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CIVILIAN SOCIAL MEDIA ACTIVISTS IN THE ARAB SPRING AND BEYOND: CAN THEY EVER LOSE THEIR CIVILIAN PROTECTIONS?

INTRODUCTION

The Arab Spring has brought great change to the Middle East. While a series of protests and violent revolutions supplanted old regimes in Tunisia, Egypt, Yemen, and Libya, Bahrain was rocked by protests and a civil war still rages in Syria.¹ New communications technologies such as Facebook, YouTube, and Twitter, as well as the global proliferation of cell phones, have been perceived as indispensable tools to organize protests,² galvanize public support,³ incite armed rebellion, and seek the support of allies and the international community.⁴ Dissidents' use of modern social media technology for these purposes can pose a real threat to an established regime, so much so that the military will try to stop these activities

1. Interview by Celeste Headlee with Abderrahim Foukara, Washington Bureau Chief, Al Jazeera Int'l, & Maren Turner, Executive Director, Freedom Now, in Washington D.C. (Oct. 2, 2012), available at <http://www.npr.org/2012/10/02/162154681/syria-bahrain-still-feel-arab-spring-aftershocks>.

2. Thomas Sander, *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, SOCIAL CAPITAL BLOG (May 23, 2012), <http://socialcapital.wordpress.com/2011/01/26/twitter-facebook-and-youtubes-role-in-tunisia-uprising/>.

3. Though there were several previous self-immolations in Tunisia, Ryan asserts that the use of social media to spread video of the event is what caused the incident to garner attention from the wider Tunisian public and the traditional media. Yasmine Ryan, *How Tunisia's Revolution Began*, AL JAZEERA (Jan. 26, 2011), <http://www.aljazeera.com/indepth/features/2011/01/2011126121815985483.html>.

4. See Richard A. Lindsey, *What the Arab Spring Tells Us About the Future of Social Media in Revolutionary Movements*, SMALL WARS J. (Jul. 2013), <http://smallwarsjournal.com/jrn/art/what-the-arab-spring-tells-us-about-the-future-of-social-media-in-revolutionary-movement>. Fitzpatrick notes that social media can be used to garner support from international partners. See Alex Fitzpatrick, *Social Media Becoming Online Battlefield in Syria*, MASHABLE (Aug. 9, 2012), <http://mashable.com/2012/08/09/social-media-syria>.

through cyberwarfare⁵ or direct action against the dissidents using such social media technology.⁶

A dissident's use of social media presents great potential to alter the military balance of an engagement, as it can be used to directly or indirectly recruit fighters and encourage military defections.⁷ Dissidents could also use social media to document abusive actions by the regime,⁸ express political views or aspirations incompatible with those of the regime, garner sympathy and material support from the international community, or otherwise aid a military or political victory over the regime.⁹ These activities, while potentially harmful to the regime's military and civilian government, could be characterized as free expression, an attempt to alter only the political situation,¹⁰ or even journalism.¹¹ In spite of such protections, a besieged regime may wish to either silence social media activists or target them as though they were enemy military forces.¹²

5. Fitzpatrick, *supra* note 4.

6. Kristen McTighe, *A Blogger at Arab Spring's Genesis*, N.Y. TIMES, Oct. 12, 2011, available at http://www.nytimes.com/2011/10/13/world/africa/a-blogger-at-arab-springs-genesis.html?_r=0.

7. Social media, such as YouTube, could be used for this purpose. However, more traditional radio devices were actually used for this purpose in documented reports. This article documents members of the armed opposition encouraging defection, but this activity could just as easily be undertaken by civilians. See Erika Solomon & Douglas Hamilton, *It's a Walkie-Talkie War on Syrian Frequencies*, REUTERS, April 4, 2012, <http://www.reuters.com/article/2012/04/04/us-syria-radio-idUSBRE8330E420120404>.

8. Jennifer Preston, *Seeking to Disrupt Protestors, Syria Cracks Down on Social Media*, N.Y. TIMES, May 22, 2011, at A10.

9. SEAN ADAY, ET. AL., BLOGS AND BULLETS II: NEW MEDIA CONFLICT AFTER THE ARAB SPRING 20–22 (2012), available at <http://www.usip.org/publications/blogs-and-bullets-ii-new-media-and-conflict-after-the-arab-spring> (detailing how outside political or military pressure may make victory for the opposition more likely).

10. International Covenant on Civil and Political Rights arts. 19, 25, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

11. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 79, June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978).

12. This can be accomplished by manipulating the content of the post, discrediting it, or blocking it. Fitzpatrick, *supra* note 4; Christopher Williams, *How Egypt Shut Down the Internet*, TELEGRAPH, Jan. 28, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/egypt/8288163/How-Egypt-shut-down-the-internet.html>.

Under international law, a regime can only target civilians with military force if the civilian has surrendered his or her protections by “taking direct part in hostilities.”¹³ Although it seems that many regimes have and will continue to use their military, paramilitary, and other state organs to target civilians regardless of international law,¹⁴ a regime has the right to repel an insurrection and defend itself against combatants or civilians who have truly lost protection by aiding combatants.¹⁵ This was demonstrated in Libya, where Muammar Gaddafi’s orders to attack armed civilians were within his regime’s right of self-defense, but orders to attack civilian protestors were contrary to international law.¹⁶ In order to balance the rights of the regime to properly defend itself and the rights of a civilian to lawfully express him or herself, it is imperative to define the line between a social media activist who has lost civilian protection and one who has not.¹⁷

Two competing approaches have developed to determine when a civilian has lost their protection from military targeting by “taking direct part in hostilities.”¹⁸ The first is the Protocol I Test, developed by the International Committee of the Red

13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3.

14. See *Libya: 10 Protestors Apparently Executed*, ALERTNET: A THOMSON REUTERS FOUND. SERVICE (Aug. 19, 2011, 12:30 AM), <http://www.trust.org/alertnet/news/libya-10-protesters-apparently-executed>.

15. Sarah Joseph, *Humanitarian Intervention in Libya*, CASTAN CENTER FOR HUM. RTS. L. (Mar. 18, 2011), <http://castancentre.com/2011/03/18/humanitarian-intervention-in-libya>.

16. *Id.*

17. Keck articulates the idea that international law seeks to strike a balance between military necessity and ensuring humanitarian protections. A state’s right to self-defense, which gives rise to military necessity, must be based on permissible goals, however. Trevor Keck, *Not All Civilians are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities, and Evolving Restraints on the use of Force in Warfare*, 211 *Mil. L. Rev.* 115, 131 (Spring 2012); The International Covenant on Civil and Political Rights contains the right to freedom of expression, though it notes that freedom may be curtailed only to the narrowest extent possible for national security and public order needs. International Covenant on Civil and Political Rights, *supra* note 10, art. 19.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3; Douglas Moore, *Twenty-First Century Embedded Journalists: Lawful Targets?*, *ARMY LAW.*, July 2009, at 18–21.

