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Deconstructing direct participation in hostilities : the constitutive elements / Michael N. Schmitt

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Title:	Deconstructing direct participation in hostilities : the constitutive elements
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Abstract:	This article, written from the perspective of a participant in the ICRC process, critically analyzes one facet of the Interpretive Guidance — its criteria for activities that qualify as “direct participation,” which it labels “constitutive elements.” The article is devoted to a comprehensive deconstruction of the three constitutive elements — threshold of harm, direct causation, and belligerent nexus — and an examination of how to characterize conduct in grey area situations. The constitutive elements evidence serious shortcomings with respect to both law and military common sense. Taken together, the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare. Accordingly, States involved in 21st century warfare are unlikely to view the document favourably, let alone use it to provide direction to their forces in the field.
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