

STRIKING THE RIGHT BALANCE:

TARGETING FINANCIERS OF ORGANIZED ARMED GROUPS

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Date: April 2017

Introduction

In early 2009 US General Brantz Craddock, then NATO's Supreme Allied Commander Europe, issued 'guidance' to NATO forces providing them with authority 'to attack directly drug producers and facilities throughout Afghanistan'.¹ The justification offered was that the drug trade was 'inextricably linked'² to the Taliban cause to which it funded some \$100 million p.a. Under that guidance, deadly force was permitted even in cases where there was no proof that suspects were actively engaged in hostilities towards coalition forces. The guidance was met with criticism by many NATO nations which considered the targeting of drug producers, ostensibly civilians, to be contrary to the principle of distinction under International Humanitarian Law ('IHL').³ As a result, the guidance was soon withdrawn.⁴ However, the US persisted with its intents of 'breaking the link between the narcotics trade and the Taliban'⁵ and prioritised the targeting of 'major drug traffickers who help finance the Taliban'.⁶ In a report to the US Senate this policy position was made clear: 'major drug traffickers who help finance

¹ Susanne Koelbl, 'NATO High Commander Issues Illegitimate Order to Kill', *Der Spiegel* (online), 28 January 2009 < <http://www.spiegel.de/international/world/battling-afghan-drug-dealers-nato-high-commander-issues-illegitimate-order-to-kill-a-604183.html> >.

² Ibid.

³ Ibid; See also Michael Schmitt, 'Targeting of Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law' (2009) 12 *Yearbook of International Humanitarian Law* 301.

⁴ On 30 January 2009; Schmitt, above n 3, 302.

⁵ U.S. Senate Committee on Foreign Relations, 111th Congress, 1st Session, *Report on Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents*, 10 August 2009, (v) ('US Senate Report').

⁶ Ibid.

the insurgency are likely to find themselves in the crosshairs of the military'.⁷ Some 50 drug producers who 'contribute funds to the insurgency' were placed on a 'kill or capture' list.⁸

The policy position adopted by the US challenges the principle of distinction and stretches the concept of 'direct participation in hostilities' to extents not contemplated by guidance published by the ICRC⁹ nor generally accepted by customary law. While it may be uncontroversial that there is a financial link between drug producers and the Taliban, should mere financial support of a military cause expose a civilian to military attack? This essay addresses that question, particularly in the context of non-international armed conflict.

Principle of Distinction

It is a fundamental tenet of IHL that parties to an armed conflict distinguish between persons engaged in hostilities and those who are not. In a traditional international armed conflict, that requires the opposing States' armed forces distinguish themselves from the civilian population.¹⁰ This is usually achieved by soldiers wearing uniforms and displaying distinctive insignia. It is a relatively simple exercise to determine who is targetable and who is not.¹¹ Indeed, in past conflicts civilians were largely absent from the battlefield, making the task of distinction even easier. Importantly, all members of those armed forces, regardless of their function, are targetable at all times.

However, recent history has shown that the instances of international armed conflict are becoming increasingly rare and, instead, modern conflicts are more likely to be of a non-international character, between a State's armed forces and some internal armed threat; whether

⁷ Ibid 1.

⁸ Ibid 16.

⁹ International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009) ('*ICRC Guidance*').

¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature on 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), art 44.3 ('*AP I*').

¹¹ *AP I* art 48.

it be dissident forces or some other ‘organized armed group’.¹² In terms of distinction, who is a member of the State’s armed forces should be readily apparent (as in an international armed conflict).¹³ However, it will be less apparent who is a member of a non-State party; in particular, who is a member of an organized armed group.

The task of distinction is complicated given recent guidance published by the ICRC which considers there to be groups within the group: those who perform combat functions and those who do not.¹⁴ Mere membership or support to a non-State party is not sufficient and those persons who do not assume a ‘continuous combat function’¹⁵ may not be subject to attack; those persons are civilians for the purposes of IHL. According to the ICRC, ‘recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.’¹⁶

The ICRC guidance, and its differential treatment of organized armed groups, raises an important issue. If making financial contributions to the general war effort of an organized armed group does not amount to a ‘continuous combat function’, under what circumstances could persons providing financial support, such as Afghan drug producers, be lawfully targeted under IHL?

¹² *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature on 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978), art 1 (‘AP II’).

¹³ Through wearing of uniforms, carrying arms openly, command structure, etc.; See generally *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, opened for signature on 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 13.

¹⁴ ICRC Guidance, above n 9, 34.; ‘Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL’.

¹⁵ *Ibid* 33.

¹⁶ *Ibid* 34.