Cross (“ICRC”).¹⁹ This Test requires that the civilian act to cause military harm through an action designed for the purpose of causing such harm.²⁰ The civilian’s actions and the harm must also be linked directly within a single causal step.²¹ The second approach, the Functionality Test, evaluates the civilian based on the military importance of the civilian’s function to the faction that the civilian is supporting.²²

This Note will argue that neither the Protocol I Test nor the Functionality Test adequately balance a social media activist’s right to free expression with a regime’s right to self-defense,²³ in light of the potential military advantages gained by using social media.²⁴ An ideal balance will allow the social media activist unlimited political expression, even if the regime is existentially threatened by it, while respecting the regime’s right to target an activist who specifically endeavors to inflict serious military harm. The social media activist is less likely to be protected under the more expansive Functionality Test, because this test fails to assure adequate protections for the activist’s

19. See Nils Melzer, *Interpretive Guidance on the Notions of Direct Participation in Hostilities Under International Humanitarian Law: Adopted by the Assembly of the International Committee of the Red Cross on 26 February, 2009*, 90 INT’L REV. RED CROSS 991 (2009) [hereinafter INTERPRETIVE GUIDANCE].

20. *Id.* at 1025.

21. *Id.* at 996.

22. Dan Stigall, *The Thickest Grey: Assessing the Status of the Civilian Response Corps Under the Law of International Armed Conflict and the U.S. Approach to the Targeting of Civilians*, 25 AM. U. INT’L L. REV. 885, 896 (2010).

23. The United Nations Charter guarantees the right to national self-defense. U.N. Charter art. 51.

24. Zambelis notes the military value of social media by writing that the “FSA [Free Syrian Army] appears keen to compensate for its tactical and operational inadequacies by exploiting social media as a force multiplier.” Chris Zambelis, *Information Wars: Assessing the Social Media Battlefield in Syria*, COMBATING TERRORISM CENTER SENTINEL, Jul. 2012, at 19, 20, available at <http://www.ctc.usma.edu/posts/information-wars-assessing-the-social-media-battlefield-in-syria>. The United States military uses information to degrade an adversary military’s efficiency and as a standalone “nonlethal capability.” These goals would seem to lend themselves to the employment of social media. U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS 1-1 to 1-4 (Apr. 2005); PRENTISS BAKER, PSYCHOLOGICAL OPERATIONS WITHIN THE CYBERSPACE DOMAIN (2012), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA519576> (submitted to the faculty of Air War College).

right to freedom of speech and association.²⁵ The Protocol I Test is much more likely to grant protection to a social media activist, but it almost universally prevents the regime from defending itself against the military harm that social media activists can purposefully cause.²⁶

This Note will then argue that the Functionality Test can be adapted to adequately balance the rights of the regime with those of the social media activists.²⁷ The Functionality Test requires additional safeguards to ensure that regimes only target social media activists in those rare instances where the activists intentionally pose a legitimate military threat.²⁸ These additional safeguards will require that the activist exhibit an individual, subjective intent to cause military harm to the regime,²⁹ and that the act not constitute part of the “general war effort” by merely building military capacity.³⁰

Part I of this Note will provide a background of civilian participation in conflict and the use of social media, both before and during the Arab Spring, by examining the dissidents’ actions and the regimes’ reactions. This examination will focus heavily on the situation in Syria, as its civil war is the closest

25. Stigall notes that the Functionality Test is more likely to allow for the targeting of civilians. Stigall, *supra* note 22, at 896. Free expression and political harm should not result in the loss of civilian protection. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

26. Michael Schmitt criticizes the Protocol I Approach as constraining a military’s ability to respond to certain legitimate threats posed by civilians. Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 725, 729 (2010) [hereinafter *Deconstructing Direct Participation in Hostilities*].

27. International law generally recognizes the right to free expression, association, and political views. International Covenant on Civil and Political Rights, *supra* note 10, art. 19. The right of a regime to protect itself in a legal manner is not affected by the general character of the regime. Joseph, *supra* note 15. However, doctrines like humanitarian intervention may be used to address abuses in the conduct of the war or the government’s behavior in general. See T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 2 (2002).

28. Stigall notes that the Functionality Test could be interpreted in a manner too expansive to constrain military action against civilians that should be protected from targeting. He also observes that the Functionality Test is more likely to allow targeting of civilians than other interpretations. See Stigall, *supra* note 22, at 896–898.

29. Free expression and political harm should not result in the loss of civilian protection. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

30. *Id.*

to a traditional intrastate armed conflict,³¹ and dissidents using social media in such a conflict are more likely to cause military harm. Part II will address the current provisions and interpretations of international law that result in civilian dissidents who use social media, either losing or maintaining their protection from targeting. Part III will analyze and evaluate the different applications of social media activities that may result in the loss of civilian protection in light of the different interpretations of a civilian's direct participation in hostilities.³² Part IV will discuss the strengths and weaknesses of each interpretation of direct participation and propose additional criteria for determining when a social media activist has lost his or her civilian protection. These additional criteria will seek to balance a regime's right to defend itself from what could be employed as a new type of military threat against the legitimate rights of a social media activist.³³

I. BACKGROUND

A. *Evolution of Protection for Civilians*

The right of the civilian population to be free from military targeting has been evolving over the last 150 years.³⁴ Following the widespread civilian suffering of World War II,³⁵ large segments of the international community drafted the final treaty in the modern series of the Geneva Conventions to protect civilians, in addition to the soldiers, sailors, and prisoners of war protected under previous Geneva Conventions, from certain

31. The conflict in Syria most closely resembles a traditional intrastate conflict because the regime forces are engaged with several organized, armed opposition groups and coalitions of such organized groups. See, Lina Sinjab, *Syria Crisis: Guide to Armed and Political Opposition*, BBC (Dec. 13, 2013), <http://www.bbc.com/news/world-middle-east-24403003>.

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 51, sec. 3.

33. The United Nations Charter guarantees the right to national self-defense. U.N. Charter art. 51; Joseph, *supra* note 15.

34. Protection of civilians was at first customary and began to be codified by instruments such as the Hague Conventions of 1907. See Waldemar Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117, 120–24 (1986).

