars find the ICRC's analysis in this regard to be neither persuasive nor reflective of customary international law. Rather, they hold the position that formal membership in armed forces is sufficient for determining the status of an individual as a lawful target.²³ At the same time, one may nevertheless wonder whether formal membership fully captures the notion of membership in all instances. In certain cases, including those in which the armed forces have no clear recruitment mechanisms, the "functional" approach might be appropriate; that is, an approach which analyzes the function an individual exercises and, on that basis, determines whether that individual may be considered a member of armed forces and thus may be targetable.²⁴ Under a functional approach, for example, an individual fighting on behalf of the armed forces may be considered a member thereof even in cases where he or she is not a *formal* member.

The functional membership theory has in fact been suggested in a number of sources. Indeed, the ICRC proposed a functional membership theory in its ICRC Interpretive Guidance.²⁵ In a report published in late 2016, the Obama administration presented its position on the subject, recognizing the possibility of both formal and functional membership as alternative bases for targeting an individual.²⁶ A similar position is found in the United States Department of Defense (DoD) Law of War Manual.²⁷ Literature has also supported theories of functional membership, with some scholars seeing it as an alternative existing alongside formal membership-based targetability.²⁸

remarks/255493.htm [https://perma.cc/9EXC-VUUF] (archived Mar. 17, 2018); see also Djamchid Momtaz, *Le droit international humanitaire applicable aux conflits armés non internationaux*, 292 RECUEIL DES COURS 9, 93 (2001).

23. See, similarly, Monika Hlavkova, *Reconstructing the Civilian/Combatant Divide: A Fresh Look at Targeting in Non-international Armed Conflict*, 19 J. CONF. & SEC. L. 251, 263 (2014). See also authorities cited in note 22.

24. This is true for both state and non-state armed forces. Nils Melzer, however, has argued that treaty law only recognizes formal membership in State armed forces. See Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 843–845 (2009). While it is true that most state militaries rely on formal membership, there is nothing in the Hague Regulations or in GC III which supports the arguments that these treaties *demand* such membership, thus rendering his argument unpersuasive.

25. INTERPRETIVE GUIDANCE, *supra* note 2, at 32–33.

26. THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf [https://perma.cc/49AE-YRU3] (archived Mar. 17, 2018) [hereinafter REPORT ON THE LEGAL AND POLICY FRAMEWORKS].

27. DOD MANUAL, *supra* note 12, §5.7.3.

28. See SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 360 (2012); David McBride, *Who is a Member: Targeted Killings against Members of Organized Armed Groups*, 30 AUST. Y.B. INT'L L. 47, 87 (2012); Hannes

Once we recognize the possibility of functional membership, the following question ensues: *what* amounts to functional membership? The ICRC's answer to this question has garnered significant attention in recent years and triggered much—and sometimes quite heated—discussion.²⁹ According to the ICRC:

[M]embership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict. Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”).³⁰

This ICRC demand for continuous combat function (CCF) has been criticized and—explicitly and implicitly—rejected by numerous states and scholars.³¹ Kenneth Watkin, for example, argues that the ICRC Interpretive Guidance defines “membership” in armed forces too restrictively, and thus limits the cases in which a member of an armed force could be targeted to an unrealistically narrow group of persons.³² Others note that as a matter of law, just as a member of a state's armed

Eechaute, *Non-international armed conflict: a trigger for the rules on targeting?*, UNIVERSITEIT GENT 70 (2016) https://lib.ugent.be/fulltxt/RUG01/002/272/228/RUG01-002272228_2016_0001_AC.pdf [<https://perma.cc/S9K9-FZT9>] (archived Mar. 17, 2018). See also PROVIDENCE NGOY WALUPAKAH & SANDRA MUYA MIYANGA, *LE DROIT DE LA GUERRE À L'ÉPREUVE DU CONFLIT ARMÉ EN RÉPUBLIQUE DÉMOCRATIQUE DU CONGO 197–198* (2015); Jordan J. Paust, *Operationalizing Use of Drones against Non-State Terrorists under the International Law of Self-Defense*, 8 ALB. GOV'T L. REV. 166, 168 (2015). Cf. Camille Marquis Bissonnette, *The Definition of Civilians in Non-International Armed Conflicts: The Perspective of Armed Groups*, 7 J. INT'L HUMAN. STUD. 129 (2016); Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 270 (2014).

29. A significant number of members of the group of experts requested their names be omitted from the to-be-issued report, objecting to the possibility of their affiliation with the stances stipulated in it. This led the ICRC to publish the document as reflecting its own views on the subject. See EMILY CRAWFORD & ALISON PERT, *INTERNATIONAL HUMANITARIAN LAW* 112 (2015).

