Extrapolation of Criminal Law Modes of Liability to Target Analysis Under International Humanitarian Law: Developing the Framework for Understanding Direct Participation in Hostilities and Membership in Organized Armed Groups in Non-International Armed Conflict.

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ABSTRACT

Direct participation in hostilities and membership in an organized armed group are contested and controversial concepts. Recent developments in military and legal doctrine suggest that a more practicable account may supplement the valuable work of the ICRC in its Interpretive Guidance on Direct Participation in Hostilities in order to guide target analysis in the unconventional and civilianized operational environment of contemporary non-international conflicts. The purpose of this article is to extrapolate criminal law models of accessorial liability and co-perpetration in order to elucidate the concepts of direct participation in hostilities and membership in an organized armed group. What is proposed is an intelligence-led framework for target analysis that is grounded in military doctrine and based on a mixture of objective and subjective criteria derived from criminal law. This can foster a better understanding of the social dynamic that sustains on-going fighting which limits the scope for arbitrary and erroneous targeting decisions in doubtful situations.

I. INTRODUCTION

This article seeks to develop our understanding of what constitutes direct participation in hostilities as well as *de facto* membership of an organized armed group by extrapolating criminal law models of participation and perpetration. A rationale for this proposal is to fill a gap in the ICRC's treatment of this topic in its Interpretive Guidance. Namely, this analysis will give consideration to the systematic approaches to linking individuals to groups and their activities embodied in the international criminal law relating to modes of liability, but without transplanting the criminal law burden of proof to a battle-field context. This synthesis is appropriate given that international criminal law has a pertinent regulatory connection with target analysis under international humanitarian law and is not necessarily restricted to high-level persons and large-scale international conflicts. This novel approach to target analysis is also feasible as it is grounded in contemporary military doctrine.

Essentially, this discussion aims to contribute to the discourse by putting the concepts of direct participation in hostilities and membership in organized armed groups on a clearer and firmer analytical footing for the benefit of military lawyers, intelligence analysts and military commanders engaged in targeting analysis at the operational and strategic levels of command within full-spectrum and civilianized operational environments. However, there is one major pre-requisite for this approach. Namely, that it can only practically apply to targeted operations that are planned at the operational level of command, and which occur in the context of a non-international armed conflict has has at least reached the common Article 3 threshold as elucidated in the *Boškoski* guidelines (which are briefly outlined in the conclusion) as this serves to confine status-based targeting (on the basis of membership in an organized armed group) to a high threshold of applicability.

II. TREATY-BASED LAW ON DIRECT PARTICIPATION IN HOSTILITIES

Humanitarian law requires parties to a conflict to distinguish between the civilian population and combatants.[1] This requirement is qualified by Article 51 paragraph (3) of AP I and Article

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1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Articles 48, 50, 51 of AP I; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Article 13.

13 paragraph (3) of AP II which both provide that civilians are to enjoy protection against attack 'unless and for such time as they take a direct part in hostilities'.[2] Given its status as a 'fundamental rule of international humanitarian law', [3] it is of concern that the principle of distinction rests on unclear and contentious foundations. As noted by the ICRC, this is compounded by the issue that 'a clear and uniform definition of direct participation in hostilities has not been developed in State practice'.[4] Furthermore, as the rules of non-international armed conflict do not provide for combatant status, it is unclear what constitutes membership in an organized armed group - a *de facto* status that deprives an individual of their civilian status and thus their immunity from attack on a continuous basis. In view of these uncertainties, the ICRC Interpretive Guidance attempted to contribute to our understanding of the modalities and parameters of immunity from attack by attempting to clarify the distinction between civilians directly participating in hostilities and civilians becoming members of organized armed groups. This is set out diagrammatically below.[5]

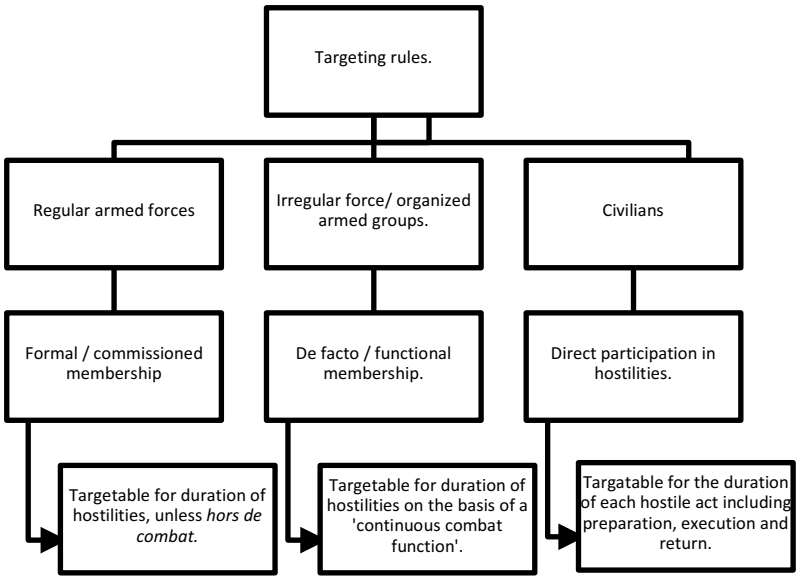
2 API, ibid, Article 51(3): Article 51 was adopted by 77 votes in favour, one against and 16 abstentions; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés), 1974-1977, CDDH Official Records Volumes I – VI, Volume VI, 16.

3 *Prosecutor v Martić* (Rule 61 Decision) ICTY-95-11-R61 (March 8 1996), 10.

4 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume 1: Rules, ICRC-Cambridge University Press, 2005) ('CIHL Study'), Rule 6, 23; *Prosecutor v Strugar* (Appeals Chamber Judgment) IT-01-42-A (17 July 2008), 66.

5 Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (International Committee of the Red Cross, Geneva 2009); see also 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' (2009 – 2010) 42 *New York Journal of International Law and Politics* 831, 854.

III. THE ICRC INTERPRETIVE GUIDANCE ON DIRECT PARTICIPATION IN HOSTILITIES



As this diagram suggests, the ICRC interpretive guidance attempts to make a clear distinction between temporary loss of immunity from attack on the basis of direct participation in hostilities (i.e. targeting on the basis of threat), and most significantly, the complete loss of immunity from attack on the basis of a 'continuous combat function' which equates with *de facto* membership of an organised armed group (i.e targeting on the basis of status). [6] In other words, individuals who are directly participating in hostilities do not lose their civilian status, but, rather, may only be lawfully attacked 'for such time' as they are directly participating in hostilities.

In contrast, where an individual is considered to be a *de facto* member of an organized armed group, they will no longer be regarded a civilian *per se*, but neither will they be regarded as a combatant in the sense of having combatant's privilege, meaning that they can be subject to attack at any time and in any place and they may also be prosecuted under domestic criminal law for fighting in hostilities. Targeting on the basis of this status is therefore problematic for two main reasons. Firstly, there remains uncertainty surrounding the

6 Melzer, 'Keeping the Balance Between Military Necessity and Humanity', ibid, 887. The rationale for making such a distinction is based on an interpretation of Article 51 paragraph (3) of AP I to the effect an act or even acts of participation in hostilities, without becoming a member of an organized armed group, should not result in a continuous loss of protection from attack, but rather a temporary loss of protection 'for such time' as an individual directly participates. ICRC (Interpretive Guidance), ibid, 44 – 45. This interpretation is premised on the notion that using past participation as an indicator of a future propensity to commit hostile acts in order to render a civilian targetable for the duration of the hostilities 'would blur the distinction between temporary activity-based loss of protection and continuous status-based loss of protection (due to continuous combat function)'.

precise scope and meaning of what constitutes a 'continuous combat function'. Secondly, the Interpretive Guidance does not expressly identify the threshold at which status-based targeting may come into effect. This next section will briefly deal with the first issue whilst the second issue will be dealt with in the concluding section.

A. Membership of an organized armed group on the basis of exercising a 'continuous combat function'

In contrast to membership of State armed forces or other officially constituted irregular groups in the context of international armed conflicts, the notion of membership in an organised armed group operating in the context of non-international armed conflicts is a notion that has so far proved difficult to define due to its context-specific and irregular nature, i.e. not recognized in domestic law or formalized in custom. The status of 'irregulars' is unclear, and so more analysis is needed in order to clarify the parameters of civilian immunity. Indeed, it is problematic that civilian status is defined in opposition to what are essentially equivocal general categories that may be labelled in various ways, such as 'terrorists', 'guerrillas', 'unlawful combatants', 'unprivileged combatants' or 'criminals'.

In practice, membership of, or incorporation within an organized armed group is problematic vis-à-vis irregularly constituted groups because it can be based on a wide range of idiosyncratic, and, in some cases, involuntary features, such as clan or tribal-based associations, political or religious affiliations, or ethnic or family ties.[7] Given the indeterminacy of these ties, the ICRC Interpretive Guidance proposes that 'membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse'.[8] Rather, the Interpretive Guidance attempts to make a categorical distinction between civilians participating in hostilities and membership of an organised armed group by adopting a narrow approach that equates membership with what it describes as a 'continuous combat function', or to put it another way, *de facto* or functional combatancy.

Hampson suggests that it is difficult to presume such functional combatancy on the basis of anything other than behaviour, and so this concept is just another type of behaviour test.[9] Whilst this is not disputed, it is suggested that the range of conduct from which we may

7 Nils Melzer, Targeted Killing in International Law (Oxford University Press, 2009) 321.
8 ICRC (Interpretive Guidance) (n 5) 33.
9 Françoise Hampson, 'Afghanistan 2001 – 2010' in Elizabeth Wilmshurst (ed), International Law and the Classification of Conflicts (OUP 2012), 199.

infer functional combatancy is by no means an uncontroversial issue, and, in part, this is because the significance that is to be attached to any given behaviour may be inextricably bound-up with the intention or motive underlying any given activity, the extent to which it can foreseeably cause harm, and the nature of its connection to a diffuse organisational structure geared towards hostilities. For example, as will be discussed below, when it comes to forms of joint criminal enterprise (JCE) or co-perpetration, it will be necessary not only to have intelligence going towards a subjective state of mind (i.e. intent to perpetrate a hostile act or to pursue a common hostile design), but that the acts performed are in some way directed to furthering an underlying common agreement, purpose or design to commit a harmful act.

Although the ICRC attempts to forge a clear distinction between direct participation in hostilities and membership in an organized armed group, the touchstone it uses to make this categorical distinction, namely the 'continuous combat function' element, is in part premised on the element of direct participation in hostilities, and, as will be discussed below, this category is itself highly contentious as it is regarded by some legal experts as being too narrow and nebulous to be applied in practice.

'Individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function'.[10]

Watkin argues that by creating the 'continuous combat function' test for membership, and then restricting its scope by tying it to a narrow definition of direct participation in hostilities not only disadvantages states engaged in hostilities with organized armed groups, but is unlikely to be found credible by the soldiers of states asked to apply such guidance.[11] Accordingly, the next section will briefly summarise and then critique the direct participation in hostilities criteria, which is broadly summed up by the dictum that 'function determines the directness of the part taken in the hostilities', i.e. only broader approaches to harm, causation and belligerency are capable of working in practice.[12] However, before that, it is worth noting that the Interpretive Guidance states that 'membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the

10 ICRC Interpretive Guidance (n 5) 25, 27, 33 34. At para 33: '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")'

11 Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance' (2010) 42 New York University Journal of International Law and Politics 655, 693 – 694.