35. Keck, *supra* note 17, at 120–121.

instances of undue harm during war.³⁶ Within international conflicts, states were obliged to offer certain protections to opposing armed forces, military objectives, and civilians actively participating in hostilities.³⁷ These included protections from murder, summary execution, use as a hostage, torture, and other inhumane treatments.³⁸ The first and second additional protocols to the Geneva Conventions explicitly protected civilians from military targeting, as long as they refrained from participation in hostilities.³⁹ The first additional protocol extended some of the Geneva Conventions protections to intra-state conflicts for the first time, though only within the context of conflicts against colonial or apartheid regimes.⁴⁰ The first additional protocol conditioned civilian protection on direct, ra-

36. The protection of civilians was codified by the fourth treaty in the Geneva Conventions and was similar to the safeguards offered to the groups shielded by the three previous treaties. For this reason, the enumerated protections are referred to as “Common Article 3” for their identical placement in each treaty. Lori Hosni, *The ABCs of the Geneva Conventions and their Applicability to Modern Warfare*, 14 NEW ENG. J. INT’L & COMP. L. 135, 137–138 (2007); Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

37. Hosni, *supra* note 36, at 137–38 (citing Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 36, art. 3).

38. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 37, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *supra* note 37, art. 3; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 37, art. 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 36, art. 3.

39. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 3; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

40. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1, ¶ 4; Hosni, *supra* note 36, at 143–45.

ther than active participation in the conflict, as had previously been the case.⁴¹ A second additional protocol extended the civilian protections of the first additional protocol to all internal armed conflicts.⁴²

B. Increasing Participation of Civilians in Warfare.

Concurrent with the development of greater civilian protections,⁴³ civilians have become generally more involved in warfare, both as victims and as participants.⁴⁴ The recent proliferation of intrastate conflicts⁴⁵ has been accompanied by the increased suffering of civilians in such conflicts.⁴⁶ The nature of these conflicts seems to create a propensity for greater civilian involvement in the fighting.⁴⁷ This increased civilian involvement is likely due to the intermingling of regime forces, opposition forces, and civilians in close quarters and the greater like-

41. The treaty protections for civilians in intrastate conflicts were originally allowed for groups attempting to overthrow a colonial regime, occupation from a foreign power, or an apartheid regime. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Conflicts (Protocol I), *supra* note 11, art. 1, sec. 4. Later, all internal armed conflicts were covered. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1; Michael Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, in FESTSCHRIFT FÜR DIETER FLECK 505, 507, (Horst Fischer et al. eds., 2004) [hereinafter *21st Century Armed Conflict*], available at http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilities.pdf.

42. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *supra* note 39, art. 1.

43. See Solf, *supra* note 34, at 117–129.

44. See generally Andreas Wegner & Simon J. A. Mason. *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L REV. RED CROSS 835 (2008).

45. See generally Stephane Dosse, *The Intrastate Wars*, SMALL WARS J., 2 (Aug. 25, 2010), <http://smallwarsjournal.com/jrnl/art/the-rise-of-intrastate-wars>.

46. The majority of the worst instances of civilian suffering are a result of intrastate conflicts. OXFAM, PROTECTION OF CIVILIANS IN 2010: FACTS, FIGURES, AND THE U.N. SECURITY COUNCIL'S RESPONSE, 2–3 (2011), available at <http://www.oxfam.org/sites/www.oxfam.org/files/protection-of-civilians-in-2010-09052011-en.pdf>.

47. See Wegner & Mason, *supra* note 44, at 840–41, 843–46.

lihood that civilians will be invested in the outcome of a more local conflict.⁴⁸

At the same time, warfare in general is being waged with greater civilian involvement under the auspices of military supervision.⁴⁹ Contractors and civilians directly employed by the military are performing jobs that were once reserved for uniformed military personnel.⁵⁰ Civilians often participate in conflicts through irregular militias⁵¹ or perform technical tasks for an organized military such as Cyber Operations,⁵² maintaining complex weapons systems,⁵³ or preparing food for soldiers.⁵⁴

48. Many factors may explain this increased civilian involvement in hostilities. Intrastate conflicts may afford the opportunity for civilians to participate in an intrastate conflict as a pretext for other opportunities, such as personal gain or prosecution of a vendetta against a certain group. Furthermore, the parties to the conflict may have uncertain membership, with action undertaken in a “bottom up” manner where civilians will broadly undertake the goals of a party on their own initiative. *Id.* at 843–44.

49. See generally Nathan E. Hill, *Military Contractors—Too Much Dependence?* (Mar. 15, 2008) (Strategy Research Project for U.S. Army War College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA479000>.

50. Civilians have become increasingly involved in administering and maintaining high technology military equipment such as command systems, communications, and sophisticated weapons. Wegner & Mason, *supra* note 44, at 839. Civilian contractors now routinely act as cooks, interpreters, security guards, and equipment maintenance workers. Mark Cancian, *Contractors: the New Element of Military Force Structure*, 38 UNITED STATES ARMY WAR COLLEGE QUARTERLY: PARAMETERS 63–64 (Autumn 2008), available at <http://strategicstudiesinstitute.army.mil/pubs/parameters/articles/08autumn/cancian.pdf>.

51. For an example of this phenomenon, see Paul Rodgers, *Syria: the Evolving Problem of Competing Militias*, OXFORD RESEARCH GROUP (Feb. 2013), <http://reliefweb.int/sites/reliefweb.int/files/resources/Syria%20the%20evolving%20problem%20of%20competing%20militias.pdf>.

52. Cyber Operations include assuring security of computer networks as well as using such networks to offensively assist military commanders. Cyber Operations capabilities have been suggested as a tool of deterrence, similar to nuclear weapons, and have been used for other national security goals, such as sabotaging Iran’s nuclear weapons program. Zachary Fryer-Biggs, *U.S. Cyber Moves Beyond Protection*, DEFENSE NEWS (Mar. 16, 2014 9:54 AM), <http://www.defensenews.com/article/20140316/DEFREG02/303170013/US-Cyber-Moves-Beyond-Protection>; DEPT OF DEFENSE, CYBER OPERATIONS PERSONNEL REPORT 10-11, 14-15 (2011), available at <http://www.hsdl.org/?view&did=488076>.

53. Wegner & Mason, *supra* note 44, at 838–39.

54. Rod Nordman, *Risks of Afghan War Shift from Soldiers to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1.

Militaries are also taking on other activities that were either formerly civilian in nature or did not exist in the recent past,⁵⁵ such as Cyber Operations, to safeguard and attack computer networks, and Information Operations, which are designed to impact a party's ability to collect, process, disseminate, and act upon information.⁵⁶ These developments have resulted in greater civilian involvement in military operations as well as the incorporation of arguably civilian activities into military operations.⁵⁷

The simultaneous trends of rising civilian involvement in intrastate conflicts and a generally increasing civilianization of military tasks⁵⁸ have collided with the growing protections offered to civilians during conflicts⁵⁹ to cause even greater friction between legal protections and the reality of warfare.⁶⁰ The use of social media can accelerate this friction, as its use may further muddle the difference between military goals, political goals, and free expression.⁶¹

C. Use of Social Media in the Arab Spring.

Social media has been perceived as instrumental to the political and military effectiveness of the opposition and insurgent forces in the Arab Spring.⁶² The genesis of the Arab Spring

55. Wegner & Mason, *supra* note 44, at 837–38.

56. Information Operations are activities designed to “affect the ability of the target audience . . . to collect, process, or disseminate information before or after decisions are made.” Information Operations include Psychological Operations which seek not only to affect other militaries, but also civilian populations and governments, which are necessary to achieve military goals. UNITED STATES DEP'T OF DEFENSE, JOINT PUBLICATION 3-13 INFORMATION OPERATIONS, II-3 to II-4 (2006) [hereinafter JOINT PUBLICATION 3-13]; Wegner & Mason, *supra* note 44, at 837–38; Fryer-Biggs, *supra* note 52.