30. INTERPRETIVE GUIDANCE, *supra* note 2, at 33.

31. See, e.g., Claire Landais, *Colloque Droit et OPEX: Intervention*, MINISTÈRE DES ARMÉES 11 (Nov. 2015); 2014 GAZA CONFLICT, *supra* note 11, ¶ 264, n.422; DoD MANUAL, *supra* note 12, §5.7.3; YORAM DINSTEIN, *NON-INTERNATIONAL ARMED CONFLICTS IN INTERNATIONAL LAW* 61–62 (2015); Chris De Cock, *Counter-Insurgency Operations in Afghanistan. What about the 'Jus ad Bellum' and the 'Jus in Bello': Is the Law Still Accurate?*, 13 Y.B. INT'L HUMANITARIAN L. 97, 118–119 (2010); William H. Boothby, *Direct Participation in Hostilities—A Discussion of the ICRC Interpretive Guidance*, 1 J. INT'L HUMAN. LEGAL STUD. 143, 154 (2010); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 24 (2010); SIVAKUMARAN, *supra* note 28, at 361; Egan, *supra* note 22. Cf. Jens David Ohlin, *Is Jus in Bello in Crisis?*, 11 J. INT'L CRIM. JUST. 27, 37 (2013) (considering CCF a “new category” and “arguably *lex ferenda*”).

32. See generally Watkin *Opportunity Lost*, *supra* note 22, at 641.

forces who does not ordinarily serve a combat role may be targeted at any time, so may similar members of non-state armed forces.³³ After all, armed forces have, over the course of history, always included members who do not exercise CCF, such as arms deals negotiators, band members, financial managers, quartermasters, liaison personnel, cooks, legal advisers, and so forth.

At the same time, the mere fact an individual is performing a function in the armed forces that is often conducted by a formal member of armed forces does not necessarily suffice for considering that individual a lawful target. For example, in certain armed forces cooking or repair services (e.g., plumbing and electricity) are now provided by external contractors despite being previously provided by members of the armed forces. It seems clear that individuals performing such functions would not be considered members of the armed forces, liable to attack at any time (especially when he or she provides such services to a range of customers). In other words, whether the function is often conducted by formal members in state armed forces is potentially relevant but not necessarily decisive.

In this regard, in the abovementioned Obama administration report, it is stipulated that determining whether a person is functionally a member of armed forces will thus not only include looking to “the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces” but also “whether that person is carrying out or giving orders to others within the group” and “whether that person has undertaken certain acts that reliably connote meaningful integration into the group.”³⁴ Building upon this report, how can we determine the existence—or lack—of an individual’s functional membership in armed forces?

In essence, in establishing functional membership, it would be appropriate to examine whether the individual’s function embodies “the critical agency relationship with others in the armed group, which is the LOAC justification for status-based targeting.”³⁵ I would like to suggest a number of substantive elements of potential relevance when assessing whether this is the case; the presence of each element is neither always necessary nor always sufficient, and this should not be regarded as an exhaustive list. First, one indication supporting the

33. See SIVAKUMARAN, *supra* note 28, at 361.

34. REPORT ON THE LEGAL AND POLICY FRAMEWORKS, *supra* note 26, at 20.

35. See Rachel E. VanLandingham, *Meaningful Membership, Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 121 (2013). Such agency relationship might be established if, for example, the individual’s conduct indicates that he or she is acting “as an agent of the belligerent group leadership for the purpose of engaging in hostile functions.” Geoffrey Corn, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Noninternational Armed Conflicts*, in COUNTERINSURGENCY LAW: NEW DIRECTIONS IN ASYMMETRIC WARFARE 58, 69 (William Banks ed., 2013).

conclusion that an individual is functionally a member of armed forces is the tasks the individual is executing. In this regard, there are tasks that are *usually* exercised by members of armed forces,³⁶ such as responsibility for acquiring weapons for the armed forces. The strength of the existence of such an element may depend on whether the function is seldom outsourced.³⁷ Second, a relevant indication is whether, and to what degree, the person is subject to an existing group's hierarchical structure—which is indeed important for ascertaining the existence of an organization in and of itself³⁸—such as being subject to orders and obligated to complete certain tasks. Third, physical location may constitute a pertinent indication,³⁹ such as use of the armed forces' facilities (e.g., offices) for conducting tasks. Fourth, there are certain acts and exercises that are often associated with joining armed forces. In addition to certain forms of oaths, it is possible to refer to basic training and certain refresher training courses.⁴⁰ There are other acts which are typical of persons who are members of armed forces, such as preparedness to fulfill any responsibility the armed forces requests of the individual.⁴¹ Fifth, the relationship of the individual with additional armed forces should also be taken into account.⁴²

In concluding this Part, it should be emphasized that there is a paucity in evidence of state practice and *opinio juris* regarding the necessary elements for functional membership in armed forces. Accordingly, it is difficult to achieve any definite answer on the necessary—or relevant—elements for functional membership. It will hence be of importance and interest to see how state practice develops in the years ahead.

36. Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 INT'L L. STUD. 181, 189 (2012).

37. Compare the discussion in the context of private military contractors. See Frauke Renz, *The Role of Private Military and Security Companies: Corporate Dogs of War or Civilians Operating in Hostile Environments*, 27 SWISS REV. INT'L & EUR. L. 305, 327 (2017); Simon Chesterman, 'We Can't Spy ... If We Can't Buy!': *The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'*, 19 EUR. J. INT'L L. 1055 (2008).

38. Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶ 195 (Int'l Crim. Trib. For the Former Yugoslavia July 10, 2008).

39. See VanLandingham, *supra* note 35, at 122–123.

40. Cf. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 64 (Int'l Crim. Trib. For the Former Yugoslavia Apr. 3, 2008).

41. See VanLandingham, *supra* note 35, at 125.

42. If an individual performing a function—or a few functions—for several different armed forces, the question will be whether he or she is a member of any of these forces, and if so, which.

III. CIVILIAN SCIENTISTS AND WEAPON SPECIALISTS AND DIRECT PARTICIPATION IN HOSTILITIES

Military power is highly dependent on the quality and quantity of means of warfare, and states and non-state actors alike are investing significant resources in an attempt to gain—or preserve—a technological edge over each other. This is not a new phenomenon, and it may be traced back to various instances in which parties to armed conflicts sought to gain the upper hand during the course of hostilities. The Manhattan Project is a well-known example in this regard: undertaken by the United States, the United Kingdom, and Canada in the 1940s, and involving many scientists who were not members of the respective states' armed forces, the project gave birth to an unsurpassable military capability—the first nuclear weapons—which brought about the submission of Japan and the end of World War II.

Similarly, with the ever-increasing complexity of weapons technology, the services of weapons specialists are increasingly being acquired by armed forces. Such specialists may assist in instructing the use of complex weapons, providing maintenance, and providing assistance in real-time employment circumstances. Indeed, it can often be the case that without the assistance of weapons specialists, a capability will be of little or no use to the armed forces.

In many instances, the individuals who are involved in research and development, as well as weapons specialists, are not members of the armed forces, and therefore qualify as civilians under LOAC. As a rule, civilians are protected from attack unless and for such time as they take a direct part in hostilities.⁴³ Nevertheless, is it possible to argue that such individuals are taking a direct part in hostilities?

Now, any serious analysis of direct participation in hostilities must begin with the nexus between the act or activity in question and the hostilities. Clearly, without such nexus there can be no direct participation in hostilities. Thus, persons involved in research, development, and maintenance activities do not qualify as direct participants in hostilities if their conduct is unrelated to the hostilities.⁴⁴ For example, scientists such as those of Raytheon, an American company responsible for the development of the Patriot surface-to-air missile system, do not qualify as persons directly participating in the hostilities of every armed conflict where the Patriot system is employed, even where their contribution leads to a substantial increase in military power. The work of Raytheon's Patriot

43. This rule of customary international law is reflected in Article 51(3) of Additional Protocol I. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 49(1), June 30, 1977, 1125 U.N.T.S 3.

44. Cf. JEAN-FRANÇOIS QUÉGUINER, INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW: BACKGROUND PAPER 18–19 (2003).

scientists is not related to the hostilities of a specific conflict. Rather, Raytheon was employed by the US Department of Defense to develop a new surface-to-air missile system as part of the ongoing effort by the United States to preserve its military superiority. Legally speaking, Raytheon's scientists were not taking part—directly or indirectly—in *any* hostilities. Indeed, a lack of nexus between the activity and the hostilities is the main reason many research and development activities do not qualify as direct participation in hostilities to begin with.

The same conclusion can be reached with regard to weapons specialists when their services are not provided in the context of particular hostilities. For example, when Raytheon sends its weapons specialists to assist armed forces in operating and maintaining the Patriot system not in the context of a specific armed conflict, they do not qualify as directly participating in hostilities, due to a lack of nexus between their activity and any hostilities.⁴⁵

However, the matter is arguably more complex when the acts conducted by the weapons research and development scientists and weapons specialists are being conducted in the course of an armed conflict for the sole purpose of influencing a belligerent's conduct of hostilities in that armed conflict.⁴⁶ In discussions on this issue, states, scholars, and other stakeholders tend to highlight different aspects they find pertinent in assessing direct participation in hostilities. It is to these contentions we now turn.