Direct Participation in Hostilities

Generally, civilians¹⁷ enjoy protection against the dangers arising from military operations and must not be the object of military attack. However, a civilian loses that protection ‘for such time as they take a direct part in hostilities’.¹⁸ The concept of ‘direct participation’ remains one of the most difficult and unresolved issues in IHL. The ICRC has made attempts to clarify the position and has published guidance on the subject. However, that guidance has been met with much criticism¹⁹ and, as one author writes, deficiencies in the guidance ‘demonstrate a general failure to fully appreciate the operational complexity of modern warfare’.²⁰

One of the loudest criticisms of the ICRC guidance is its handling of ‘organized armed groups’. Their status is unique as membership is not established in the same manner as a State’s armed forces, and they are not classified as civilians.²¹ Instead, membership is based on the function a particular person serves. Only those who perform a ‘continuous combat function’ are members of the organized armed group.²² This third group of participant, neither traditional combatant nor civilian, is not found in existing treaty or customary law.²³ According to the ICRC, continuous combat function requires ‘lasting integration into an organized armed group’ and only those who prepare, execute or command an act or operation which amounts to ‘direct participation in hostilities’ are members of that group.²⁴ Therefore, membership to organized

¹⁷ Defined negatively to be ‘any person who does not belong to one of the categories of persons referred to in Article 4 A(1), (2), (3) and (6) of the Third Convention and in Article 43’ of AP I; AP I art 51.

¹⁸ AP II art 13.

¹⁹ See generally, Shannon Bosch, ‘The International Humanitarian Notion of Direct Participation in Hostilities – A Review of the ICRC Interpretive Guide and Subsequent Debate’ (2014) 17 *Potchefstroom Electronic Law Journal* 999; Michael Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’ (2010) 42 *N.Y.U. Journal of International Law and Politics* 697; Kenneth Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretative Guidance’ (2010) 42 *N.Y.U. Journal of International Law and Politics* 641.

²⁰ Schmitt, above n 19, 699.

²¹ Watkin, above n 19, 643.

²² ICRC Guidance, above n 9, 33.

²³ Watkin, above n 19, 643.

²⁴ ICRC Guidance, above n 9, 34.

armed groups is interwoven with the concept of ‘direct participation in hostilities’. Under ICRC’s rationale, only members of the organized armed group may be the object of attack.²⁵ Every other person performing a support function for the group, which falls short of the ‘continuous combat’ requirement, is a civilian and may only be the object of attack ‘for such time as they take a direct part in hostilities’.

Therefore, determining whether a person is a member of an organized armed group requires an understanding as to what amounts to direct participation in hostilities. Under the ICRC guidance there are three ‘constitutive elements’²⁶ of direct participation in hostilities. In order to qualify, a specific act must be likely to cause some harm to a party to the conflict or others protected from attack (*threshold of harm*), there must be a ‘direct causal link’ between the act and the harm, or from a ‘coordinated military operation of which that act forms an integral part (*direct causation*), and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict (*belligerent nexus*).

The ICRC guidance therefore contemplates some level of specificity before any particular act can be said to amount to direct participation in hostilities; the specific act must bring about a specific harm, in support of a specific party. This requirement for specificity and direct harm is largely contained in the ‘one causal step’ test.²⁷ Generally, acts which merely build up or maintain a party’s capacity to harm are too removed from the direct application of actual harm, and are excluded from the concept of direct participation in hostilities.²⁸ In terms of financial support, a general monetary payment to a non-State party would fall into this category.²⁹ It is difficult to imagine a circumstance where the mere payment of money could

²⁵ Ibid 17.

²⁶ Ibid 46.

²⁷ Ibid 53.

²⁸ Ibid 53, 66.

²⁹ Ibid 53.

ever cause direct harm. However, funding is usually but the first step to the successful completion of a military operation.

Importantly, the ICRC guidance recognises this stepped approach by taking into account the ‘collective nature and complexity of contemporary military operations’ in the assessment of direct causation of harm. This allows a wider view as to whether a specific act forms an ‘integral part’ of a ‘coordinated military operation’. While a specific act may not, of itself, cause direct harm it may still amount to direct causation where that act was integral to an operation which ultimately causes such harm.³⁰

Financing Specific Attacks - Causal Link?

As noted above, general monetary support to a non-State party which builds or maintains military capacity would not amount to direct participation in hostilities.³¹ However, that is not to say that all financing should be considered alike. It is argued that the civilian funding of specific attacks by organized armed groups should be viewed as an integral part of a coordinated military operation, amounting to direct causation. As Schmitt argues, the criteria of what amounts to direct participation should be expanded to capacity building that ‘can be linked to specific operations, or types of operations, that are relatively imminent’.³² A similar view is proffered by Boothby who argues ‘the important distinction is between acts designed to create the general capacity to undertake military operations and acts preparatory to combat. To be preparation, combat must be in the contemplation of the actor at the time of the preparatory act’.³³ In appropriate circumstances therefore, provided the threshold of harm and

³⁰ Ibid 54-55.