57. Wegner & Mason, *supra* note 44, at 837–38.

58. *Id.*

59. See Nils Melzer, *Keeping the Balance Between Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notions of Direct Participations in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 887 (2010) [hereinafter *Keeping the Balance Between Necessity and Humanity*].

60. Wegner & Mason, *supra* note 44, at 843–45.

61. Actors in the conflict are either political or military, but employ similar means to use social media in the Syrian conflict. Zambelis, *supra* note 24, at 19.

62. See T.J. Waters, *Social Media and the Arab Spring*, SMALL WARS J. (Nov. 14, 2012), <http://smallwarsjournal.com/jrnl/art/social-media-and-the>

movement is thought to have occurred in Tunisia when Mohamed Bouazizi immolated himself.⁶³ He acted out of desperation after he was unsuccessful in securing the return of his fruit and scale impounded by corrupt government officials.⁶⁴ This act is often cited as the catalyst that unleashed protests and rebellion across the region as the citizens of Tunisia, Libya, Egypt, Syria, Bahrain, and other Arab countries yearned for “dignity, justice, and opportunity.”⁶⁵ The ensuing protests and skirmishes with authorities were distributed throughout Tunisia via Facebook, until traditional media picked up the story and further accelerated its distribution.⁶⁶ News of the opposition’s activities and the regime’s repression were disseminated by the various means of social media; that dissemination, in turn, appears to have increased acts of protest against the regime.⁶⁷ Although paramilitary and police forces⁶⁸ were used

arab-spring. Some experts believe, however, that the impact of social media in the Arab Spring may have been overstated and that additional study is needed to draw definite conclusions about social media’s importance to these movements. See ADAY, ET. AL., *supra* note 9, at 3–5.

63. This event is often cited as the spark that ignited the events in Tunisia, which in turn is cited as the immediate catalyst for the Arab Spring. Salman Shaikh, *Mohamed Bouazizi: A Fruit Seller’s Legacy to the Arab People*, CNN (Dec. 17, 2011, 9:23 AM), <http://www.cnn.com/2011/12/16/world/meast/bouazizi-arab-spring-tunisia/>; Ryan, *supra* note 3.

64. Hernando De Soto, *The Real Mohamed Bouazizi*, FOREIGN POLICY (Dec. 16, 2011), http://www.foreignpolicy.com/articles/2011/12/16/the_real_mohamed_bouazizi.

65. Shaikh, *supra* note 63.

66. Social media is given great credit for spreading news of this event, as a similar event that was not widely reported failed to spark widespread civil action in Tunisia. Ryan, *supra* note 3.

67. Facebook, Twitter, and YouTube were used to spread news about the opposition’s and regime’s activities. These sources even fed information to traditional television news outlets. Ryan, *supra* note 3.

68. Customary practice indicates that police or paramilitary forces can be considered armed forces, thus their members are considered combatants, if they independently meet the criteria to be considered an armed force. It is arguable that this practice is confined to international conflicts, as it is not mentioned in Protocol II, which deals with a broader scope of intrastate conflicts than Protocol I, though examples given by the ICRC of activities, such as the enforcement of a nation’s laws, are not analogous to traditional military action. International Committee of the Red Cross, *Rule 4: Definition of Armed Forces*, CUSTOMARY INT’L HUMANITARIAN L. DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule4 (last visited Oct. 25, 2012); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and

against the protestors, the military itself seemed to act against the regime.⁶⁹ This suggests the possibility that the use of social media may have served to recruit widespread military support for the revolution. It is entirely possible, however, that this movement was purely political, and the military simply declined to intercede as the president had ordered.⁷⁰ The usage of social media was aimed at organizing protests and disseminating information about the regime.⁷¹ These activities generally involved political mobilization against the government and lacked a military component.⁷²

During the conflict in Syria, the Free Syrian Army used social media to implore members of the regular Syrian military to defect and join the Free Syrian Army.⁷³ The defections that fol-

Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 43. Membership in the armed forces, however, is a predicate to being considered a combatant—as distinguished from a civilian—in international conflicts. International Committee of the Red Cross, *Rule 3: Definition of Combatants*, CUSTOMARY INT'L HUMANITARIAN L. DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3 (last visited Sep. 14, 2012); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 43; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1.

69. Ellen Knickmeyer, *Just Whose Side are Arab Armies on, Anyway?*, FOREIGN POLICY (Jan. 28, 2011), http://www.foreignpolicy.com/articles/2011/01/28/just_whose_side_are_arab_armies_on_anyway.

70. The motivation for the military's refusal to intercede and obey the President's order to fire on the protestors is not clear. This refusal and the withdrawal of the military, however, have been described as "inexplicable." See David Kirkpatrick, *Chief of Tunisian Army Pledges His Support for 'the Revolution'*, NY TIMES, Jan. 24, 2011, at A4.

71. The use of social media in Tunisia closely mirrored the use of social media in Egypt. Sahar Kamus & Katherine Vaughn, *Cyberactivism in the Egyptian Revolution: How Civic Engagement and Citizen Journalism Tilted the Balance*, 14 ARAB MEDIA & SOC'Y, SUMMER 2011, available at <http://www.arabmediasociety.com/index.php?article=769&printarticle>.

72. See Knickmeyer, *supra* note 69.

73. YouTube and walkie-talkies were used by the opposition to try to induce defection by regime soldiers. Solomon & Hamilton, *supra* note 7; Saad Abedine, *Military Defectors Unite Under Free Syrian Army*, CNN (Mar. 25, 2012), <http://www.cnn.com/2012/03/24/world/meast/syria-unrest>.

lowed chronologically⁷⁴ have allegedly filled the ranks of the Free Syrian Army while sapping the strength of the regular Syrian Army.⁷⁵ Furthermore, the Free Syrian Army used the same social media to sow disunity and lower the morale of the Syrian military.⁷⁶ This type of action has the effect of building up the military capacity of the Free Syrian Army while inflicting military harm on the forces of the regime.⁷⁷

Social media activists used YouTube, Twitter, Facebook, and a host of other media to broadcast atrocities and other abuses by the regime to the outside world.⁷⁸ In Libya, social media users publicized violence by the regime, which was cited as a significant factor in galvanizing support for international military intervention.⁷⁹ Posting evidence of such violence can bridge the gap between what happened on the ground during an armed conflict and what the governments and citizens of the world know when traditional international media is unable to document such violence through local reporting.⁸⁰ In many instances, such international awareness galvanized the citizens of other countries to encourage their own governments to politically pressure the regime committing the violence.⁸¹ Measures un-

74. The connection between media inducement and actual defection can be inferred, but not documented. *See generally* Abedine, *supra* note 73; *See* Solomon & Hamilton, *supra* note 7.