On the one hand, it has been contended that the most important question is whether the activity has solely "operational" effects, or whether it also provides a contribution at a "tactical" level.⁴⁷ A similar view was expressed in the ICRC consultation process on the notion of direct participation in hostilities, where a few experts argued that close causal proximity was needed between the act in question and the harm anticipated to result from it. Pursuant to this view, only scientists whose work involves such proximity are considered to be taking a

45. See Giulio Bartolini, *The Participation of Civilians in Hostilities*, in RULES AND INSTITUTIONS OF INTERNATIONAL HUMANITARIAN LAW PUT TO THE TEST OF RECENT ARMED CONFLICTS 321, 379 (Michael J. Matheson & Djamchid Momtaz eds., 2010); SECOND EXPERT MEETING: DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 6 (2004) [hereinafter SECOND EXPERT MEETING]; QUÉGUINER, *supra* note 44, at 6–7; INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW: SUMMARY REPORT 3 (2003). Nevertheless, such civilian workers assume the risks arising from the fact that the weapon factory itself may be regarded as a military objective and therefore lawfully targeted, subject to the rules of proportionality and precautions.

46. It is no coincidence, for instance, that the meeting laying the groundwork for the Manhattan Project took place on 18 December 1941, only a few days after the Japanese attack on Pearl Harbor. See VINCENT C. JONES, *MANHATTAN: THE ARMY AND THE ATOMIC BOMB* 35 (1985). Indeed, many weapon programs are launched, accelerated or amended to meet the concrete challenges and needs faced by a belligerent in a specific armed conflict.

47. See Bartolini, *supra* note 45, at 379.

direct part in hostilities.⁴⁸ Likewise, according to this position, weapons specialists assisting a party to an armed conflict in operating capabilities—such as a sophisticated weapon system to be employed at a tactical level, or providing maintenance for weapons systems to be employed imminently⁴⁹—would constitute direct participants in hostilities.⁵⁰ On the other hand, neither tactical effects nor causal proximity are requisite conditions for direct participation in hostilities. Indeed, it is widely accepted that direct participation in hostilities does not require tactical effects,⁵¹ whereas close causal proximity is likewise rejected by most authorities.⁵² To elaborate why the contrasting positions mentioned above are too narrow, it is apt to bring an example in this regard.

Consider a scenario where Arcadia is engaged in an ongoing armed conflict, in which its aircraft are ineffective due to the adversary's strong counter-air-defense capabilities. Consequently, many Arcadian planes and pilots are lost in action and the Arcadian military is having difficulty completing its most important missions. Concerned by this reality, a small group of civilian scientists specializing in electronic countermeasures (devices designed to deceive air-defense detection systems) approach the Arcadian Minister of Defense and offer their services: within six months, they intend to develop a system, while consulting with Arcadian fighter pilots, allowing Arcadian planes to strike the enemy's targets without any obstacle. The Ministry of Defense accepts their proposal and hires them so they can establish a special task force. Within a short period of time, they make significant progress.

Clearly, the case of the Arcadian scientists is very different from that of the Raytheon scientists. While both groups of scientists are

48. INT'L COMM. OF THE RED CROSS, FOURTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 49 (2006) [hereinafter FOURTH EXPERT MEETING].

49. Such allegations were made, for example, regarding the Vinnell Corporation, the contractor entrusted with training the Saudi Arabian National Guard. The civilians employed by the corporation performed significant functions during the first Gulf War and accompanied the armed force to the theatre of operations with the aim of providing further advice (particularly during confrontations in Khafji), and as a result they have been considered as civilians taking direct participation in hostilities. See Bartolini, *supra* note 45, at 368.

50. Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511 [hereinafter Schmitt Humanitarian Law]; see QUÉGUINER, *supra* note 44, at 17–19.

51. For example, with respect to issuing operational military orders; collecting operational intelligence; operational planning; and so forth. See NILS MELZER, INT'L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW: BACKGROUND PAPER 13 (2004); SECOND EXPERT MEETING, *supra* note 45, at 3; Schmitt Humanitarian Law, *supra* note 51, at 23.

52. See, e.g., DOD MANUAL, *supra* note 12, 229–30; NILS MELZER, INT'L COMM. OF THE RED CROSS, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 28 (2005); Schmitt, *supra* note 50, at 15–16.

composed of civilians, the Arcadian research and development project is closely related to the hostilities being conducted between Arcadia and its adversary. It was the operational paralysis suffered by the Arcadian air force during the hostilities which prompted the project, and the scientists involved received all the necessary assistance and support from the relevant components of the Arcadian Ministry of Defense and the Arcadian armed forces. Moreover, the scientists engaged in the project with the express intention of providing Arcadia a technological breakthrough expected to change the course of the conflict.