12 *Public Committee against Torture v The Government of Israel et al., Israel, Supreme Court,* Judgment of 14 December 2006, HCJ 769/02, 35 – 37.

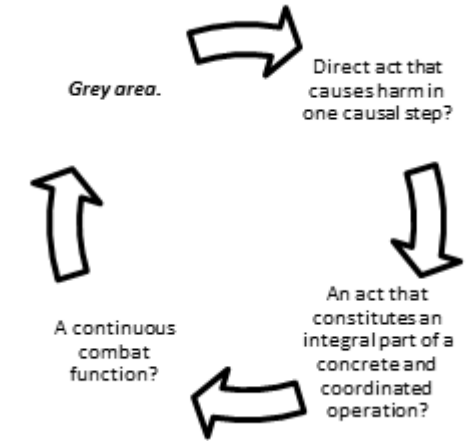
group'.[13] In other words, they become members where they 'go beyond spontaneous, sporadic, or unorganized direct participation in hostilities'. [14]

The Interpretive Guidance thus attempts to distinguish between direct participation and membership on the basis of the apparent frequency and timing of the acts in question. However, without intelligence, soldiers operating at the tactical level would find it near impossible to distinguish between a civilian who participates in hostilities on a spontaneous, sporadic or unorganized basis (or what Watkin describes as participating on a 'persistently recurring basis')[15] and a member of an organized armed group who performs a 'continuous combat function'. Indeed, the doctrinal notion of positive identification[16] suggests that absent a direct and immediate lethal threat, assessing the existence of a 'continuous combat function', and even distinguishing it from many supportive forms of direct participation in hostilities, is a process that can only take place in the context of targeted operations that are planned at the operational level of command with the benefit of accurate and reliable intelligence as this allows for a variety of objective and subjective considerations to be taken into account in order to overcome reasonable doubt that an individual is not directly participating in hostilities or a member of an organized armed group.[17] Furthermore, as will

13 ICRC (Interpretive Guidance) (n 5) 72.
14 Ibid.
15 Kenneth Watkin (n 11), 693–694.
16 Thus, there must be positive identification either of a hostile force or a hostile actor. Identification of a hostile actor is based on individual's manifest hostile action, ie the direct or indirect use of force, or hostile intent, ie the threat of imminent force. Major Mark Martins, 'Rules Of Engagement For Land Forces: A Matter Of Training, Not Lawyering' (1994) 143 *Military Law Review* citing US Army Headquarters, 10th Mountain Division, Operations Plan for Restore Hope, Annex N, at para 3b (1993): 'Hostile intent is the threat of imminent use of force against United States Forces or other persons in those areas under the control of United States Forces. Factors you may consider include: (a) weapons: are they present? what types?; (b) size of opposing force; (c) if weapons are present, the manner in which they are being displayed; that is, are they being aimed? are the weapons part of a firing position?; (d) how did the opposing force respond to United States Forces?; (e) how does the opposing force act toward unarmed civilians?'
17 Chairman of the Joint Chiefs of Staff, 'Instruction: No-Strike and The Collateral Damage Estimation Methodology' (13 February 2009) 15; Center for Law and Military Operations: Indeed, the US Department of Defense instruction on 'No-Strike and the Collateral Damage Estimation Methodology' goes as far as stating that '[i]t is an inherent responsibility of all commanders, observers, air battle managers, weapons directors, attack controllers, weapons systems operators, intelligence analysts, and targeting personnel to…[e]stablish positive identification and to accurately locate targets consistent with current military objectives'. Furthermore, the instruction defines the requirement of positive identification as 'the reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War …'; Center for Law and Military Operations, 'Legal Lessons Learned From Afghanistan and Iraq, Major Combat Operations: Volume I' (Report) (11 September 2001 – 1 May 2003) The Judge Advocate General's Legal Center & School, United States Army, Charlottesville, Virginia, 72, 98 <http://www.fas.org/irp/doddir/army/clamo-v1.pdf>; Center For Law And Military Operations, 'Legal Lessons Learned From Afghanistan And Iraq: Volume II, Full Spectrum Operations' (Report) (2 May 2003 To 28 June 2004) The Judge Advocate General's Legal Center & School, United States Army, Charlottesville, Virginia, 139 <http://www.fas.org/irp/doddir/army/clamo-v2.pdf>; Philippines, AFP Standing Rules of Engagement, Armed Forces of the Philippines, General Headquarters, Office of the Chief of Staff, 1 December 2005, 8(f); Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschift No. 27-412, Koninklijke Landmacht, Militair

be discussed further below, in view of the ICRC's recognition that a civilian may cause harm, and thus be deprived of their immunity from attack 'for such time' as their activities form an integral part of, and are closely linked to a specific and co-ordinated military operation, the concept of 'continuous combat function' may not be regarded as the sole and definitive determinant of deprivation of immunity from attack on a continuous basis. [18]

Rather, as it currently stands the Interpretive Guidance maintains the the existence of a 'grey area' that permits a broad margin of discretion to target civilians on a continuous basis. As indicated by the diagrams below, due to the indeterminacy as to what amounts to 'continuous' and 'direct' hostile acts, the Interpretive Guidance does not satisfactorily make a clear and unequivocal distinction between temporary activity-based loss of protection and continuous status-based loss of protection due to a continuous combat function.[19] This is particularly so where 'temporary acts' are performed on an intermittent or discontinuous basis.[20]



Juridische Dienst, 2005, 0548: This may be described as the emerging requirement of 'positive identification' which can be described as an approach that 'requires reasonable certainty that the object of attack is verified and confirmed as a legitimate military target'. Philippines, Philippine Army Soldier's Handbook on Human Rights and International Humanitarian Law, A Practical Guide for Internal Security Operations, 2006, 60 para (6): Thus at the very least, this may be viewed as requiring, as far as possible, that soldiers 'double-check' a target rather than being 'too hasty and careless in firing at anyone who [is thought to be] a combatant … [as] [t]here are times when it is too late to know that the supposed combatant is just carrying an airgun or a farm tool [or is a] friendly …'

18 Kenneth Watkin, above (n11) 691.

19 William Boothby, 'Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance' (2010) 1 International Humanitarian Legal Studies, 157.

20 Ibid, 154.

B. The elements of direct participation in hostilities: an overview

Firstly, the requisite 'threshold of harm' has to be met. In this regard, an act does not need to amount to a direct 'attack' *per se*, but rather an act reaches the requisite threshold where it is likely to affect adversely the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction. Secondly, there must be 'direct causation' between the act and the harm. In other words, there must be a direct causal link in the form of 'one causal step' between the act and the harm likely to result, either from that act or from a concrete and co-ordinated military operation that directly causes harm of which that act constitutes an integral part.[21] Thirdly, there must be a 'belligerent nexus' between the act and the harm caused. This means that the act must be specifically designed to cause directly the required threshold of harm in support of a party to the conflict and to the detriment of another.[22]

1. Threshold of harm

According to the Interpretive Guidance, the requisite 'threshold of harm' is met where an act is likely to affect adversely the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction.[23] Schmitt has criticized this criterion in that it is sets the threshold at too high a level and so does not adequately reflect military considerations. In particular, Schmitt suggests that this concept is under-inclusive for the reason that civilian contributions that generally enhance military capacity would not meet such a high threshold requirement. For example, the training and manufacturing processes involved in the use of improvised explosive devices are contributions to one side that will typically weaken its opponent, but do not *prima facie* fall within the ICRC's framework of direct participation in hostilities as they are insufficiently direct so as to be likely to adversely affect military operations or to inflict directly death, injury or destruction.[24] Furthermore, Schmitt notes that within any definition of harm, it was important to make a distinction between acts that were directly related to the hostilities and acts that are criminal in nature. [25]

21 ICRC (Interpretive Guidance) (n5), 55.
22 Ibid., 53.
23 Ibid., 47.
24 Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal,* 27. ICRC (Interpretive Guidance) (n 5) 53. Michael Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2009–2010) 42 New York University Journal of International Law and Politics 697, 719, 731.
25 ICRC (Interpretive Guidance) (n 5) 28.

This point is important in view of the fact that in hostilities, individuals and groups may take advantage of a breakdown in law and order to commit a range of petty and organized criminal offences, and this should not be confused with direct participation in hostilities or membership in an organized armed group.

2. One causal step

Although ICRC suggested that 'direct causation' means that harm be 'brought about in one causal step', this implies *a contrario* that there are also indirect forms of causation, but that these do not amount to causation for the purposes of participation in hostilities. To bolster this, the Interpretive Guidance initially embodies a tactical level focus by stating that an attack 'begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation', and that an attack 'ends once the individual in question has physically separated from the operation'.[26] The 'one causal step' criterion is thus a seemingly narrow approach for distinguishing sufficiently 'direct' from insufficiently 'indirect' acts of participation.The coherence and plausibility of this 'one causal step' criterion has been called into question quite severely by legal experts on grounds of logic and pragmatism. Most notably, Schmitt argues that it represents an under-inclusive and contradictory approach to causation and suggests states are only likely accept a broader conception of causation that is pertinent to 'the realities of 21st century battlefield combat.[27]

In terms of under-inclusivity, Schmitt notes that harm may be brought about by acts that are more than one step removed from an attack, and that indirectly contributing to capability may result in harm,[28] for example through weapons production, logistical support and scientific as well as technological research and development.[29] Indeed, Schmitt provocatively asserts that 'it is necessary to ... extend participation as far up and downstream as there is a causal link, and close the revolving door of participation'.[30] It is suggested that this particular proposition is far too broad to be acceptable from a humanitarian or even a military point of view, and, as will be discussed below, absent a positive identification of a hostile threat or intent, the harmful, causal and belligerent aspects of participation in

26 Ibid., 67.
27 Michael Schmitt, 'Deconstructing Direct Participation in Hostilities (n 24) 730, 738.
28 Ibid., 726.
29 Ibid., 738. Michael Schmitt, (n 24) 30. In terms of weapons production and voluntary human shields, Schmitt notes that the ICRC's treatment of the manufacture of improvised explosive devices (IEDs) 'reflects a troubling ignorance of the realities of 21st century battlefield combat' and suggests that 'States that engage in conflict on a frequent or intense scale will certainly reject the Guidance's treatment of various examples'.
30 Melzer (n 6) 868.

hostilities need to be circumscribed with further objective and subjective considerations derived from criminal law modes of liability in order to be sensible in practice.