75. *Inside the Free Syrian Army*, PBS NEWS HOUR (March 12, 2012), http://www.pbs.org/newshour/bb/world/jan-june12/syria_03-12.html.

76. Zambelis, *supra* note 24, at 20.

77. The composition of the Free Syrian Army itself implies that defection causes harm to regime forces as well as benefit to opposition forces. *See Inside the Free Syrian Army*, *supra* note 75; But, Zambelis characterizes the use of social media to encourage defections from the regime to the opposition as more important to reducing the morale and effectiveness of the regime than the marginal shift in relative personnel strength. *See* Zambelis, *supra* note 24, at 20–21.

78. *Libya: 10 Protestors Apparently Executed*, *supra* note 14.

79. Aday writes that the use of social media in Libya generated a great deal of discussion of the conflict. He is currently investigating how much, if at all, such discussion can influence a foreign government to intervene. *See* Sean Aday, *Social Media, Diplomacy, and the Responsibility to Protect*, TAKE FIVE (Oct. 17, 2012), <http://takefiveblog.org/2012/10/17/social-media-diplomacy-and-the-responsibility-to-protect>.

80. ADAY, ET. AL., *supra* note 9.

81. This “boomerang” phenomenon is when a population oppressed by a regime causes citizens of another country to compel their own government to pressure the regime. This political pressure may cause the regime to suspend abuses or make it more difficult to commit them. ADAY, ET. AL., *supra* note 9

dertaken by other governments to compel the regime to halt violence sometimes result in subsequent military intervention.⁸²

Dissidents' use of social media during the Arab Spring has shown that some uses of social media are capable of altering the military landscape in addition to causing widespread political consequences.⁸³ The recent uprisings of the Arab Spring also suggest several plausible scenarios in which social media could be employed in future political and military uprisings, such as organizing protests to distract the regime's military while opposition forces attack.⁸⁴ Each of these scenarios has different military and political consequences, and will therefore inform a different legal result as to when the social media activist in question would lose his or her civilian protection.⁸⁵

II. APPROACHES TO CIVILIAN PROTECTION

Under the Geneva Conventions Additional Protocols I and II, protecting civilians in interstate and intrastate conflicts respectively,⁸⁶ a civilian loses his or her protections from military

(citing MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998)).

82. See *The Colonel Charges Ahead*, *ECONOMIST* (May 17, 2011), <http://www.economist.com/node/18400592>.

83. See Zambelis, *supra* note 24

84. See generally *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, *supra* note 2.

85. Stigall notes that the interpretative framework chosen will lead to different results in situations with the same facts. See Stigall, *supra* note 22, at 907–08.

86. Civilian status is asserted simply by finding that the person is not a member of the armed forces or a comparable opposition group in an armed conflict. The most important factor in determining membership in the armed forces is that the person is under the discipline of a responsible command. The Geneva Conventions and its additional protocols are, however, unclear about whether protections afforded to combatants extend to dissident armed forces in an intrastate conflict. The ICRC states that the definition of armed forces may be used to distinguish combatants from civilians for the purposes of determining civilian status in an intrastate conflict. International Committee of the Red Cross, *Rule 3: Definition of Combatants*, *supra* note 68; International Committee of the Red Cross, *Rule 4: Definition of Armed Forces*, *supra* note 68; International Committee of the Red Cross, *Rule 5: Definition of Civilians*, *CUSTOMARY INT'L HUMANITARIAN L. DATABASE*, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule5 (last visited Sep. 15, 2012). Both additional protocols contain the same protections for civilians not taking direct part in hostilities but apply to different types of conflicts. The

targeting only by taking “direct part in hostilities.”⁸⁷ There are two primary interpretations of this standard which would allow varying degrees of participation and support to an armed conflict before the civilian would lose his or her status.⁸⁸ The Protocol I Test evaluates three formal elements of the civilian’s actions in a manner that tends to conservatively preserve civilian protections⁸⁹ whereas the more expansive Functionality Test evaluates a civilian based on their military value.⁹⁰

first protocol applies to international conflicts and a limited set of intrastate conflicts while the second protocol applies generally to intrastate conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *supra* note 11, art. 1, sec 4, art. 51, sec. 3; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 1, sec. 2, art. 13.

87. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 13, sec. 3. A temporal element must also be considered in order to understand the requirement of direct participation in hostilities. Many scholars believe that protection is lost only for the duration of such participation as opposed to the idea that habitual participation will result in a long term, total loss of protection. Kenneth Watkin, *Opportunity Lost, Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 660–62 (2010).

88. Moore, *supra* note 18, at 20–21. The Geographic, Functional, and Temporal Test is a third alternative test to determine direct participation in hostilities. This test considers “(1) geographic proximity of service provided to units in contact with the enemy, (2) proximity of relationship between services provided and harm resulting to enemy, and (3) temporal relation of support to enemy contact or harm resulting to enemy.” Albert S. Janin, *Engaging Civilian-Belligerents Leads to Self-Defense/Protocol I Marriage*, ARMY LAW., July 2007, at 89 (quoting INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, INT’L & OPERATIONAL LAW VOL. II, at I-10 (2006)). Stigall finds the Geographic, Functional, and Temporal Test less expansive than the Functionality Test. Stigall, *supra* note 22, at 896. It should be noted that some believe the Functionality Test to also consider the geographic and temporal proximity of military harm. Moore, *supra* note 18, at 21 n. 215.

89. The International Committee of the Red Cross developed this interpretation because prior national guidance and adjudications on the subject did not establish an applicable rule, but rather lists of behaviors, beyond physically fighting an enemy, that were classified as either direct or indirect participation. See INTERPRETIVE GUIDANCE, *supra* note 19, at 991–93; *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 705–08, 725, 729.