³¹ See, *The Public Committee Against Torture in Israel v The Government of Israel* (2006) H CJ 769/02, 35 (‘*Targeted Killing Case*’); ‘The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid’.

³² Schmitt, above n 19, 727.

³³ Bill Boothby, “‘And For Such Time As’: The Time Dimension to Direct Participation in Hostilities” (2010) 42 *N.Y.U. Journal of International Law and Politics* 741, 749-750.

belligerent nexus is satisfied, this would permit the direct targeting of civilian financiers who knowingly choose to involve themselves in specific military operations.

Assuming this approach is correct, it would fall on those seeking to target a civilian financier to determine when that person is targetable. Has the person become a member of the organized armed group, or is he simply a civilian taking a direct part in hostilities? The distinction is important as the former can be targeted at any time, while the latter may only be targeted 'for such time as' he directly participates in hostilities. This would likely be determined by reference to the person's level of ongoing involvement with the organized armed group. Is the person so involved that they perform a 'continuous combat function', or have they provided support merely on an individual, sporadic, unorganized basis? If a person is a mere civilian taking a direct part in hostilities, determining the window of attack is obviously problematic; is he targetable when it is known he has offered to supply funds, at the time of handing over cash, or after on the chance he might do it again?³⁴

Addressing the Imbalance: Case-by-Case

As illustrated above, the targeting of civilian financiers is not an easy proposition. However, that fact alone should not prohibit the active targeting of civilian financiers who, by forming an integral part of a coordinated military operation, knowingly take a direct part in hostilities. Of course, not all levels of finance or every financier will be integral to an operation. Further, not every transaction will satisfy each of the constitutive elements of direct participation. What is required is a case-by-case approach.

³⁴ As Schmitt suggests, a reasonable approach is to 'treat direct participants as a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal'; Michael Schmitt, 'Targeting of Narcinsurgents in Afghanistan: The Limits of International Humanitarian Law' (2009) 12 *Yearbook of International Humanitarian Law* 301, 312-313.

That was the approach adopted by the Israeli Supreme Court in the *Targeted Killing Case* in which it was acknowledged there remains “‘gray” cases, about which customary international law has not yet crystallized. There is thus no escaping examination in each and every case’.³⁵ A similar approach was taken by the Appeals Chamber of the International Criminal Tribunal in *Strugar*: ‘Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such... Moreover, 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’³⁶. The Appeals Chamber went on to conclude that whether a person was participating in hostilities should be determined on a ‘case-by-case basis, having regard to the individual circumstances’³⁷ of the person at the time.

Acknowledging the ‘grey’ areas, and adopting a sensible case-by-case approach, goes some way to address the distinction imbalance inherent in modern armed conflicts, where the State’s armed forces are obliged to distinguish themselves from the civilian population whereas members of organized armed groups frequently use the civilian population as cover. This imbalance exposes the armed forces of a State, making them readily identifiable and subject to attack at all times. The imbalance is even greater when one considers that only persons performing a ‘continuous combat function’ qualify as members of an organized armed group. As discussed above, persons performing support functions do not qualify and, as civilians, must not be the object of attack. Compare this to a State’s armed forces which would include all manner of logistics and support personnel. While those persons might not be actively engaged in causing direct harm to the enemy, it is their membership rather than their function which

³⁵ *Targeted Killing Case* (2006) HCJ 769/02, 39.

³⁶ *Prosecutor v. Pavle Strugar*, IT-01-42-T, ICTY, 31 January 2005, 176.

³⁷ *Ibid* 178.

make them targetable. Are persons supporting an organized armed group less integral to its military capacity than logistics and support members of a State's armed forces?

Consider the following in the context of financial support; in a modern conflict a logistics officer can be invaluable to a State's armed forces, often required to handle significant sums of money in payment of equipment, weapons, food and other materials while in theatre. That role is integral to the fighting force's ability to conduct its operations. The logistics officer is subject to attack at any time, although it is very unlikely that he will personally cause harm during his time in theatre. Compare this to the civilian financier of an organized armed group. Both men fulfil similar roles and both support the military operations of their party. But, on a restrictive view of direct participation, only the logistics officer may be killed for his involvement.