Both Schmitt and other legal experts involved in the ICRC consultation process were not convinced by the ICRC's suggestion that the assembly and storage of IEDs as well as the purchase and smuggling of component parts do not directly cause harm, such as with the actual planting or detonating of IEDs, but are rather 'connected with the resulting harm through an uninterrupted causal chain of events' that are insufficient to amount to direct participation in hostilities.[31] To the contrary, Schmitt argues that this suggestion is not feasible in that assembly of IEDs will often constitute an 'integral part of subsequent operations almost certain to occur in the near future and relatively nearby', and so given the clandestine nature by which IEDs are emplaced, where there is intelligence relating to their assembly or storage then an immediate attack at this stage of the process may be 'the only option for foiling a later operation employing the device'.[32]

This bolsters Boothby's criticism that the ICRC's 'direct causation' criterion narrows the notion of direct participation in hostilities to overtly hostile activities that are recognizable only at the tactical level, rather than recognizing that hostile acts are likely to be achieved through a 'multiplicity of integrated steps', rather than 'one causal step', which can only feasibly be analysed and responded to at an operational level with the benefit of legal, political and military analysis.[33] Indeed, for a situation to amount to a common Article 3 non-international armed conflict, an organized armed group must at least have the ability to wage protracted hostilities, which implies that it has the ability to mount collective operations. However, as Schmitt points out, individuals can be deeply involved in collective operations without necessarily directly causing harm themselves. Accordingly, this is problematic as according to the ICRC's criteria, indirect command activities such as ordering or planning, and indirect support activities such as assembling and supplying weapons, might not constitute direct participation in hostilities.[34]

The 'one causal step' criterion is seemingly contradicted by an exception that is so broad that that it virtually nullifies it. [35] Namely, 'where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical

31 ICRC (Interpretive Guidance) (n 5) 54; Michael Schmitt, 'Deconstructing Direct Participation in Hostilities' (n 24) 731; Kenneth Watkin (n 11) 658.
32 Michael Schmitt, ibid.
33 William Boothby, (n 19) 159.
34 Michael Schmitt, 'Deconstructing Direct Participation in Hostilities' (n 24) 731.
35 Ibid., 730 – 731.

operation that directly causes such harm'.[36] It is suggested that the parameters of loss of immunity are thus extended from individual deployment in an attack to preparatory measures that are an integral part of such an attack. Nevertheless, as noted by Watkin, this indicates a narrow tactical focus in the assessment of direct participation in that 'preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities' and this could unduly serve to exclude general planning for future attacks that are executed in an opportunistic fashion.[37]

However, the Interpretive Guidance does not give any clear guidance on how to distinguish between activities that 'are of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act' from those activities that indirectly contribute to 'the general capacity to carry out unspecified hostile acts'.[38] Thus, whilst it may be an evidential challenge to identify and to understand the ways in which indirect support activities cause harm in conjunction with other acts that may be objectively construed as directly hostile, as the ICRC itself recognizes, they cannot be ruled out in absolute terms given that they may be deemed to be 'an integral part' of a 'co-ordinated military operation'. For example, the assembly and supply of weapons, the supply of information through an organized armed group's chain of command, or most significantly, ordering or planning an operation, may be regarded as being an integral part of a concrete and coordinated tactical operation that directly causes such harm. [39]

Furthermore, indirect support or command roles such as those just mentioned may not fit neatly within the narrow temporal parameters of the Interpretive Guidance which are framed as 'measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation'.[40] By way of example, the Interpretive Guidance states that 'civilians should be liable to direct attack exclusively during recognizable and proximate preparations, such as the loading of a gun, and during deployments in the framework of a

36 Michael Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (n 24), 30.
37 Kenneth Watkin, (n 11) 660; ICRC (Interpretive Guidance) (n 5) 66.
38 ICRC (Interpretive Guidance) (n 5) 66. Y Sandoz, C Swinarski and B Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC/Martinus Nijhoff, Geneva 1987) 34. The Interpretive Guidance is circular in the sense that it is merely an extended reformulation of the starting point set out in the Commentary to AP I of it being necessary to distinguish between activities that are part of 'combat and active military operations' and indirect activities that are part of the 'war effort'
39 Ibid., 36 & 38. In this way, it has been suggested that the notion of causation links in with the notion of temporal scope of participation, in that a civilian may cause harm 'for such time' as their act forms an integral part of, and is closely linked to a specific and coordinated military operation.
40 ICRC (Interpretive Guidance) (n 5) 65.

specific military operation'.[41] This reasoning is problematic in that it assumes the existence of that which has first to be established, namely the existence of acts that are 'recognizable' as direct participation in hostilities. Acts such as firing a weapon in self-defence or as part of the commission of a criminal offence may seem objectively hostile, whilst activities actuating in harm, such as clandestine weapons production or planning and logistics, may not be immediately 'recognizable' as harmful and thus within the scope of direct participation in hostilities, even where they are occurring on an ongoing basis.

3. Belligerent nexus

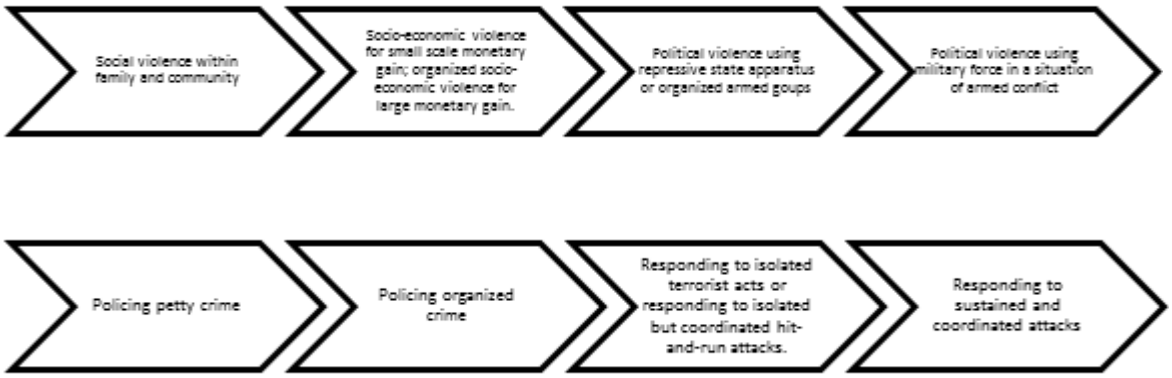
According to the Interpretive Guidance, for an act to amount to direct participation in hostilities it must have a 'belligerent nexus' or a connection with the surrounding hostilities, otherwise it should be dealt with using law enforcement measures.[42] Yet the Interpretive Guidance construes the notion of 'belligerent nexus' in a narrower fashion than that developed in international criminal law jurisprudence and is, therefore, not harmonious with this related and interconnected branch of public international law.[43]In particular, according to the Interpretive Guidance, to amount to direct participation in hostilities an act must not only be 'objectively likely' to injure or adversely affect the enemy, but it must also be 'specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'.[44]

Although the term 'specifically designed' connotes subjective intent, the Interpretive Guidance initially posits an objective standard that does not depend on the 'subjective' state of mind or 'hostile intent' of 'every participating individual'.[45] Indeed, where there is a direct and immediate threat, then according to the Interpretive Guidance subjective considerations are not generally relevant.[46]Thus, according to the Interpretive Guidance, the belligerent nexus should be deduced 'objectively' from the acts themselves. However, this is a rather crude behaviour test which does not help to resolve difficulties facing armed forces in the face of uncertain facts, or in other words, how to establish that a person to be targeted is member of an organised armed group that belongs to a party to the conflict. Again, the proposition that

41 Ibid.
42 Ibid,. 59.
43 Ibid,. 58 – 59. *Prosecutor v Kunarac et al.* (Appeals Chamber Judgment) ICTY-96-23&IT-96-23/1-A (12 June 2002), 58. *Prosecutor v Rutaganda* (Appeals Chamber Judgment) ICTR -96–3 (26 May 2003), 570.
44 ICRC (Interpretive Guidance), ibid, 58.
45 Ibid., 59.
46 Ibid., 58.

the belligerent nexus should be deduced 'objectively' from the facts themselves is to assume that which has to be first established, namely, what are the 'recognizable acts' from which one can reliably infer a belligerent nexus.

Despite the proposition of an objective standard, the ICRC necessarily qualifies this by suggesting that subjective considerations may be relevant in calling into question 'the belligerent nexus of their conduct', but only in 'exceptional cases'.[47] For example, this may be so 'when civilians are totally unaware of the role they are playing in the conduct of hostilities',[48]or situations involving self-defence or the commission of criminal acts unrelated to the surrounding hostilities. [49] However, in the context of unconventional and full-spectrum operational environment, subjective considerations may not be regarded as 'exceptional', but a key way, and in many cases, arguably the only way to overcome doubt as to participation or status and thus distinguish a continuum of violence [50] which may range from petty and organized crime, to isolated terrorists acts and then to combat activities. [51]



Indeed, the Interpretive Guidance actually states that '[m]any activities during an armed conflict lack a belligerent nexus even though they cause a considerable level of harm',[52] and furthermore that 'loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behaviour but a consequence of military necessity in the conduct

47 Ibid., 60.
48 Ibid.
49 Ibid., 61.
50 United Nations Human Settlements Programme (UN-Habitat) Global Reports on Human Settlements 2007: Enhancing Urban Safety and Security (UN-Habitat, 2007) 4, 7-8, 51, 8, figure 1.1.
51 US Department of the Army (Training and Doctrine Command) Counterinsurgency (COIN) Field Manual (FM) 3–24 and Marine Corps War fighting Publication (MCWP) 3-33.5 (Headquarters, Department of the Army, Washington, DC & Marine Corps Combat Development Command, Department of the Navy, Headquarters, United States Marine Corps, Washington, DC 15 December 2006), 1 – 142.
52 ICRC (Interpretive Guidance) (n 5) 60.

of hostilities'.[53] In this way, the Interpretive Guidance not only understates the vital practical importance of subjective considerations in unconventional operational environments, but does not indicate the modalities for distinguishing between those situations where subjective considerations should, as far as possible, be deduced in addition to doubtful activities, and those situations where the objective purpose of a 'recognizable act' can reliably and justifiably undergird the deprivation of immunity. As will now be discussed, military doctrine has responded to this challenge. This indicates that extrapolation of subjective elements associated with criminal law modes of participation and perpetration are both relevant and practical in establishing different forms of belligerent nexus as well as implementing the precautionary requirement under IHL to do everything feasible in the circumstances to verify that attacks are not directed at civilians.

IV. DOCTRINAL AND STRATEGIC APPROACHES TO CONTEMPORARY OPERATIONAL ENVIRONMENTS

Contemporary military doctrine suggests that where operational planners of offensive strikes, such as targeted killings by remotely piloted air systems, conventional air strikes or Special Forces, have the benefit of advanced intelligence, surveillance and reconnaissance capabilities (ISR), then this will allow for heightened standards of target analysis. Unless forces are acting in self-defence or instinctually to a stark life and death dilemma, that is where force is used in response to a concrete, specific and imminent threat to life or physical safety, then contemporary military doctrine suggests that it is both increasingly feasible and strategically important to ensure that tactical patience and persistent ISR make way for a more rigorous criteria-based approach to verifying hostile intent. [54] It will be suggested below that such criteria can and should be imported from international criminal law. This may serve to avoid intelligence flaws, manipulation, and positive identification errors whereby decision-makers erroneously presume civilian behaviour to be hostile or suspicious, or where they have differing interpretations of what it means directly to participate in hostilities or be a

53 Ibid., 61.

54 Interview with General John Allen, May 10, 2016, Washington, D.C. in Christopher Rogers, Rachel Reid & Chris Kolenda, The Strategic Costs of Civilian Harm – Applying Lessons from Afghanistan to Current and Future Conflicts (Report) (Open Society Foundations–Washington, D.C. June 2016). Amos Guiora, 'The Importance Of Criteria-Based Reasoning in Targeted Killing Decisions' in Claire Finkelstein, Jens David Ohlin, Andrew Altman, Targeted Killings: Law and Morality in an Asymmetrical World (Oxford University Press, 2012), 309 and 310.

member of an organized armed group.[55] In this way, clearer criteria may actually enhance effective operational decision making by promoting the correct identification and engagement of legitimate targets rather than allowing decision makers to act primarily on subjective perceptions about civilian behaviour.