When civilians knowingly join ongoing hostilities in such a manner, it may be plausible to argue they are taking a direct part in hostilities and thus are rendering themselves lawful targets under LOAC. It should be noted in this regard that the abovementioned Manhattan Project is usually analyzed along these lines, considering its scientists were involved in ongoing hostilities to a significant extent.⁵³ An official US memorandum from 1989, for example, classifies the scientists involved in the project—as well as their German counterparts engaged in developing new types of rockets during World War II—as direct participants in hostilities, since they occupied “key positions in a weapons program regarded as vital to a nation’s national security or war aims.”⁵⁴ Several scholars likewise agree with this position.⁵⁵ Indeed, as the ICRC Interpretive Guidance acknowledges, such instances bring into question the aforementioned general claim that scientific research and development is at most “indirect” participation.⁵⁶

Weapon development may arguably constitute direct participation in hostilities even in less “game-changing” circumstances.⁵⁷ A case in

53. See JONES, *supra* note 46, at 35.

54. W. Hays Parks, Executive Order 12333 and Assassination 6 (Nov. 2, 1989). As a possible (although not decisive) indication of direct participation in such cases, the memorandum suggests taking into account whether the relevant specialist has been given immunity from military service on the basis that his or her value to his State’s war effort in his or her civilian position is greater than the value of him or her serving in the military. *Id.*

55. Several experts who participated in the ICRC consultation process are mentioned as supporting this position in the context of weapon design and development. See FOURTH EXPERT MEETING, *supra* note 48, at 49. For further support, see AVRIL McDONALD, THE CHALLENGES TO INTERNATIONAL HUMANITARIAN LAW AND THE PRINCIPLES OF DISTINCTION AND PROTECTION FROM THE INCREASED PARTICIPATION OF CIVILIANS IN HOSTILITIES 18–19 (2004); Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: Festschrift für Dieter Fleck 509 (Horst Fischer ed., 2004) [hereinafter Schmitt Direct Participation].

56. INTERPRETIVE GUIDANCE, *supra* note 2, at 53 n.122.

57. For example, Michael Schmitt suggests that “an individual performing an indispensable function in making possible the application of force against the enemy is directly participating”, and states further that “the appropriate test is whether that

point is the recent Iraq War, in which coalition forces were regularly confronted with large numbers of improvised explosive devices (IEDs) laid in various locations, causing many casualties. The IEDs were often designed and manufactured by civilians, and so discussion ensued over whether these civilians qualified as direct participants in hostilities. During the ICRC consultation process, several experts opined that this was an instance of direct participation, stressing the contribution made to the ongoing hostilities.⁵⁸ Additional scholars agreed with this analysis in two subsequent academic consultation processes,⁵⁹ as well as in various publications.⁶⁰

In conclusion, it appears that in certain instances a plausible argument can be made for the qualification of civilian weapons developers and weapon specialists as direct participants in hostilities. In determining whether this is the case, one must analyze all the relevant factors, and especially the existence and degree of the nexus between the act in question and the hostilities.

IV. CERTAIN FINANCIAL FUNCTIONS AND DIRECT PARTICIPATION IN HOSTILITIES

Military operations at all levels—strategic, operational, and tactical—are shaped by financing. Correct handling and budgeting of financial resources by the armed forces is thus a crucial part of the exercise of military power. Armed forces have historically established complex mechanisms for performing these financial functions, creating various duties for officers and other personnel. Some roles are general in nature and include managing payrolls, overseeing financial planning, reviewing policy, or monitoring financial systems. Other roles are more operational or tactical, including duties such as wiring funds for an impending operation or purchasing the requisite arms for it.

When the party to the conflict is a state, financial functions of these sorts are usually performed within the armed forces. Matters

individual is an integral facet of the uninterrupted process of defeating the enemy.” See Schmitt *Direct Participation*, *supra* note 55, at 529.

58. FOURTH EXPERT MEETING, *supra* note 48, at 49–50; NILS MELZER, INT’L COMM. OF THE RED CROSS, FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: EXPERT COMMENTS & ELEMENTS OF RESPONSE 28 (2008). *Contra* INTERPRETIVE GUIDANCE, *supra* note 2, at 54.

59. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIV., MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 113 (2013); TALLIN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 430 (Michael N. Schmitt ed., Cambridge Univ. Press 2017). Both Manuals regard such cases to be unsettled as a matter of law.

60. See generally Laurie Blank & Amos Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SEC. J. 45 (2010).

may be more complex, however, with respect to non-state actors. In some instances, those performing the aforementioned financial functions will be *formal* members of the armed forces. In other instances, they may be performed by individuals who are not formal members of the armed forces. Is such an individual a lawful target of attack? As described in Part II, functions performed by an individual for the armed forces may, depending on the circumstances, render him or her a *functional* member thereof. In the context of certain financial roles, one scholar opined:

[A] person could be seen as working within a non-State armed group if they were acting as the director of its finances. In other words, handling finances in a roughly analogous manner to State military forces. This would include members of organized armed groups carrying a 'finance' logistics function such as internally managing the resources for the armed group.⁶¹

Under this analysis, such individuals may be lawful targets as functional members of the armed forces.