It is argued that those who actively support organized armed groups should be subject to the same dangers as logistics and support personnel of a State's armed force. Arguably, those individuals do not 'deserve the same protections as civilians who disdain hostilities and comply with their status'.³⁸ The absurdity of the situation was noted by the Israeli Supreme Court (in adopting the comments of Schmitt): 'Suggesting that civilians retain their immunity even when they are intricately involved in a conflict is to engender disrespect for the law by combatants endangered by their activities'.³⁹

While this approach may expose more civilians to attack, it is limited only to those who actively support the military operations of an organized armed group. It must be remembered that the onus remains on the attacker to establish the individual is a lawful target.⁴⁰ We should not be quick to assume that broadening the scope of what amounts to 'direct participation in

³⁸ William Banks, *New Battlefields Old Laws: Critical Debates on Asymmetric Warfare* (Columbia University Press, 2011), 102.

³⁹ *Targeted Killing Case* (2006) H CJ 769/02, 34.

⁴⁰ *Ibid* 40.

hostilities' would result in arbitrary killing of civilians. On the contrary, it may serve to better protect civilians. As Schmitt writes, 'a liberal approach creates an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted'.⁴¹

Case Study – Afghan Drug Producers

This essay commenced with a brief study of the US decision to actively target drug producers in Afghanistan. In light of the above discussion, consideration is now given as to whether the US policy should be considered lawful under IHL.

The prevailing view is that, at the relevant time, the conflict in Afghanistan was a non-international armed conflict and the Taliban was an organized armed group.⁴² Assuming that a drug producer had not otherwise qualified as a member of the Taliban for other activities, he would only qualify as a member of the organized armed group if his financing activities amounted to direct participation in hostilities. As advanced above, while general support to the Taliban cause would not satisfy the direct causation criterion, informed funding of a specific attack may qualify and expose the drug producer to attack as either a member of the organized armed group or a civilian taking a direct part in hostilities. Importantly, it is the financing activity, rather than the drug production activity, that qualifies as direct participation.⁴³

Neither the guidance given by General Craddock nor the report to the US Senate went to that level of specificity. They merely sanctioned targeting of drug producers with 'links'⁴⁴ to the Taliban. Even worse, the report to the US Senate acknowledged that the majority of

⁴¹ Michael Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict', in *Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004), 505-509; Again, those comments were adopted by the Israeli Supreme Court in the *Targeted Killing Case* (2006) HCJ 769/02, 34.

⁴² Schmitt, above n 34, 315.

⁴³ As drug production, of itself, would not meet the threshold of harm; See, Schmitt, above n 34, 316, 318.

⁴⁴ US Senate Report, above n 5, 15; Koelbl, above n 1.

payments made to the Taliban were extorted from the drug producers as part of a protection racket, or as payoffs and taxes.⁴⁵ Although ‘two verifiable human sources and substantial additional evidence’ was required before a drug producer was placed on the ‘kill or capture’ list,⁴⁶ if that evidence merely confirmed payments had been made to the Taliban, then the exercise was fundamentally flawed.

Undoubtedly, General Craddock’s guidance was not lawful under IHL. His guidance allowed lethal force in cases where there was no proof that suspects were members of the Taliban or had otherwise directly participated in hostilities. It was therefore contrary to the principle of distinction.⁴⁷ The US policy, as articulated in the report to the US Senate, is not unlawful *prima facie*. Provided the sources and additional evidence informing a decision to target a particular drug producer established the person had directly participated in hostilities, then the targeting of that person may be lawful under IHL. However, it is suggested that if the basis of that targeting is due to the drug producer providing financial support to the Taliban, there must be specificity to the payment before he can be considered to be directly participating in hostilities.

Conclusion

As the concept of modern warfare changes so must our understanding of what defines a civilian and the extents to which they may lose their protection from military attack. The current guidance issued by the ICRC presents a number of challenges to the principle of distinction. By its restrictive interpretation of ‘organized armed groups’ by reference to ‘continuous combat function’, traditional armed forces are placed at a distinct disadvantage; the scope and opportunity to attack them is significantly broader than an organized armed

⁴⁵ US Senate Report, above n 5, 9.

⁴⁶ *Ibid* 15-16.

⁴⁷ See, Schmitt, above n 35, 318.

group.⁴⁸ This is particularly so in the fight against terrorist organisations such as the Taliban. While membership to such an organisation is defined by reference to ‘continuous combat function’ those who support and facilitate combat operations, without directly causing harm, will be immune from attack. Indeed, there is a push to broaden the qualifying terms of membership to include these supportive elements, including financiers. This is true of the attempts made by General Craddock and the US Senate. That is not customary law, but it seems state practice may soon overtake events and even out the distinction imbalance.⁴⁹

⁴⁸ Watkin, above n 19, 649.

⁴⁹ Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 544; See also, *Targeted Killing Case* (2006) HCJ 769/02, Targeting killing was not prohibited and the legality of each individual must be determined in light of customary international law.

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