In view of contemporary operational manuals, doctrine and rules of engagement, as well as modern information related capabilities, the 'fog of war', whereby information in warfare is limited, unreliable and uncertain because of the chaotic nature of combat and the opposing sides' efforts to deceive one another, for example with regards to their command structure and intentions, increasingly appears to be an outdated notion, especially in our modern information environment and with modern information related capabilities which enable heightened standards of target analysis as well as the graduated use of force.[56] Examples of contemporary military doctrine generally require detailed planning, assessment and positive identification of targets as well as mitigation procedures before proceeding with attacks so as to avoid the strategic costs associated with civilian harm, such as causing hostilities to escalate, weakening the legitimacy of military operations and acting as an obstacle to reconciliation. [57] Indeed, operational decisions in planned and unplanned targeted killings will usually benefit from direct access to detailed target information, such as visual recognition, the target's characteristics and analytical reasoning that links the target with a desired military effect or outcome. [58] It is critically important therefore to avoid positive identification errors or faulty assumptions within complex operational environments where organized armed groups conceal themselves within high density civilian populated areas and

55 Christopher Rogers, Rachel Reid & Chris Kolenda, The Strategic Costs of Civilian Harm – Applying Lessons from Afghanistan to Current and Future Conflicts (Report) (Open Society Foundations–Washington, D.C. June 2016), p. 19.

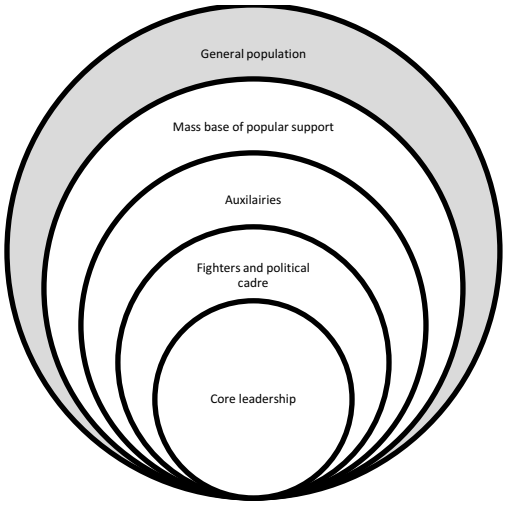
56 US Joint Chiefs of Staff, Information Operations, Joint Publication 3-13 (27 November 2012 Incorporating Change 1, 20 November 2014), Chapter I and VI; US Department of Defence, Law of War Manual (12 June 2015), para. 1.4.2.2; US FM 3-24 (n 51) Chapter I and VII; US Joint Chiefs of Staff, Joint Targeting, Joint Publication 3-60 (31 January 2013), Chapter II; British Army, Countering Insurgency, Field Manual Volume 1 Part 10 (Army Code 71876), October 2009, Chapters 3 and 5; 2007 Tactical Directive (General McNeill); COMISAF, Tactical Directive, December 30 2008; ISAF, Tactical Directive, July 6 2009; ISAF, Tactical Directive, August 1 2010; ISAF Tactical Directive, November 30 2011.

57 JP 3-60, ibid., Chapter II, 'The Joint Targeting Cycle'; FM 3-24, ibid, Chapter 7; US Joint Chiefs of Staff, Close Air Support, Joint Publication 3-09.3 (25 November 2014), Chapter I and Chapter III; US Department of Army (Training and Doctrine Command) Operations, Field Manual (FM) 100-5 (Headquarters, Department of the Army, Washington, DC 14 June 1993), Chapter 6; British COIN FM, ibid, Chapters 1, 2, 3, 4, 5, 6, 7, 9; UK Ministry of Defence, Joint Doctrine Publication 3-40: Security And Stabilisation: The Military Contribution, Chapter 5; UK Ministry of Defence, Joint Doctrine Publication 5-00 (JDP 5-00) (2nd Edition, Change 2), July 2013, Chapter 3; UK Ministry of Defence, Allied Joint Doctrine for Operational-Level Planning, Development, Concepts and Doctrine Centre, Allied Joint Publication-5 (AJP 5) (with UK National Elements), Chapters 2 and 3; NATO, Allied Command Operations Comprehensive Operations Planning Directive Interim V1.0, 17 December 2010, Chapters 3 and 4.

58 JP 3-60, ibid., Executive Summary, Chapter I and Chapter II; British COIN, ibid., Chapter 5.

increasingly cyberspace, especially because there are increased pressures for civilians to play a variety of direct and indirect support roles within the often diffuse internal support structures of organized armed groups that are party to an armed conflict.[59] In this type of environment, an intelligence-led approach is critical to avoid mistakes, especially in relation to whether or not a perceived individual-level threat is integrated into an enemy organisation that is organised militarily and which can actuate sufficiently intense collective violence.

As it is extremely difficult to distinguish between the auxiliaries, fighters and core leadership involved in hostilities from elements of the general population or mass base of popular support that may provide them with direct or indirect support, or who are neutral in the sense that their activities lack proximity or a nexus with surrounding hostilities,[60] military doctrine advocates social network analysis (SNA) which seeks to 'understand the social dynamic that sustains on-going fighting'[61] in terms of how individual and group functions are performed and how they connect to each other and change over time.[62] SNA seeks to assess the intentions and motivations of individuals as well as the extent to which they contribute to the internal support structure of an organised armed group that is engaged in hostilities. In this way SNA is a crucial tool for avoiding positive identification errors and manipulation.



59 Michael Schmitt, 'Civilians at War: Deconstructing the 21st Century Battlefield' (Chatham House International Law Discussion Group, A summary of the Chatham House International Law discussion group meeting held on 1 November 2007). British COIN, (n 56), Chapter 9.
60 US FM 3-24 (n 51) Chapter 3, Chapter 5, Appendix B
61 Ibid., Chapter 4, Appendix B
62 Ibid., paras 1-307, 1-309; British Army COIN FM, (n 56) Chapter 3 and Chapter 5.

US Joint Targeting Doctrine suggests that the targeting cycle may not necessarily take place in the 'fog of war', but rather that targeting decisions may be made well in advance of their execution and will often be made jointly at high levels of military and political leadership on the basis of human and signals intelligence.[63] Indeed, according to John Nagl, a former counterinsurgency adviser to a commander of forces in Afghanistan, and former director of the CIA, 'we've gotten far, far better at correlating human intelligence and signals intelligence to paint a very tight coherent picture of who the enemy is…'[64]

As U.S. experience shows, strikes will often be deliberate and planned in advance as part of a coordinated joint forces effort overseen by joint staff over a targeting cycle that lasts from between twenty four to seventy two hours. [65] Accordingly, rather than responding to attacks in the 'fog of war', individual targets are usually identified in advance and their names are placed on secret 'kill lists'. In such cases, targets are known, identified and engagement actions may be scheduled against them for a specific time, or they may be planned without having a specific delivery time. Even with 'unplanned targets' that are engaged using expedited procedures, there will be pre-existing target analysis in the form of an initial decision not to place them on a target list, or to place them on a target list but not selecting them for engagement or engagement within the current targeting cycle.[66] Where there is need for an immediate response, particularly with regards to 'time-sensitive targets', then 'dynamic' planning and engagement may take place over a reduced targeting cycle of twenty-four hours.[67] Even though this may necessitate a more expedited target analysis at subordinate levels of operational command and control, it will still have to go through core pre-operational validation, prioritisation, mitigation and execution procedures, which will involve gathering intelligence, applying assessment criteria and using ISR to track and monitor the target as well as to assess options and risks involved in engaging the target. The ability to identify and fix a target allows for tactical patience and persistent ISR to observe and track individuals remotely over many hours, or even days, to confirm the existence of hostile intent.[68] With regards to 'emerging targets', namely those that meet the criteria to be

63 JP 3-09.3, (n 57); US Joint Chiefs of Staff, Information Operations, Joint Publication 3-13 (n 56), Chapters I and VI; US; JP 3-60 (n 56); US Joint Chiefs of Staff, Joint Communications System, Joint Publication 6-0 (10 June 2015).
64 Kevin Govern, 'Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?' in Finkelstein *et al,* (n 54) 354.
65 JP 3-60, ibid., Executive Summary, Chapter 3, Appendix C. See also British COIN (n 56) Chapter 3, Chapter 7.
66 JP 3-60, ibid., Executive Summary, Chapter II.
67 JP 3-60, ibid., Executive Summary, Chapter I, Chapter II, Chapter III, Appendix C.
68 JP 3-60, ibid., Chapter II.

regarded as potential targets, US Joint Doctrine stipulates that they will normally require further ISR and/or analysis to develop, confirm and continue the targeting process. [69]

V. INTERCONNECTIVITY BETWEEN MILITARY DOCTRINE, INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMANITARIAN LAW

Criminal law is as sensitive functional modes of participation and perpetration in hostilities as military doctrine because, as stated in *Tadić,* widespread killing in the context of an armed conflict does 'not result from the criminal propensity of single individuals, but constitutes manifestations of collective criminality … often carried out by groups of individuals acting in pursuance of a common criminal design'.[70] It is the diffuse and collective nature of hostilities in a non-international armed conflict that provides the rationale for the extrapolation or 'cross-fertilization' of models of accessorial liability and co-perpetration from criminal law in order to elucidate our conception of participation and membership in humanitarian law target analysis. Criminal law takes account of, and thus seeks to repress, acts that facilitate or support the direct or principle perpetration of proscribed and harmful acts. Whilst not suggesting that non-state actors are necessarily committing war crimes, it is merely suggested that the logic inherent within this process of ascribing principal liability for perpetration, and accessorial liability for participation in an act perpetrated by another, is therefore relevant to the issue of participation in hostilities and membership in an organized armed group. It serves to put target analysis on a clearer footing so as to enable primary duty bearers to avoid arbitrary and erroneous targeting decisions. Moreover, it is suggested that extrapolating criminal law modes of liability to target analysis in the context of planned operations can serve to restrict the conditions under which civilians may be deprived of their immunity and furthermore, that this proposal is grounded in contemporary military doctrine.