90. Moore, *supra* note 18, at 19–22; Stigall, *supra* note 22, at 896.

A. Protocol I Test

The Protocol I Test was developed by the ICRC to clarify the ambiguity of the “direct participation” requirement articulated in the Geneva Conventions and its additional protocols.⁹¹ The Protocol I Test requires three elements to find direct participation in hostilities under the Geneva Conventions.⁹²

First, a “threshold of harm” must be reached wherein an act is “likely to adversely affect the military operations or military capacity of a party to an armed conflict” or an act that kills or causes physical harm to a person or object protected from attack.⁹³ This includes any harm, or potential harm, that may have a negative effect on the military situation.⁹⁴ Such harm is broadly defined and only needs to deprive the regime of some military advantage or diminish its military capabilities.⁹⁵ The threshold of harm does not account for actual severity of harm, so long as some harm occurs or is likely to occur.⁹⁶

Second, there must be a direct causal relationship between the act and the harm suffered.⁹⁷ The ICRC recommends considering several factors to parse direct causation from indirect causation.⁹⁸ First, in order to constitute direct causation, the act must not be a part of the general war effort.⁹⁹ This distinguishes those acts that indirectly support hostilities through the general war effort, to include “war sustaining activities like

91. INTERPRETIVE GUIDANCE, *supra* note 19, at 991–94; Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 39, art. 13, sec. 3.

92. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 856–57.

93. The harm does not have to actually come to fruition but must only be a likely result. INTERPRETIVE GUIDANCE, *supra* note 19, at 1016.

94. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, 714–15.

95. The breadth of activity meeting this element is intentionally wide. It was thought that the remaining elements would properly exclude indirect participation. Still, “political, economic, and other advantages, such as impacting civilian morale” are not military harm though they may be indispensable to a war effort. *Id.* at 715–20.

96. INTERPRETIVE GUIDANCE, *supra* note 19, at 1017.

97. *Id.* at 1020.

98. Michael Schmitt, *Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 26–27 (2010) [hereinafter *A Critical Analysis*].

99. Stigall, *supra* note 22, at 894.

manufacturing ammunition,” from those that actually apply military force, like assaulting an enemy position.¹⁰⁰ Activities within the general war effort are those that build the general military capacity and contribute to military victory by supporting and enabling the general capability to apply military force.¹⁰¹ These include military production, maintenance of transportation infrastructure, finance, and activities building political support for the conflict.¹⁰² The causation element is, however, broader than simply separating participation in the general war effort from actions with more specific military consequences.¹⁰³ This element also requires that no more than a single “causal step” exist between the action constituting direct participation and the harm inflicted.¹⁰⁴ For instance, building

100. This idea tries to parse military logistics, industrial research, and other support into that which is part of a traditional war economy from support tied to specific military operations which, while similar, shares a closer causal connection to the specific military harm in question. The ICRC actually defines the general war effort as activities “objectively contributing to the defeat of the adversary . . . beyond the actual conduct of hostilities.” This, along with the argument that the line delineating direct participation should fall somewhere between an individual engaged in combat and any person with an indirect impact on the war effort, strongly implies that the dividing line between the general war effort and the conduct of hostilities is the addition to or support of military capacity versus some application of force or harm to the enemy. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1020 n.113. Keck gives several other examples of this fine line. For instance, he posits that transporting ammunition on a truck meets causation if it is destined directly for a unit at the front line, but transporting it to a port for further shipment would not meet the required level of causation. Keck, *supra* note 17, at 142.

101. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020

102. The ICRC notes a difference between the general war effort and war sustaining activities. The general war effort includes activities directly supporting the general military effort, such as production, design, and transport. War sustaining activities are further removed and include activities associated with a nation at war such as political propaganda, finance, and maintenance of an economy geared to support the war effort. *Id.*

103. This test, however, stipulates that participation in the general war effort will always be considered indirect participation in hostilities. *Id.* at 1019–20.

104. This act does not need to be indispensable to the harm, as direct participation could occur when a person provides extra help that is not strictly needed to accomplish the goal. Schmitt further notes that the single step could not have been literal, as gathering intelligence is several steps removed from an attack, but still certainly direct participation. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 727–28.

and storing an Improvised Explosive Device would be at least a single causal step removed from the military harm incurred when that weapon is employed by placing and detonating it.¹⁰⁵ The direct causation element contains an exception for coordinated operations where the operation itself meets the causation element.¹⁰⁶ This exception will find direct causation if the individual act is both an integral part of the operation and undertaken specifically for that operation.¹⁰⁷

The third requirement of the Protocol I Test is a belligerent nexus.¹⁰⁸ A belligerent nexus exists when the act in question was “specifically designed [to cause the required threshold of military harm] to support a belligerent party to the detriment of another” party.¹⁰⁹ A belligerent nexus differs from traditional subjective intent, in that a belligerent nexus requires only an evaluation of the purpose of the act itself, whereas a subjective evaluation would focus on what the individual actually intended to accomplish through the act.¹¹⁰ Belligerent nexus is evaluated by inferring the purpose of the act from available objective facts in each circumstance, and therefore imputes intent to all participants in such an act regardless of their individual intent.¹¹¹ For instance, a civilian that attacks a soldier to prevent

105. There is great disagreement about whether a civilian should be targetable when engaging in such an activity. Many military commanders believe that, although it would fail the Protocol I Test, the act is inherently hostile and is likely the only practical time to interdict the Improvised Explosive Device. *See id.* at 725, 729.

106. INTERPRETIVE GUIDANCE, *supra* note 19, at 1022.

107. Actions like general military training, though integral to a certain operation, are not specific enough to a certain operation to amount to direct participation. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 729–30. Moreover, the examples given by the ICRC and its specific language, such as indicating the location of forces, imply that collective military operations are limited to those achieving a specific and limited objective, instead of broader strategic operations. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1023.

108. Watkin, *supra* note 87, at 657–58.

109. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 857, 873.

110. A finding of belligerent nexus requires the intent to cause the threshold of harm referenced in the first element of Protocol I Test. INTERPRETIVE GUIDANCE, *supra* note 19, at 1026–27.

111. Similar acts may have different motivations, such as inflicting military harm on an enemy, enjoying criminal gain, or simply defending one's self. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36.

a rape would lack a belligerent nexus because the act would not be designed to cause military harm, even though military harm was caused through a purposeful act, regardless of the true intentions of the civilian.¹¹² Conversely, a civilian would have a belligerent nexus if he or she spontaneously joined a military attack with the sole intention of looting the other side for profit.¹¹³ An individual would be excused from an act with a belligerent nexus only if he was unaware of his participation in the act, such as a person unaware that they were transporting a bomb.¹¹⁴

C. *Functionality Test*

The Functionality Test was predominantly developed by the United States to interpret the idea of direct participation in hostilities in a manner that acknowledged the military value of civilians on the battlefield.¹¹⁵ The Functionality Test evaluates the importance and level of support of a civilian's military function to the achievement of a party's military goals.¹¹⁶ This test does not focus on the actual or potential harm caused to the other side, but instead focuses on the value provided to the armed forces by the civilian's activities.¹¹⁷ Under the Functionality Test, the more essential a civilian is to victory on the bat-

112. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027–28.

