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"Direct participation in hostilities" : a legal and practical road test of the International Committee of the Red Cross's guidance through Afghanistan / Damien van der Toorn

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Abstract:	<p>The increasing difficulty in distinguishing between peaceful civilians and irregular forces in modern conflicts has necessitated closer legal analysis of the phrase 'direct participation in hostilities' as used in the Geneva Conventions and Additional Protocols. The International Committee of the Red Cross's ('ICRC') 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', published in June 2009, undertakes such an analysis. The Guidance may well have a significant influence on international and national tribunals considering the meaning of direct participation in hostilities, as well as the framing and implementation of rules of engagement by states for current and future operations. This article offers a critique of the Guidance both in terms of its process and nature, as well as its substantive legal analysis of the phrase. It also evaluates whether the ICRC's interpretation strikes a reasonable balance between the ability to achieve legitimate military objectives and the protection of civilians. Finally, it considers whether the interpretation results in a 'level legal playing field' for all parties to a conflict.</p>
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