In *Tadić*, a justification for the repression of activities that support the commission of proscribed acts was that 'the moral gravity of such participation is often no less – or indeed – no different - from that of those actually carrying out the acts in question'.[71] In this way, *Tadić* noted that 'the participation and contribution of the other members of [a] group is often vital in facilitating the commission of the offence in question'.[72] Furthermore, although the Appeals Chamber in *Strugar* noted that 'conduct amounting to direct or active participation in

69 JP 3-60, Chapter II
70 Ibid.
71 Ibid.
72 Ibid.

hostilities is not, however, limited to combat activities as such', it went on to state that 'to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless'.[73] In this regard, it is suggested that the logic of criminal law modes of direct and indirect liability are not only relevant for the penal repression of activities that contribute to, or support the direct perpetration of proscribed acts, but also have import concerning the modes and parameters of civilian immunity from attack under humanitarian law.[74]

General elements of complicity or accessorial liability	**General elements of participation in hostilities**
Participation in the choate or inchoate perpetration of predicate act	Act likely to affect adversely the military operations or military capacity of a party to an armed conflict
Material contribution to perpetration of predicate act	There must be 'direct causation' between the act and the harm
Material contribution was intended, reckless or done with knowledge of predicate act	Belligerent nexus: the act must be 'objectively likely' to inflict harm and 'specifically designed' to cause directly the required threshold of harm in support of a party to the conflict and to the detriment of another

A concern that this discussion aims to dispel is that this approach to addressing lacunae in humanitarian law can serve to undermine the principle of distinction by leading to what has been described as the 'complicity cascade',[75] i.e. this proposal constitutes a slippery slope towards imposing collective guilt upon civilians or creating a state of total war on the basis of the presumption that all hostile acts can ultimately be linked back to civilian activities, and therefore civilians and civilian populations are therefore collectively liable and thus open to attack. Whilst this type of speculative consideration is of major importance in ensuring the existence of humanitarian protections, it must vie with the equally cogent notion that the net

73 *Prosecutor v Strugar* (n 4).
74 In this regard, it is also worth noting that if a member of an organized armed group shoots at government soldiers during a non-international armed conflict, then this will usually constitute a crime under domestic law, and forms of indirect participation or co-perpetration may also attract criminal censure under domestic law.
75 William Schabas, 'Enforcing international humanitarian law: Catching the accomplices' (2001) 83 (842) *International Review of the Red Cross*.

of complicity can be as wide as there is reliable intelligence and evidence to demonstrate such a link. Thus, if it is logical to propose that criminal acts with a nexus to surrounding hostilities can involve a multiplicity of persons contributing in a range of direct and indirect ways, then it is logical to make a similar proposition regarding hostile or belligerent acts. Accordingly, individual crimes can be an expression of collective criminality and thus subject to penal repression in the same way that individual hostile acts can be an expression of collective hostility and thus subject to loss of immunity from attack. The difficulty in both respects lies in pinpointing the specific contribution that an individual makes to the collective enterprise and in this regard, criminal law is more highly developed than humanitarian law and can therefore serve to elucidate further its provisions relating to the parameters of immunity. Furthermore, it is suggested that criminal law, with its analytical focus on the objective and subjective elements of indirect participation and perpetration possesses less of a propensity towards collective guilt than humanitarian law as it currently stands. [76]

Nevertheless, it is suggested that focusing on the different outcomes and functions of these interrelated branches of law is not sufficient to preclude cross-fertilization of models of complicity, especially given that they are related branches of international public law centred around protecting fundamental standards of humanity as well as public order and safety.[77] The reason for this is that the issue of a civilian's complicity in hostilities is material to the determination of the lawfulness of the attack against them. Indeed, as the Appeals Chamber held in *Strugar,* 'in order to establish the existence of a violation […] a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war …'[78] Therefore, where 'a reasonable doubt subsists' with regard to a civilian's 'non-participation in acts of war' and thus to their immunity, then 'a Trial Chamber cannot convict an accused' for an unlawful attack. [79]

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76 *'The I.G. Farben Case' : United States of America v Carl Krauch et al.*, (Judgment of 30 July 1948) in IV Trials of War Criminals Before the Nuremburg Military Tribunals Under Control Council Law No 10 Volume VIII (US Government Printing Office, 1951): the manufacturers of poison gas were deemed to be not liable as accessories to war crimes on the basis that they did not have requisite knowledge of its end use. Furthermore, according to the United States War Crimes Tribunal, this knowledge could not be inferred as 'neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put'; See also Schabas, ibid, 844.

77 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, Art 43: 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country'.

78 *Strugar* (Appeals Chamber Judgment) (n 4) 178.

79 Ibid.

This suggests that *ex post facto* criminal adjudication must objectively take into consideration the circumstances of the victim as well as the outlook of the attacker in order to assess whether or not they were 'participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces'.[80] This implies the need for a balanced interrelationship between what Hayashi describes as 'two combatancy-related presumptions', namely the humanitarian law presumption of 'mandatory civilian protection' or doubt on the one hand, and, on the other, the criminal law principles of *in dubio pro reo* and *nullem crimen sine lege*, whereby any doubt is to be resolved in favour of the accused.[81] Therefore, the presumption of *in dubio pro reo*, as manifest in the above-mentioned dictum in *Strugar*, is to be balanced against the presumption of doubt in favour of civilians as described in *Galić,* whereby '[a] person shall be considered to be a civilian for as long as there is a doubt as to his or her real status', and furthermore, 'that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant'.[82]

Accordingly, this discussion suggests that there is an important substantive and practical relationship between the *ex ante* and contemporaneous targeting decisions by primary duty bearers which are governed by humanitarian law, and *ex post facto* adjudication and jurisprudence of international criminal tribunals. [83] In other words, international criminal law serves to condition and regulate the use of force under the framework of IHL in terms of setting reasonable parameters vis-à-vis the lawful use of military force in situations of conflict, and these should be born in the minds of military commanders and military lawyers operating within full-spectrum operational environments. In this sense, ICL seeks to give military and political leaders advance notice of modes of perpetration and participation that may result in criminal liability, and so serves both to deter acts before commission and punish acts following commission. In this way, ICL may be regarded as operating upon actors *ex ante* in operations and *ex post facto* review.

In turn, this implies that a consideration of modes of indirect participation in and co-perpetration of hostile acts are relevant to the issue of whether or not an individual was

80 Ibid.
81 N Hayashi, 'The Role of Judges in Identifying the Status of Combatants' (2006) *Acta Societatis Martensis*, 76.
82 *Prosecutor v Galić* (Trial Judgment) ICTY-98-29-T (5 December 2003) 50.
83 Antonio Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) 5 *Journal of International Criminal Justice*, 344.

'participating in acts of war' so as to adequately balance the two above-mentioned 'combatancy-related presumptions'.

VI. EXTRAPOLATION OF CRIMINAL MODES OF LIABILITY

A. Accessorial liability and direct participation in hostilities

As discussed above criminal law models of accessorial liability and co-perpetration are relevant to the issue the issues of what constitutes direct participation in hostilities and membership in an organized armed group. Not only that, but as this approach is grounded in military doctrine it is suggested that it is practicable in the context of planned targeted operations. The framework of accessorial liability is a useful concept for elucidating the notion of direct participation in hostilities as forms of liability in this regard are derived from support given to the commission of a criminal wrong by a principal offender or perpetrator. For example international and domestic systems of criminal law not only provide for principal liability for the person who directly perpetrates a crime, but also for forms of accessorial liability for support roles such as aiding and abetting, planning, instigating and ordering the perpetration or execution of a crime.[84]

1. Aiding and abetting

This section contributes to a general framework of target analysis which may be used to assess whether the indirect support activities provided by civilians comprising the general population, the mass base of popular support [85] and 'auxillaries' amount to direct participation in hostilities by extrapolating the objective and subjective elements of aiding and abetting as developed in international criminal law. [86] It is suggested that where there is intelligence or

84 Article 7(1) of the Statute of the ICTY, Article 6 (1) of the Statute of the ICTR and Article 25 of the Statute of the International Criminal Court.

85 British Army COIN FM (n 56) 2-15: The base of popular support comprises those elements of the civilian population who do not remain neutral, but who play a general, clandestine and indirect role in supporting an insurgency or armed groups in their activities. Rather than functioning as active auxiliaries, the base of popular support engages in normal every-day civilian activities, whilst at the same time providing general and occasional supportive functions such as providing intelligence, concealment, funding and transport. Importantly, it is recognized that insurgencies involving clans or tribes, roles and functions are difficult to define and are fluid in that individuals have no formal status, but constantly move between combat, auxiliary and follower functions; see also US Department of the Army Field Manual (FM) 3 – 24 (n 51), 1-66.

86 British Army COIN FM ibid: Auxiliaries have been defined as those 'active sympathizers' who play an active role in supporting combat activities rather than engaging directly in combat activities. Forms of support

evidence that establishes these elements, then a civilian may be targeted for such time as their conduct amounts to direct participation in hostilities or for such time as their indirect activities constitute 'an integral part' of a specific and coordinated military operation.

Beginning with the objective elements, according to ICTY jurisprudence, an individual will be liable as an accessory for aiding and abetting a crime where it is demonstrated that they offered practical assistance, encouragement or moral support to a principal offender or perpetrator and this has a substantial effect on the perpetration of their crime(s). Rather than implying a causal relationship, the accomplice must make a significant difference the commission of the criminal act by the principal before during or after its perpetration. In other words, the criminal act would have occurred in a different way had it not been for their factual contribution. [87]

Generally, a 'substantial contribution' will be self-evident where there is proximity between acts of support and the direct perpetrators. [88] For example, in the *Zyklon B Case* before British Military Court Hamburg, arguments that the provision of poison gas to concentration camps amounted to general assistance for lawful purposes were rejected in view of evidence demonstrating that the owner and manager of a company which manufactured poison gas had provided training to the principal perpetrators in how to use it to kill humans in confined spaces and that they knew that the gas was to be used for the purpose of killing human beings. [89]

The ICTY Appeals Chamber previously held that in cases of geographical or temporal remoteness it will be necessary to demonstrate that acts of support or assistance are 'specifically directed' towards the commission of a crime so as to ensure that there is a sufficient 'culpable link'. For example, a six-month delay between an individual being observed unloading weapons and a subsequent attack was considered to reduce the likelihood that these weapons were specifically directed towards assisting in this attack.[90] However the Appeals Chamber has subsequently conducted a survey of ICTY jurisprudence, customary

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provided by auxiliaries may include collecting and transmitting intelligence, running safe houses, sending signals and warnings, procuring, transporting and storing weapons, supplies and documents; See also, US FM 3-24, ibid, 1 – 62.

87 *Prosecutor v Blagojević et al.* (Trial Judgment) IT-02-60-T (17 January 2005), 726 and 777. *Prosecutor v Šainović et al* (Appeals Judgment) IT-05-87-A (23 January 2014) 1626, 1647 and 1649. *Prosecutor v Strugar* (Trial Judgment) ICTY-01-42-T (31 January 2005) 91. *Prosecutor v Simić* (Trial Judgment) ICTY-95-9-T (17 October 2003) 161. *Prosecutor v Tadić* (Opinion and Judgment) ICTY-94-1-T (7 May 1997) 688.

88 *Prosecutor v Perešić* (Appeals Chamber Judgment) ICTY-04-81-A (28 February 2013) 38.

89 *'The Zyklon B Case': The trial of Bruno Tesch et al (The Zyklon B Case*), British Military Court Hamburg 1946 (United Nations War Crimes Commission, 1 Law Reports of Trials of War Criminals) 93-102.