It must be stressed, however, that looking at financial functions through the prism of membership in the armed forces is somewhat misleading. Following various domestic and international developments aimed at halting the financing of terrorist organizations,⁶² many non-state actors have creatively adapted their mechanisms of not only obtaining funds but also of handling and budgeting them once they are in their possession.⁶³ In certain instances it has therefore become difficult, if not impossible, to make analogies between the financial conduct of state armed forces and that of non-state actors. Nevertheless, such analogies are currently the prominent tool used to identify functional membership in the armed forces of non-state actors, and so those performing financial functions will often be seen as civilians in the eyes of the law. In turn, these situations raise the question of whether certain financial activities can qualify as direct participation in hostilities.

61. KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 309 (2016) [hereinafter WATKIN *FIGHTING*].

62. At the international level, the most prominent developments have been the International Convention for the Suppression of the Financing of Terrorism (1999), United Nations Security Council Resolutions 1267 (1999), 1373 (2001), 2161 (2014), 2170 (2014), 2178 (2014), 2199 (2015), 2253 (2015), 2322 (2016) and 2368 (2017), and the establishment of the Security Council Counter-Terrorism Committee. *See also* NICHOLAS RYDER, *THE FINANCIAL WAR ON TERRORISM: A REVIEW OF COUNTER-TERRORIST FINANCING STRATEGIES SINCE 2001* (2015); ROBERTO DURRIEU, *RETHINKING MONEY LAUNDERING & FINANCING OF TERRORISM IN INTERNATIONAL LAW* (2013); ARABINDA ACHARYA, *TARGETING TERRORIST FINANCING: INTERNATIONAL COOPERATION AND NEW REGIMES* (2009).

63. For an overview of the financial *modus operandi* of terrorist organizations such as Al Qaeda and the Islamic State, see ACHARYA, *supra* note 62, at 45–80; FINANCIAL ACTION TASK FORCE, *FINANCING OF THE TERRORIST ORGANISATION ISLAMIC STATE IN IRAQ AND THE LEVANT* (2015).

As was specifically mentioned in the Israeli *Targeted Killings* case, “a person who aids . . . by general strategic analysis, and grants . . . logistical, general support, including monetary aid” is not taking a direct part, but rather an indirect part, in hostilities.⁶⁴ This position is also reflected in scholarly literature, much of which supports the position that, in general, the mere fact that an individual makes monetary contributions to the armed forces does not render him or her a direct participant in hostilities.⁶⁵ The question might be more challenging, however, in more complex instances, and I would like to briefly discuss two of them: one where the function directly supports a specific military activity; and another where the individual is assisting the armed forces in moving funds across the battlefield for operational purposes.

Consider a hypothetical operation by the Islamic State (also known as ISIS) against the United States, in the context of the ongoing armed conflict between them. Planned by a special military unit of the Islamic State, the operation involves crashing an airplane into a civilian hospital situated in Iraq and run by a European humanitarian non-governmental organization. However, due to strict restrictions in Iraq on matters involving aircraft, the operation can only be carried out through purchasing an airplane and loading it with a large quantity of explosives. Since an airplane costs millions of USD, which the unit does not have, its commander contacts a wealthy Iraqi businessman who sympathizes with the ideology of the Islamic State. After ensuring he can be trusted, the commander tells the businessman about the planned operation and asks him to provide the funds needed for the purchase of the airplane as well as to register it in his name. The businessman enthusiastically agrees and begins making arrangements so that the funds can be transferred within a few days, with the attack scheduled to take place shortly thereafter. Fortunately, the phone call between the businessman and the Islamic State is tracked and eavesdropped, and neutralizing the businessman seems to be the only way to thwart the impending attack. May the businessman be targeted as a direct participant in hostilities?

Unlike the situations often referred to in the literature, as well as in the *Targeted Killings* case, the businessman hypothetical deals with a deliberate contribution to a specific attack. Maintaining that such instances amount to direct participation in hostilities appears to be uncontroversial. For example, the ICRC Interpretive Guidance lends support to this argument. While the Guidance maintains that

64. See, e.g., *Targeted Killings Case*, *supra* note 1, ¶ 35. See also Frederic Wiesenbach, *Uncertainty on Somalia's Beaches—The Legal Regime of Onshore Anti-Piracy Operations*, 19 J. CONFLICT & SEC. L. 85, 103 (2014).

65. See, e.g., Kenneth Watkin, *Targeting “Islamic State” Oil Facilities*, 90 INT'L L. STUD. 499, 509 (2014); Manon Ballesterio, *Les boucliers humains volontaires: des civils ne participant pas directement aux hostilités*, 41 REV. BELGE DE DROIT INT'L 265, 284 (2008).

providing the adversary with supplies and services or transporting weapons and equipment generally constitutes *indirect* participation, it recognizes that such activities amount to direct participation if “carried out as an integral part of a specific military operation designed to directly cause” harm such as injury, loss of life, or damage to property.⁶⁶ The United States DoD Law of War Manual does not deal with such situations specifically, but it encourages consideration of “the degree to which the act is connected to military operations”; “the degree to which the act contributes to a party’s military action against the opposing party”; “whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party”; and “whether the act is the proximate or ‘but for’ cause of death, injury, or damage to persons or objects belonging to the opposing party.”⁶⁷