113. *Id.*

114. Keck, *supra* note 17, at 143.

115. The Parks Memorandum is a United States Army Judge Advocate General memorandum that is credited with introducing the ideas of the Functionality Test. The Parks Memorandum originally detailed the Functionality Test's criteria to determine a civilian's protection status when attached to an army. This document is geared towards evaluating the classification of civilians that accompany United States forces in overseas, interstate conflicts, and, therefore, must be adapted to an intrastate conflict which may feature less organized belligerent parties. See Moore, *supra* note 18, at 21 (citing Memorandum of Law, W. Hays Parks, Office of The Judge Advocate General, U.S. Army, Law of War Status of Civilians Accompanying Military Forces in the Field (May 6, 1999) (on file with The Brooklyn Journal of International Law) [hereinafter Law of War Memo]).

116. *Id.*; *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725–28. Adopting and expecting reciprocal treatment from the enemy can be said to underlie the International Law of War. As such, this test should apply to irregular militaries, including those in armed opposition during an intrastate conflict. Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 368 (2009).

117. Moore, *supra* note 18, at 21.

tlefield, the more likely they are to have crossed the threshold for direct participation.¹¹⁸ Furthermore, under this test, direct participation can be dependent on the particular strategy a side chooses because the strategy determines the importance of specific functions to military success.¹¹⁹ The Functionality Test, therefore, is dependent on the circumstances of the individual civilian, as well as his or her role in the overall war strategy.¹²⁰ This test is attractive because it accounts for the fact that civilians can augment and perform functions that are not just indispensable, but constitute the heart of military operations, even in modern armies.¹²¹

The Functionality Test also requires that the hostile activity be in "direct support of combat operations."¹²² Direct support is determined by examining the alignment of goals and the integration of civilian and military activity.¹²³ The definition of direct support is amorphous, but it seeks to include civilian activities that support soldiers in battle or a civilian's action "in the midst of an ongoing engagement."¹²⁴

118. See Stigall, *supra* note 22, at 906–07.

119. Stigall notes that, during the United States campaign in Afghanistan, the strategy selected will affect how vital a civilian is considered under the Functionality Test. The use of American civilians to build and repair infrastructure in Afghanistan may constitute direct participation under the Functionality Test, since such activity is viewed by the U.S. military as integral to the overall military strategy. If the reconstruction, however, was undertaken for purely humanitarian reasons concurrent with the war, American civilians participating in such an effort would not directly participate in hostile acts under the Functionality Test due to their unimportance to the military strategy. *Id.*

120. Keck, *supra* note 17, at 145.

121. Moore, *supra* note 18, at 21; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID-00-115, DEFENSE LOGISTICS: AIR FORCE REPORT ON CONTRACTOR SUPPORT IS NARROWLY FOCUSED 1-9, 13, 16 (2000), available at www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA377822.

122. This standard is intended to provide some protection from civilians engaged in what is traditionally understood as the general war effort. It seems to place a heavy focus on the geographical disposition of the civilian, whereas the Protocol I Test seems to acknowledge that these categories are driven more by the function of the civilian. See Moore, *supra* note 18, at 21.

123. Moore, *supra* note 18, at 24.

124. *Id.* At 21 n. 224 (quoting ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 484 n.14 (A.R. Thomas & James C. Duncan eds., Supp. 1999)). Moore implies that the idea of direct support is related to the idea of activities in the general war effort through examples, though he notes that guidance is not clear. See *id.* at 21 n.224.

The Functionality Test also requires that the perception of the enemy must be considered in order to determine how critical they believe the civilian is to the opposing side.¹²⁵ The same criteria used in the main Functionality Test should be evaluated from the point of view of the opposing party.¹²⁶ This consideration provides some balance to the subjective and arbitrary nature of the Functionality Test by considering the view of both sides to a conflict.¹²⁷

III. APPLICATION OF THE PROTOCOL I AND FUNCTIONALITY TESTS TO THE ARAB SPRING

The different uses of social media during the Arab Spring would result in different protections for civilians depending on which test is used.¹²⁸ The choice of applying either the Protocol I Test or the Functionality Test can be dispositive in determining whether international law is able to best balance protec-

Moore also writes that the Functionality Test does “not condone targeting civilians for general participation in the war effort, similar to Protocol I” but allows targeting of those rendering direct support. This seems to adopt direct support as an element of the test, and explain its relation to the general war effort. *See id.* at 21. The definitions of direct support that Moore cites are not entirely congruent with the general war effort as understood by the ICRC in the Protocol I Test. *Compare id.* at 21 n.224, with INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

125. Moore, *supra* note 18, at 21.

126. This element should inject predictability into the test, as putting one’s self in the shoes of the enemy should lead to more uniformity between what each party believes is protected. *See Law of War Memo, supra* note 115, §3.

127. *See id.* §3.

128. Stigall notes that the choice of framework, when coupled with the facts of the situation, will be dispositive in determining if direct participation in the hostilities occurred. Stigall, *supra* note 22, at 898. It is unlikely, but possible, that social media activists would be considered combatants in an intrastate conflict if they could be found to be under a responsible command of a recognized party to the conflict and under that party’s system of discipline. This would only be found when the social media activist was integrated into a quasi-military command structure and subject to its directions. *See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), supra* note 11, art 43; *Committee of the Red Cross, Rule 4: Definition of Armed Forces, supra* 68; JOINT PUBLICATION 3-13, at II-1. It is important to note, however, that the increase in focus on Information Operations and Psychological Operations among established militaries reinforces the idea that dissemination of information can be a military activity, especially when used as a supporting effort in a military operation. U.S. DEP’T OF ARMY, *supra* note 24, at 1–7.

tions of legitimate social media activity with a regime's right to self-defense in an internal conflict.¹²⁹

A. Use of Social Media to Organize Protests that Threaten the Regime.

In a situation where social media is used to organize and incite protests against a regime, as it was in Tunisia,¹³⁰ neither test would likely result in a finding of direct participation in hostilities.¹³¹ Under the Protocol I Test, no threshold of harm would be found, as the harm would not be of a "specifically military nature,"¹³² because any harm would be political.¹³³ Causation likewise would not be found, as such a finding is directly contingent upon a finding that the threshold of harm had been met.¹³⁴ Even if it were stipulated that the threshold of harm had been met, causation would also fail, as providing the information to incite a protest would be several steps removed from any specific military harm inflicted by the actual protesters.¹³⁵ A belligerent nexus would also be lacking in this situation because a political protest is difficult to characterize as exhibiting an objective intent to cause the threshold of harm required by the first element of the test.¹³⁶ In examining the actions of a social media activist organizing a protest, it would be difficult to conclude that the activist's actions were designed with the purpose of causing the requisite military harm.¹³⁷

129. Stigall, *supra* note 22, at 898; See International Covenant on Civil and Political Rights, *supra* note 10, art. 19; See Joseph, *supra* note 15.