90 *Prosecutor v Perešić,* ibid., 40; *Prosecutor v Kupreškić* (Appeals Chamber Judgment) ICTY-95-16-A (23 October 2001, 275 – 277.

law and municipal law and has found that specific direction does not constitute an additional and free-standing element of aiding and abetting liability.[91] Nevertheless, it noted that specific direction may at times be factually implicit in a finding that an individual's provision of practical assistance amounts to a substantial contribution.[92] Moving onto the subjective elements, for an individual to be liable for aiding and abetting it must be demonstrated that they know that their acts assist in the commission of the principal perpetrator's crime. [93] This means that they must have knowledge or awareness that the acts they performed assist in the commission of a specific crime by the principal and that they knew of the principal's intention to commit this crime.[94]

If function determines the directness of the part taken in hostilities, then the concept of aiding and abetting provides a useful tool for target planners by elucidating the objective and subjective elements of what it means to participate in hostilities. Compared to previous attempts at substantive elucidation, this approach narrows the scope of what it means to participate in hostilities. Firstly, it requires practical assistance, encouragement or moral support that is substantial and which has in a substantial effect on the commission of a hostile act. This means that supportive acts that are remote from the commission of harmful acts by principal perpetrators may merely amount to acts that are 'in some way' directed rather than being regarded as substantial contributions towards hostile acts. In other words, indirect support activities that are geographically or temporally remote from the direct perpetration of hostile acts may be more appropriately described as general assistance directed towards a war effort rather than direct participation in hostilities, and so by themselves, they may be regarded as being insufficient to result in activity-based loss of immunity from attack. Conceivably, this is because a broader range of inferences may be drawn as to the nature and purpose of such indirect activities and so the analysis given to what constitutes a sufficient culpable link to the surrounding hostilities may be used to elucidate the notion of a belligerent nexus. This serves to ensure that there is a clear culpable link in situations where seemingly

91 *Prosecutor v Šainović et al* (n 87) 1625.
92 Ibid.
93 *Prosecutor v Blaskić* (Appeals Chamber Judgment) ICTY-95-14-A (29 July 2004) 49. *Prosecutor v Šainović et al* (Appeals Judgment), ibid., 1649.
94 *Prosecutor v Delalić et al. the 'Čelebići Case'* (Trial Judgment) ICTY-96-21-T (16 November 1998) 162 – 163: 'the act of participation [must] be performed with knowledge that it will assist the principal in the commission of the criminal act'; at para 329: there must be 'awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime'; With regard to aiding and abetting under the ICCS, Article 25 paragraph (3) (c) provides that a person shall be criminally responsible for a crime within the jurisdiction of the Court where they aid, abet or otherwise assist in the commission or attempted commission. In addition, it requires that the assistance must be '[f]or the purpose of facilitating the commission of such a crime.'

supportive acts are geographically or temporally remote from direct perpetration of harmful acts. Secondly, the participant needs to know that their participation assists the hostile act(s).

Accordingly, in the context of this discussion, activities that seemingly amount to 'substantial contributions' but which are geographically and temporally remote from directly hostile acts should attract the presumption of civilian immunity from attack as this remoteness decreases the likelihood of a sufficient belligerent nexus. In this way, an individual may only be targeted for such time as their support or assistance constitutes a substantial contribution towards a hostile act and where the intelligence suggests that they know that their acts play a facilitative role. Where there is a delay between an observable act of assistance or support and a subsequent hostile act, then the likelihood of that act constituting a substantial contribution with a significant effect on the perpetration of a hostile act is reduced. In such situations, evidence regarding an individual's state of mind constitutes important circumstantial evidence that may temporarily rebut the presumption of civilian immunity from attack if it indicates that they know that their support or assistance is having a significant effect on hostilities. This means that in many doubtful cases, temporary activity-based loss of immunity ought to be based on evidence or reliable information which suggests that the activities suspected of having a substantial effect on the preparation or commission of hostile acts are the sole reasonable inference that can be made in the circumstances.

Although aiding and abetting has been seemingly granted wide reach by the ICTY, for instance in cases involving aiding and abetting by omission and cases where psychological support is given through words or even physical presence at the scene of crime, it is suggested that the elements 'substantial contribution' and 'substantial effect' represent appropriate constraints in order to allay the risk of an overly broad approach to the principle of distinction in this context. With regards to the former, it must be demonstrated firstly, that an individual has failed to discharge a legal duty and that this has had a substantial effect on the realisation of a crime, and secondly that they knew of the principal's crime and that their omission assisted its commission.[95] With regards to the latter, it is necessary to demonstrate that facilitation through physical presence and/or psychological support is combined with a position of *de facto* authority which lends tacit approval or moral support that has a significant legitimising or encouraging effect. [96]

95 *Prosecutor v Mrkšić* (Appeals Judgment) ICTY IT-95-13/1-A (5 May 2009), para 49.
96 *Prosecutor v Delalić et al. the 'Čelebići Case'* (Trial Judgment) (n 94) 327 – 328. *Prosecutor v Simić* (Trial Judgment) (n 87) 165.

Aiding and abetting will now be distinguished from another mode of liability relevant to this discussion, namely the liability of co-perpetrators who participate in a common plan in order to distinguish between temporary activity-based loss of immunity on the basis of direct participation in hostilities and status-based loss of immunity on the basis of individual membership of an organized armed group and exercising a continuous combat function.

2. JCE and Article 25(3)(a) of the ICC Statute

This section aims to contribute to the framework of target analysis by examining the import of the ICTY's approach to JCE as well as the three modes of perpetration or commission under Article 25(3)(a) of the Statute of the International Criminal Court (ICCS), namely individual perpetration, jointly with another person or co-perpetration and through another person or indirect perpetration as well as the fourth hybrid mode of indirect co-perpetration. On this basis, it aims to distinguish these modes of perpetration or commission from participation, e.g. in the form of aiding and abetting, as discussed above, in order to suggest they offer practical ways of distinguishing between status-based loss of immunity on the basis of individual membership of an organized armed group, e.g. as a leader, fighter or auxiliary, and temporary activity-based loss of immunity on the basis of direct participation in hostilities, e.g. by individuals within the general population or mass base of popular support.

It is suggested that these frameworks are not necessarily focused on high-level accused but may be used flexibly to encompass those who participate in common plans as leaders and as subordinates, and furthermore, they may encompass small-scale to large-scale common purposes, for example killing on a village, town or regional, national or international level. They may be construed as widely as the strategic plan or common purpose to adversely affect military operations or military capacity itself, and this is an objective matter that should be properly defined and supported by intelligence. [97] Status-based targeting in this respect can only occur in the context of targeted operations where there is reliable intelligence that suggests the objective and subjective elements outlined below are in existence.

According to the ICTY jurisprudence on JCE, a plurality of persons that share an agreement, common purpose or common design should be identified, as should the general goal(s), temporal and geographical scope and intended victims of the common plan. This may

97 *Prosecutor v Brđanin* (Appeals Chamber Judgment) IT-99-36-A (1 September 2004) 421, 422, 423, 424, 425, 438

be inferred from intelligence which suggests the existence of a common pattern.[98] Furthermore, an individual should intentionally make a significant contribution to the commission or furtherance of this common purpose, or in some cases they must also have foresight that hostile acts outside the common purpose were likely to be committed'. [99] Similarly, under ICC jurisprudence, co-perpetration refers to a situation where there is a common plan or joint agreement between two or more persons. This can be inferred from circumstantial evidence.[100] Furthermore, such persons must make 'essential contributions' to this plan in a combined and coordinated fashion.[101] Co-perpetrators must have an awareness that the consequences of the common plan would occur in the ordinary course of events.[102]

Extrapolating the jurisprudence on JCE and co-perpetration suggests that those who physically perform hostile acts may not be considered as members of organised armed groups where these abovementioned conditions are not satisfied, but rather as direct participants in hostilities only in those circumstances where it can be established that they are aiding and abetting hostilities, or are 'tools' of the members of organised armed groups.[103] According to ICTY jurisprudence, members may execute their common objective(s) by ordering or instructing such non-members who, unlike members, do not share their intention to further or achieve the common objective(s) *per se*. [104] Rather, in the absence of an express understanding or agreement, their acts may be regarded as forming part of a manifest common purpose, strategic plan or pattern of conduct which can only be explained through coordinated cooperation.[105] ICC jurisprudence takes a similar approach whereby perpetration may occur through another person. In other words, the physical perpetrator of the crime is used as a tool by an indirect perpetrator who is masterminding or controlling the physical perpetrator behind the scenes.[106] Another means of committing a crime through another is by means of control over an organization, by an individual, or jointly by several leaders who act

98 *Prosecutor v Tadić* (Appeals Chamber Judgment) ICTY-94-1-A (15 July 1999) 299. Prosecutor v Krajišnic (Trial Judgment) ICTY-00-39-T (27 September 2006) 885.
99 *Prosecutor v Kvocka et al.* (Trial Judgment) ICTY-98-30/1-T (2 November 2001) 285.
100 *Prosecutor v Lubanga*, (Trial Chamber) ICC-01/04-01/06-2842 (14 March 2012) 988.
101 *Prosecutor v Lubanga*, (Pre-Trial Chamber Decision on the Confirmation of Charges), ICC-01/04-01/06-803, (29 January 2007) 343. *Prosecutor v Lubanga*, (Trial Chamber), ibid, 994 & 1000.
102 *Prosecutor v Lubanga*, (Trial Chamber), ibid, 1008. *Prosecutor v Katanga*, (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07-717 (30 September 2008) 473.
103 *Prosecutor v Brđanin* (Appeals Chamber Judgment) (above n 97) 410, 412, 413, 414, 415, 418, 441, 445.
104 Ibid.
105 Ibid.
106 *Prosecutor v Katanga*, (Pre-Trial Chamber Decision on the Confirmation of Charges) (n 102) 488. *Prosecutor v Lubanga* (Appeals Chamber Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against his Conviction) ICC-01/04-01/06-3121-Red (1 December 2014) 465.

in concert and provide the contributions necessary for the execution of a common plan.[107] An organisation must be based on hierarchical relations between superiors and a sufficient number of subordinates so that orders given by the recognised leadership will generally be complied with by the subordinates.[108] Finally, the concept of indirect co-perpetration has been developed within the jurisprudence of the ICC for situations where there are two or more individuals involved in a common plan executed by subordinates who belong to military organisations that are under separate, rather than joint control, e.g. where subordinates only accept orders from the leader(s) of their own ethnic group, rather than any leader within a joint command.[109] Despite the lack of direct control here, where an individual acts jointly with another individual who controls the person used as a tool, then their acts may be attributed to the former on the basis of mutual attribution. [110]

In summary, where there is intelligence indicating that an individual shares the hostile intention(s) of other individuals party to a common plan to engage in hostilities, and makes substantial or essential contributions to its furtherance or achievement, then they may be subject to status-based targeting for the duration of hostilities as a member of an organised armed group as this hostile intent evinces a genuine and continuous combat function. [111] For those individuals who are participating in hostilities, but who do not share the hostile intention(s) of other individuals that are party to a common plan, then as this may be the equivalent of aiding and abetting, they may accordingly be subject to threat-based targeting for such time as they are participating in, or making substantial contributions to hostile acts but no longer. This approach does not advocate the need to prove these extrapolated elements for establishing membership in an organized armed group beyond reasonable doubt in battle-field context. Rather, it is suggested that where there is doubt as to any of these elements, then it is reasonable to resolve it through a process of careful verification[112] otherwise continuous status-based loss of protection based merely on a slight suspicion, and without 'objective' manifestations of hostile force or actions, could serve to undermine and erode the fundamental principle of distinction in non-international armed conflicts involving diffuse organisational structures. [113]

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107 *Prosecutor v Katanga*, (n 102) 498 and 524-526.
108 *Prosecutor v Katanga*, ibid., 512. *Prosecutor v Bashir*, (Pre-Trial Chamber Public Redacted Version of the Prosecution's Application under Article 58), ICC-02/05-157AnxA (12 September 2008) 248.
109 *Prosecutor v Katanga*, (n 102) 492.
110 Ibid., 493.
111 *Prosecutor v Krnojelac* (Appeals Chamber Judgement) IT-97-25-A (17 September 2003) 75.
112 *PCAT v Israel* (n 12) 40.
113 ICRC (Interpretive Guidance) (n 5) 44 – 45.