Whether one adopts a perspective like that of the United States or an approach such as the ICRC’s, the businessman’s role in the Islamic State’s attack certainly meets the criteria of direct participation in hostilities. Much appears to depend on what the individual in question knows about his or her role in the operation as well as his or her level of involvement. For example, if the individual provides funds without knowing what will be done with them, or if the funds are transferred to the general financial pool of the armed forces, that individual would probably not be considered a direct participant in hostilities, since, as noted, general monetary aid does not suffice. However, as the businessman hypothetical shows, the analysis may be different in a case where the contribution goes towards a specific attack that the individual is aware of and intends to participate in, when the contribution is necessary for its execution.

Some questions may nevertheless remain with regard to the “for such time” condition. Even if the businessman is considered to be directly participating in hostilities, the temporal element of that participation must be considered and assessed. However, there are certainly instances in which this temporal condition would be met.⁶⁸ Such an instance may be where there is information that the person is aware of the planned attack, and has agreed to transfer funds in the very near future, but has not yet done so. In such a situation, the temporal requirement would without a doubt be met, and as a result it seems that person might be lawfully targeted under LOAC.

It is important to note that the question of whether a person funding a specific military operation may be regarded as directly

66. INTERPRETIVE GUIDANCE, *supra* note 2, at 53. See also Michelle Lesh, *Direct Participation in Hostilities*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 181, 185 (Rain Liivoja & Tim McCormack eds., 2016).

67. DOD MANUAL, *supra* note 12, at 229–230.

68. See generally Bill Boothby, “And For Such Time As”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL’Y 741 (2010).

participating in hostilities is different from the issue of classification of “war-sustaining objects” as military objectives,⁶⁹ as the two relate to separate issues. Defining whether an object constitutes a military objective, pursuant to the customary definition of military objectives, relates to whether the object provides the adversary an “effective contribution to military action” and whether attacking the object “offers a definite military advantage.”⁷⁰ Conversely, whether a person is directly participating in hostilities concerns other issues, most notably the nexus between the act or activities of the person and the hostilities.⁷¹ As a result, even those who reject the notion that war-sustaining objects might constitute military objectives may nevertheless agree that there are instances in which a person who funds a specific military operation meets the direct participation in hostilities criteria.⁷²

Additional, and more complex, questions arise with respect to individuals assisting the armed forces in moving funds across the battlefield for operational purposes. In light of domestic and international sanctions, as well as other measures taken to limit terrorism financing, such assistance has become essential for the ability of non-state actors to carry out their military operations. For example, following the gaining of control by the Islamic State of territories in Iraq and Syria, branches of banks in these territories were shut down, leaving the Islamic State unable to use the financial institutions in those states for moving money. As a result, the Islamic State established a network of confidants in the region charged with transferring funds to and from ISIS-held territories to finance ISIS activities, including its military operations. An elaborate *Wall Street Journal* article publicly revealed a small part of this system,

69. Such objects include, in particular, “the economic infrastructure used to generate revenue for an enemy’s armed forces.” See Ryan Goodman, *The Obama Administration and Targeting “War-Sustaining” Object in Noninternational Armed Conflict*, 11 AM. J. INT’L L. 663, 663 (2016). For contrasting views, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 109–110 (3d ed. 2016); Western Front, *Aerial Bombardment and Related Claims, Eritrea’s Claims* 1, 3, 5, 9–13, 14, 21, 25 & 26 (Eritrea-Ethiopia), 135 ILR 565, 121 (2005).

70. See, in this regard, Christine Byron, *International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage*, 13 Y.B. INT’L HUM. L. 175, 188 (2010); Robert Kolb, *Considérations sur l’application du droit international humanitaire par la Commission arbitrale Erythré/Ethiopie*, in *INTERNATIONAL LAW: NEW ACTORS, NEW CONCEPTS, CONTINUING DILEMMAS: LIBER AMICORUM BOŽIDAR BAKOTIĆ* 519, 538 (Budislav Vukas & Trpimir M. Šošić eds., 2010).

71. Such a difference is not only with regard to attacking persons as opposed to objects, but also with regard to targeting different classes of persons. For example, the criteria for attacking members of the armed forces is different from the criteria for attacking civilians taking a direct participation in hostilities. In principle, every member of the armed forces is a lawful target whereas only civilians who meet the criteria of taking direct part in hostilities may be targeted.