3. Instigating an act

The concept of instigating, soliciting or inducing the commission of criminal acts can be considered to be relevant for targeting the core leadership as well as the political or ideological cadre and the auxiliaries of an organized armed group. Accordingly, the objective and subjective elements of this mode of liability will be extrapolated to the notion of participation in hostilities.

The objective elements of instigation are prompting another person to commit a hostile act'.[114] Targeting an accessory to a perpetrator in this regard will arise only where instigation leads to the actual commission of an offence desired by the instigator.[115] It is considered to be a form of indirect participation as an instigator does not carry out the objective elements of the underlying hostile act in question, but if they do, then they will be considered to be a co-perpetrator.[116] Furthermore, it needs to be established that the instigation was a clear contributing factor to the conduct of other persons who perpetrated the hostile act. While it is not necessary to demonstrate that the hostile act would not have been perpetrated without the involvement of the individual instigator, it is sufficient to demonstrate that the instigation was a factor that substantially contributed to the conduct of the person or persons perpetrating the hostile act.[117]

As for the subjective elements of instigation, it must be established that the instigating individual intended to provoke or induce the commission of a hostile act, or was aware of the substantial likelihood that the commission of a hostile act would be a probable consequence of his acts.[118] Instigation differs from indirect forms of participation such as ordering in that its influence on the perpetrator of an act need not be connected with a superior-subordinate relationship or an authority to order.[119]

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114 *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (2 September 1998) 482

115 Ibid., 481 - 482.

116 Héctor Olásolo, The International Criminal Responsibility of Senior Political and Military Leaders as Principles to International Crimes (Hart, Oxford 2010), 142 – 143; *Prosecutor v Kordić and Čerkez* (Trial Judgment) ICTY-95-14/2-T (26 February 2001), 387; *Prosecutor v Orić* (Trial Judgment) ICTY-03-68-T (30 June 2006), 273. Instigation can take place by omission, with threats and menaces, or even with bribery and financial promises. An act can be instigated face-to-face as well as through intermediaries. It can be exerted over both small and large audiences, provided that the instigator has the intent to prompt the audience to commit an act.

117 *Kordić and Čerkez,* ibid, 32.

118 *Prosecutor v Brđanin* (Trial Judgment) ICTY-99-36 (1 September 2004), 269.

119 Antonio Cassese, *International Criminal Law* (3rd rev edn Oxford University Press, 2013), 189; *Prosecutor v Orić* (Trial Judgment) n 117) 272. As stated in Oric: '… although the exertion of influence would hardly function without a certain capability to impress others, instigation [is different from] 'ordering' [because ordering] implies at least a factual superior-subordinate relationship [whereas instigation] does not presuppose any kind of superiority'.

Furthermore, instigation differs from ordering in that they have different tests for causation. Whereas ordering requires, that hostile acts be committed in furtherance of the order, or that the order has a direct and substantial effect on the commission of the hostile act,[120] instigation merely requires that it be clear and contributing factor of the commission of the hostile act. Instigation need not cause in the physical perpetrator the intention to commit the hostile act. Instead, all that need be established is that the instigation strengthens the perpetrator's will or resolve to commit the hostile act by providing additional motives or reasons for its commission.[121] In this regard, by itself, instigation can be considered to be to be a form of indirect participation in hostile acts. Given that it is not punishable *per se,* it is suggested that loss of protection from attack may not occur unless it is having a 'direct and substantial effect' on the commission of hostile acts, in which case its duration is temporary to the extent that loss of immunity occurs only for such time as there are hostile acts being committed.

4. Planning an act

This section contributes to a general framework of target analysis by suggesting that the objective and subjective elements of planning the perpetration of an offence as developed in international criminal law may be used to identify and target the core leadership[122] as well as the political or ideological cadre [123] and the auxiliaries of an organized armed group. It is suggested that where there is intelligence that establishes these elements, then where planning can be considered to be 'an integral part' of a specific and co-ordinated military operation, then this may thus lead to a deprivation of immunity from attack. However, given that the majority of approaches discussed below base liability for planning on a choate offence, i.e. actual perpetration or attempted perpetration, then it is suggested that by itself, planning may

120 *Prosecutor v Kamuhanda* (Appeals Chamber Judgment) ICTR-99-54A-A (19 September 2005) 75.
121 *Prosecutor v Blaskić* (Trial Judgment) ICTY-95-14-T (3 March 2000), 270, 277; Héctor Olásolo (n 116) 142–147; *Prosecutor v Orić* (n 117): instigation 'does not necessarily presuppose that the original idea or plan to commit the crime was generated by the instigator. Even if the principal perpetrator was already pondering on committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator'.
122 British Army COIN FM (n 56): The role and attributes of military and political leaders are generally organizing and planning at the strategic and operational levels. They provide the strategic direction and ideological impetus to the movement that underpins the activities of auxiliaries, the political cadre, combatants and the mass base of support; See also US FM 3-24, above n.452, 1-61.
123 British Army, COIN FM*,* ibid., 2-15: The political or ideological cadre is not necessarily formally constituted, for example, into a political party or extremist group, but in substance, its function is to assist with the organization, planning and direction necessary for the implementation of the overarching political or ideological goals that stem from the leadership; See also US FM 3-24, ibid, 1-65.

only result in temporary loss of protection unless and for such time as it can be considered to be 'an integral part' of a specific and co-ordinated military operation is in motion.

In terms of the objective elements, planning as a mode of perpetration is very similar to the notion of conspiracy, but what makes planning different is that a planner designs the commission of an act that is perpetrated by others. International criminal law has taken slightly divergent approaches the conditions under which planning the commission of offences can be regarded as a distinct form of accessorial liability. The first approach is that planning constitutes a distinct form of criminal liability punishable *per se,* that is, even if the planned crime is not in fact committed. [124] The second approach is that liability for the planning of criminal offences can arise on the basis acts that are yet to be committed, primarily attempts to commit crimes. [125] The third approach is that planning or the preparation of a crime is only punishable when followed by the actual commission of the planned offence [126] The objective elements of planning are that one or more persons design the criminal conduct. [127]

Those who are liable for planning do not participate in the implementation of the criminal plan, and so strictly-speaking planners are considered to be accessories because of their participation in the formulation of a criminal plan rather than subsequent implementation and perpetration.[128] However, if planners participate in its implementation, then they would be regarded as perpetrators or co-perpetrators. Planning is therefore a mode of accessorial liability to be applied where an individual's role is limited to participation in the process of formulating a hostile plan rather than perpetrating the belligerent act or in some way contributing to its execution. Furthermore, there must be evidence or intelligence that an individual's planning or formulation of a plan substantially contributes to the perpetration hostile activities.[129]

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124 *Prosecutor v Kordić and Čerkez* (n 116) 386: 'an accused may be held criminally responsible for planning alone' because 'planning constitutes a discrete form of responsibility under Article 7(1) of the Statute'. It is important to qualify this by stating that only the planning of large-scale international crimes may be punishable per se, due to the gravity of these crimes and the demands of policy to prevent them. In contradistinction, for crimes of lesser gravity, there is the argument that the doubt should be resolved in favour of the accused, and so the planning of lesser crimes may not be punished per se.

125 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 25 paragraph (3) (b).

126 *Akayesu* (n 114) 475. *Prosecutor v Rutaganda* (n 43) 34. *Prosecutor v Musema* ICTR-96-13-A (27 January 2000), 115.

127 *Prosecutor v Kordić and Čerkez* (Appeals Chamber Judgment) ICTY-95-14/2-A (17 December 2004), 26.

128 *Prosecutor v Bagilishema* (Trial Judgment) ICTR-95-1A-T (7 June 2001), 30.

129 *Kordić and Čerkez* (n 127) 26.

As for the subjective elements of planning, it needs to be established that an individual intended the hostile act in question to be committed'. [130] All that needs to be demonstrated in this regard is that a person plans a hostile operation with an awareness of the substantial likelihood that a hostile act will be committed in the execution of that plan. Planning activities performed with such awareness are to be regarded as accepting that hostile act,[131] and so where there is evidence that an individual's plan substantially contributes to the perpetration of hostile activities then planning can be considered to be an 'integral part' of a specific and co-ordinated military operation. Where this can be demonstrated then this may thus lead to a deprivation of immunity from attack for such time as it can be considered to be 'an integral part' of a specific and co-ordinated military operation is in motion.

5. Ordering an act

Whilst ordering may in one sense appear to be a form of indirect perpetration, international criminal law regards ordering as a form of indirect participation that results in accessorial rather than principal liability.[132] Ordering is subjectively different from principal modes of liability in that it need not be established that a superior giving an unlawful order has the particular intention required for the underlying criminal act executed in pursuit of that order. Rather, the superior merely needs to be aware of the substantial likelihood that the physical perpetrators will act with the intention required by the particular crimes that have been executed. As such, ordering does not constitute a form of indirect perpetration, as the authority giving the order does not possess the intention of the physical perpetrators. In this regard, by itself, ordering can be considered to be to be a form of indirect participation in hostile acts. Accordingly, the objective and subjective elements of this mode of liability will be set out to distinguish it from the notion of indirect perpetration before extrapolating the elements of this mode of liability to the concept of direct participation in hostilities. In this way, the concept of ordering can be considered to be relevant for targeting the core leadership as well as the political or ideological cadre of an organized armed group.

As for the objective elements, ordering requires no formal superior-subordinate relationship. Rather, it is sufficient to demonstrate that the individual who issued the order had

130 Ibid.
131 Ibid., 31.
132 Article 25 para (3) (a) and (b) of the ICC Statute (n 126); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia adopted 25 May 1993 by UNSC Resolution 827 (September 2009), Article 7 para (1); Statute of the International Criminal Tribunal for Rwanda, Security Council resolution 955, 8 November 1994, Article 6 para (1).

a form of *de facto* authority to instruct the perpetrators of the act or acts ordered. [133] This means that the individual issuing an order has a significant influence over the perpetrators such that they are compelled to obey.[134] *De facto* authority to 'instruct' the physical perpetrators may be implied from the circumstances and as such there is no particular form in which an order must be given. [135] An order can be given orally or in writing and it can be made expressly or implicitly. Accordingly, the existence of an order can be proven by circumstantial evidence.[136] Furthermore, each intermediary who is at least in a position of *de facto* authority and who passes on the order is considered to be reissuing the order, and can thus be held liable for ordering the commission of the crimes.[137]

In order to target an individual for ordering the perpetration of a hostile act a causal link between the act of ordering and the physical perpetration of a crime needs to be demonstrated. It is not necessary to demonstrate that the offence would not have been perpetrated in the absence of the order.[138] According to one approach, perpetrators must commit the crimes in execution or furtherance of an order, although, according to another approach, it is sufficient if the physical perpetrators attempt to commit the crimes in execution or furtherance of the order. [139]

With regard to the subjective elements of ordering, it must be established that individual giving the order intended the hostile act to be committed, or was aware of the substantial likelihood that the commission of the hostile act would be a consequence of his acts, and so ordering with such awareness is to be regarded as accepting the hostile act.[140] This state of mind does not need to be explicit. Rather, it may be inferred from the

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133 *Prosecutor v Kamuhanda* (n 120) 3, 75; *Prosecutor v Semanza* (Appeals Chamber Judgment) ICTR-97-20-A (22 May 2005), 361; *Kordić and Čerkez* (n 127) 28; *Prosecutor v Galić* (Appeals Chamber Judgment) ICTY-98-29-A (30 November 2006), 176; Olásolo (n 116); C del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level. The Experience of the ICTY' (2006) 4 *Journal of International Criminal Justice*, 549.

134 Olásolo, ibid, 136; *Semanza* (Appeals Judgment) ibid, para 361.

135 *Blaskić* (n 93) 660.

136 *Galić* (Trial Judgment) (n 82) 168; *Prosecutor v Strugar* (Trial Judgment) (n 87) 388. In this regard, the approving presence of a superior at the scene of the crime while the crimes are being committed, or immediately afterwards, can be a relevant factor to infer that the superior ordered the commission of the crimes.

137 *Prosecutor v Kupreškić* (Trial Judgment) ICTY-95- 16-T (14 January 2000), 827, 862.

138 *Prosecutor v Strugar* (Trial Judgment) (n 87) 332.

139 Article 25 para (3) (b) of the ICC Statute (n 126).

140 *Blaskić* (Appeals Chamber Judgment) (n 93) 41 & 42. In this way the *mens rea* standard for this offence is one of specific intent or recklessness. The threshold of recklessness was set at a relatively high threshold in *Blaskić*, in that '[t]he knowledge of any kind of risk, however low, does not suffice for the imposition of criminal responsibility … an awareness of a higher likelihood of risk and a volitional element must be incorporated into the legal standard…a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime'.

circumstances, but in such circumstances it must be the only reasonable inference from the evidence.[141]

Given that ordering it is not punishable *per se,* it is suggested that loss of protection from attack may not occur unless there is some indication of *de facto* authority over the physical perpetrators as well as some indication of a causal connection between the order and the hostile acts. However, once hostile acts have been committed, then given the existence of a relationship of *de facto* authority over the perpetrators, then it is reasonable to suggest that this hierarchical relationship involving *de facto* authority of the core leadership as well as the political or ideological cadre of an organized armed group will persist for the duration of the hostilities. This is because from a doctrinal point of view, it will be necessary to degrade the organizational structures that sustain hostilities, and therefore it is not only the core leadership, but also intermediaries who are in a position of *de facto* authority to reissue orders and have them executed by the physical perpetrators that can be targeted on an ongoing basis during hostilities. However, for targeting to occur on this basis, i.e. *de facto* authority to issue orders and have them executed by subordinates, then there needs to be reliable evidence or intelligence going towards this superior status. Targeting on this basis can thus only occur in the context of targeted operations in situations that meet the threshold of a common Article 3 non-international armed conflict.

VII. CONCLUSIONS

Criminal law modes of liability set out evolving conceptual frameworks for connecting individuals to crimes across a multiplicity of fact patterns and therefore suggest ways of linking individuals to hostilities as well as the membership of organised armed groups. Doctrinal developments relating to 'full-spectrum', 'counterinsurgency' and 'stability' operations lend credence to Van Creveld's prediction that 'the armed forces of the world will have to adjust themselves to this situation by changing their doctrine, doing away with much of their heavy equipment and becoming more like the police'.[142] This discussion has contributed towards an framework that better suits these changes in the strategic environment and in military doctrine by extrapolating principles derived from evolving criminal justice modes of liability to guide intelligence-based targeting analysis that can better 'understand the

141 *Prosecutor v Strugar* (Trial Judgment) (n 87) 333.
142 M van Creveld, 'Through a Glass, Darkly – Some Reflections on the Future of War' (2000) 53(4) *Naval War College Review*, 26.

social dynamic that sustains on-going fighting'.[143] In particular, it has sought to contribute towards the fundamental issue of distinguishing the indirect support activities of the general civilian population and mass base of popular support that lack proximity or a nexus with the surrounding hostilities from what can be broadly defined as the internal support structure of an organized armed group by putting participation and membership on a more analytical footing.

This approach means that in the absence of manifestations of hostile intent at the tactical level, targeting on the basis of many supportive, clandestine and opportunistic forms of direct participation in hostilities as well as membership in an organized armed group on the basis of a 'continuous combat function' may only practically occur in the context of targeted operations that are planned at the operational level of command and which occur within a situation that has at least reached the threshold of common Article 3 non-international armed conflict, otherwise domestic criminal law and applicable human rights law will continue to apply. This serves to undergird the doctrine of positive identification by elucidating the conditions and criteria for establishing 'reasonable certainty' vis-à-vis civilian participation in hostilities or membership in 'complex and diffuse organizational structures and networks'[144] in situations where there are no clear manifestations of hostile force or intent. It also serves to constrain targeting decisions by suggesting a clearer framework for resolving doubt in indeterminate situations *vis-à-vis* civilians that would otherwise fall into a 'grey area' within targeting law. This reduces the likelihood of arbitrary or erroneous targeting and thus ensures that combat lines of operations do not end up being operationally and strategically counter-productive. Thus in situations of armed conflict, this approach seeks to constrain extrajudicial or 'targeted' killing of civilians who are suspected of being terrorists, criminals or participating in hostilities. Unbridled and extensive use of lethal force as a first resort can only serve to escalate hostilities. Nevertheless, this framework for understanding participation in hostilities does in no way obstruct the application of conventional military approaches and considerations where necessary.

However, this is premised on the basis that the situation must at least have reached the threshold of a CA3 NIAC as indicated by the criteria in *Boškoski* as this marks the point at which it may be deemed appropriate to shift from a law and order paradigm to an armed conflict paradigm *vis-à-vis* targeting. This is because it is suggested that *Boškoski* provides

143 US FM 3-24 (n 51) Appendix B – 47.
144 Christopher Harding, 'The Offence of Belonging: Capturing Participation in Organized Crime' (2005) *Criminal Law Review*, 690.

reasoned and authoritative objective guidelines for identifying those situations that exceed the capacity of the law enforcement paradigm, or, in other words, those situations where individualized threat assessments and standard law enforcement techniques may not be generally practicable across a full-spectrum operational environment. In other words, where the intensity and organization of group violence becomes such that the framework of law enforcement can no longer function due to the breakdown in the security environment, for example, where it poses 'totally unreasonable risks to law-enforcement officials' and where 'the State does not have sufficient control to carry out an arrest', then recourse may be had to the legal framework of hostilities that allows for targeting on the basis of status as a member of an organized armed group.[145]

Arguably, this can serve to prevent, as far as possible, any premature recourse to status based targeting that may result in unwarranted 'extra-judicial' or 'targeted' killing of suspected 'terrorists' and any consequent 'collateral' deprivation of life in grey area situations characterized by low levels of violence. The CA3 threshold represents a high intensity of violence beyond what can be regarded as mere states of crisis or emergency to which the law enforcement regime of human rights law threat-based targeting can apply. In terms of the intensity criterion, consideration ought to be given to whether violence is sufficiently serious so as to amount to an armed conflict.[146]In terms of the organizational criterion, the more organized an armed group is, the greater the threat it represents and therefore the greater the challenge it will be for the 'normal' framework of law-enforcement to apply and so military means and methods are needed to reimpose public order. Essentially, to constitute an

145 David Kretzmer, 'Rethinking Application of IHL In Non-International Armed Conflicts'(2009) 42 Israel Law Review, 35.

146 *Prosecutor v Boškoski and Tarculovski* (Trial Judgment) ICTY-04-82-T (10 July 2008), 177: Factors include include whether there has been an increase in and a spread of armed clashes over territory and over a period of time. In this regard account ought to be taken of the casualty level and the extent of the destruction caused by the fighting as well as the effect of hostilities on civilians, for example by forcing them to flee from combat zones and whether civilians and/or civilian objects have been subject to direct or indiscriminate attacks.An assessment should also be made as to whether there has been any increase in the size of government armed forces as well as evidence of mobilization and distribution of weapons among both parties to the conflict. Indicators in this regard include troop and unit deployment numbers, the formation and change of front lines between belligerent parties and whether high intensity 'weapons of war' such as 'heavy weapons and other military equipment, such as tanks and other heavy vehicles' have been used. Also relevant to the issue of mobilization of forces and matériel is whether military tactics and formations have been employed such as the mass deployment of forces to a crisis area, the closure of roads and the blocking and encirclement of conurbations and the use of mortar or artillery fire against them. Another key factor that is relevant to the intensity criterion is whether international organizations such as the UN Security Council have become involved over concerns about the situation presenting a threat to domestic, regional and international stability, and whether any resolutions have been passed in this regard. Boškoski suggests that an account of the intensity or seriousness of hostilities can take place at a 'more systematic level'. This may involve an analysis of the policy decisions, orders and instructions that lie behind 'the way that organs of the State, such as the police and military, use force against armed groups' at the various levels of conflict.

organized armed group for the purposes of common Article 3, there needs to be 'some hierarchical structure' and furthermore the 'leadership requires the capacity to exert authority over its members'.[147]

147 *Boškoski,* ibid, 196, 199: *Boškoski* sets out five indicative and interrelated criteria of what constitutes a sufficient degree of organization for there to be an armed conflict for the purposes of IHL. Firstly, there must be some form of command structure in place. This may be evidenced by the existence of what can be regarded as a 'general staff' or a 'high command' which can issue political statements and communiqués as well as organize personnel, logistics and weapons, such as by appointing personnel to specific roles or tasks, giving orders and authorizing military operations. Furthermore, IHL can only apply where there is a command structure which allows the 'high command' to receive reports from all operational units within the chain of command and to establish and disseminate internal regulations that set out the hierarchical organization and structure of the armed group in terms of roles and duties at each level of the chain of command. Secondly, for a group to qualify as being 'organized', it must have the ability to carry out military operations in an organized fashion and control territory. Factors to consider in this regard are whether the group has the ability to establish a 'unified military strategy' so as to be able 'to conduct large scale military operations', whether it has 'the capacity to control territory' (rather than actually controlling it), and whether 'there is territorial division into zones of responsibility'. Furthermore, there must be some evidence that commanders and operational units can 'co-ordinate their actions' and effectively disseminate 'written and oral orders and decisions'. Thirdly, an organized armed group is one which has a sufficient level of logistical and organizational capabilities. For example, an assessment is to be made of a group's ability to recruit new members and to provide them with military training and to control and organize the supply of weapons and uniforms as well as its ability to link and co-ordinate all levels of the chain of command through a communications system. Fourthly, an armed group must also be sufficiently organized so as to ensure a level of discipline and demonstrate the ability to implement common Article 3. Factors relevant in this respect include whether there is a system of internal regulations and disciplinary rules in place as well as mechanisms such as proper training and supervision to ensure that they are disseminated to members of the organized armed group. Fifthly, Boškoski suggests that an 'organized' armed group is one with the ability to "speak with one voice" in the course of political negotiations. In this regard, account may be taken of the group's capacity 'to act on behalf of its members in political negotiations with representatives of international organisations and foreign countries' as well as its ability to negotiate and conclude agreements such as ceasefire or peace accords'.