72. Cf. Robert McLaughlin, *An Australian Perspective on Non-International Armed Conflict: Afghanistan and East Timor*, 88 INT’L L. STUD. 293, 302 (2012).

specifically referring to the conduct of individuals who run exchange houses and shell companies:

Their network works on trust, with members honoring real-time money transfer orders between offices. People pay cash in one office and a recipient draws the equivalent funds at a distant locale, a Middle Eastern practice known as hawala that predates the modern banking system. [. . .] They settle their accounts by shuttling bank notes, often through war zones.⁷³

Clearly, general monetary assistance, such as transferring donations made by Islamic State sympathizers, does not constitute direct participation in hostilities. But, once more, whether a certain activity qualifies as direct participation will turn on the circumstances, and some situations are less clear-cut than others. For instance, what is the correct legal assessment where money changers are specifically asked to transfer funds closely connected to the military activity, such as transferring money to weapons suppliers?⁷⁴ What would our assessment be if these money changers have close relations with the armed forces, such as having designated offices in the bases of the armed forces in order to better facilitate discussion and the provision of financial services?⁷⁵ Would the answer differ in instances where the money changers know, on the one hand, precisely when the transferred money is needed for general financing of the group, and where, on the other hand, it is needed for concrete military actions? These are only some examples, and many others are possible.

There are no hard and fast answers to these questions. Rather, each instance must be assessed cautiously, taking all the relevant factors and circumstances into account. Indeed, a case-by-case analysis is often supported in legal doctrine;⁷⁶ there are no compelling reasons not to adopt a case-by-case approach in instances concerning individuals who move military funds across the battlefield. Finally, one should not rule out the possibility that a person may be directly participating in hostilities on behalf of parties to different armed

73. Margaret Coker, *How Islamic State's Secret Banking Network Prospers*, WALL ST. J. (Feb. 24, 2016), www.wsj.com/articles/how-islamic-states-secret-banking-network-prospers-1456332138 [<https://perma.cc/9VMK-8L39>] (archived Mar. 18, 2018).

74. The relevance of this example is evident in *Treasury Sanctions Senior Isil Financier and Two Money Services Businesses*, U.S. DEP'T TREAS. (Dec. 13, 2016), www.treasury.gov/press-center/press-releases/Pages/jl0684.aspx [<https://perma.cc/89XP-EBVX>] (archived Mar. 18, 2018).

75. Cf. *Coalition Forces Kill ISIS Financial Facilitator*, OPERATION INHERENT RESOLVE (June 23, 2017), www.inherentresolve.mil/News/Article/1227052/coalition-forces-kill-isis-financial-facilitator/ [<https://perma.cc/J7KY-LX6B>] (archived Mar. 18, 2018).

76. Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT'L L. & POL'Y 281, 289 (2010); Hin-Yan Liu, *Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company*, 15 J. CONFLICT & SEC. L. 141, 154 (2010); Schmitt Humanitarian Law, *supra* note 50, at 534.

conflicts or different parties to the same conflict. Indeed, there is nothing conceptually difficult regarding such a scenario.⁷⁷

V. CONCLUDING REMARKS

Soon after the turn of the century, the late Shabtai Rosenne—a former Legal Adviser to the Israeli Ministry of Foreign Affairs and one of the most highly respected international legal scholars of modern times—wrote that “[t]hrough the [20th] century . . . the international community, and with it international law, have undergone a continuous run of fundamental change, which became accelerated during the second half of the century. Cumulatively, these changes have led to the perplexity that so many of us feel today.”⁷⁸ Nearly two decades later, it would seem that the noted changes have only accelerated.

This Article has discussed three issues relating to the targeting of persons: functional membership in armed forces; the possibility of classifying persons involved in research and development projects, as well as weapons specialists, as direct participants in hostilities; and whether persons involved in particular financial activities may, in the appropriate circumstances, constitute direct participants in hostilities. Regarding each of these issues, it has been demonstrated that the legal analysis which should be applied is quite complex, and does not always lead to clear answers.

Nevertheless, it is hoped that, at the very least, the Article has demonstrated that the issues discussed warrant further discussion. In this regard, it is submitted that the question of functional membership in armed forces requires a robust assessment of the person’s function and relationship to the armed forces. Likewise, in regard to civilians involved in research and development projects, as well as weapons specialists, it is necessary to account for the fundamental differences in the roles persons play and consider the context where the particular role is being played. Only then is it possible to reach a correct legal answer to whether a particular civilian qualifies as a direct participant in hostilities. Similarly, in regard to persons conducting certain financial activities for the armed forces, it is difficult to contend that persons providing monetary assistance to armed forces never qualify as direct participants in hostilities. Here, too, there is an array of possibilities for how financial assistance may manifest, and there is no

77. Factually, it is entirely possible that a person may provide simultaneous—and even critical—financial services to multiple entities. Legally, there is no compelling reason why such services could not amount to direct participation in the hostilities of concurrent armed conflicts.

78. Shabtai Rosenne, *The Perplexities of Modern International Law: General Course on Public International Law*, 291 RECUEIL DES COURS 9, 25–26 (2001).

“one size fits all” answer to the question of direct participation in hostilities.