130. *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, *supra* note 2.

131. See generally Kamus & Vaughn, *supra* note 71. The use of social media to incite political protests is analogous to events that took place during the Tunisian revolution. See Ryan, *supra* note 3.

132. Threshold of harm is more arguable in Tunisia where protests pressured the regime to give up political power. Although the army was called, but failed, to respond to requests for aid to the Tunisian regime—possibly due to social media pressure—there was still no armed military conflict to be altered in that scenario. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1016.

133. Here, the harm was to pressure the regime to cede power in a political sense. See Ryan, *supra* note 3.

134. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 719–20; See Watkin, *supra* note 87, at 658.

135. INTERPRETIVE GUIDANCE, *supra* note 19, at 1021.

136. *Id.* at 1021.

137. Jamie Williamson, *Challenges of Twenty-First Century Conflict*, 20 DUKE J. COMP. & INT'L L. 457, 466 (2010).

The Functionality Test also would fail to find direct participation in this scenario. Evaluating the status and importance of a social media activist's effect on the military would be moot when his or her activities do not contribute to any military goals.¹³⁸ Though the Functionality Test is more liberal than the Protocol I Test, it is still based on a civilian's importance to the achievement of military goals.¹³⁹

B. Use of Social Media to Incite Protests that Aid Military Action.

Protests, informed and organized by social media, could be used to distract or hamper regime forces in order to allow an opposition attack.¹⁴⁰ A protest could be deliberately organized, or opportunistically exploited, by an insurgency to distract or misdirect military forces during an armed attack.¹⁴¹

Under any of these circumstances, the Protocol I Test could be used to find the threshold of harm because the protests divert military resources away from fighting in the concurrent armed conflict.¹⁴² The military harm caused by distracting soldiers is not diminished by the possibility that protected political or other nonmilitary harm may result from the protest.¹⁴³ Military harm under this test must be specific, but not exclusive, as implied by the ICRC's finding that interrupting the

138. Moore examines a journalist who only begins to be considered under the Functionality Test when the goals of the journalist and military align. See Moore, *supra* note 18, at 21.

139. *Id.* at 24–26.

140. Although not an attack on a regime by an insurgency, the Benghazi attack on the U.S. Consulate illustrates the plausible tactic of using a protest as a distraction for a military assault. The genesis of the Benghazi Protests that accompanied the simultaneous attack on the U. S. Consulate is not entirely clear. It is likely the protest was planned in response to an offensive video, without knowledge of the impending attack; however, it is possible that the protest was a planned distraction. See Scott Shane, *Clearing the Record on Benghazi*, N.Y. TIMES, Oct. 18, 2012, at A16; More recent reports have shown that the relationship between the protest and attack may be even less clear upon further investigation. David Kirkpatrick, *A Deadly Mix in Benghazi*, N.Y. TIMES (Dec. 28, 2013), <http://www.nytimes.com/projects/2013/benghazi/#/?chapt=0>.

141. See Shane, *supra* note 140.

142. INTERPRETIVE GUIDANCE, *supra* note 19, at 1018–19.

143. Again, it is not clear what the motivation of the Benghazi protestors was. Their goals may have been expressive or possibly even military. Scott Shane, *supra* note 140; David Kirkpatrick, *supra* note 140.

food supply could meet the threshold of harm, even though it may disproportionately affect the civilian population.¹⁴⁴

Even if the broad military threshold of harm element is met, causation is extremely difficult to show. Here the military harm is distracting the soldiers, which is directly caused by the participants in the protest.¹⁴⁵ Therefore, the social media activist's action of inciting the protest would be at least one causal step removed from the protestors' distraction.¹⁴⁶ Furthermore, the ICRC guidance states that political propaganda is necessarily indirect participation, as it is part of the general war effort.¹⁴⁷

Inciting, or even organizing, a protest to support an attack could be considered an integral part of a collective military operation, and thus fall within the coordinated operations exception to the causation requirement.¹⁴⁸ Such an argument would misconstrue the purpose of the collective operations exception, which is to ensure that causation is not excused simply because some participants in a military operation do not independently cause harm, but still help a collective unit inflict the required threshold of harm.¹⁴⁹ It would be an abuse of the causation ex-

144. Examples like interrupting food supply are stated not to meet the threshold of harm unless they impair military operations or capacity. This suggests that "specific" military harm does not equate with "exclusive" military harm, as the residual harm of that action could be to hurt government or civilian operations. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1019.

145. See Keck, *supra* note 17, at 142.

146. Unlike Schmitt's example of gathering intelligence, which could possibly be characterized as a single causal act with multiple steps, acts to incite a protest are inherently indirect as they rely on the independent actions of discreet individuals instead of integrated collective actions to complete the hostile act. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 727–28.

147. It may be possible to distinguish this situation from what the ICRC thought of as political propaganda if it was done with the purpose of causing specific military consequences, like diverting military forces. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

148. *Id.* at 1022–23.

149. This exception seeks to acknowledge that a modern military operation includes many people who do not directly cause harm to the enemy. For instance a Forward Air Controller may not drop a bomb but may be necessary to properly target the bomb. Andrew Walton, *The History of the Airborne Forward Air Controller in Vietnam*, 2–3 (2004) (unpublished thesis for Masters of Military Art and Science, U.S. Army Command and General Staff College), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA429021>; INTERPRETIVE GUIDANCE, *supra* note 19, at 1022–23.

ception to consider an operation to be collective, when participants may not be aware that they are even participants in a collective action. Thus, a social media activist who incites or even organizes a protest is not part of a collective action with the protestors and the collective operations exception is not applicable.¹⁵⁰

A belligerent nexus could only be found, upon objective inspection of the facts, if the protest was designed specifically with the intent to divert military resources away from an armed conflict.¹⁵¹ In a situation where a protest was organized in order to cause military harm, but the participants attended to express political discontent, the Functionality Test does not provide clear guidance.¹⁵² The ICRC states that civilians obstructing military activity while fleeing violence lack a belligerent nexus, while those blocking a road in order to obstruct military operations exhibit a belligerent nexus.¹⁵³ It is likely that, in an unclear situation, the objective facts would be construed cautiously in order to ascribe the intent of the majority of participants to the act as a whole.¹⁵⁴ The outcome, however, is far from clear.

It is important to note that a finding of belligerent nexus is a description of the objective purpose of the act, not of any individual, and that such a finding would impute a belligerent nexus onto the organizers and all participants in the protest.¹⁵⁵ The Protocol I Test declines to find a belligerent nexus in extreme situations where a civilian is unaware of his or her part

150. This seems most analogous to the example of the training of military recruits being considered indirect causation because the training was removed from the specific hostile action by intervening decisions, similar to the way that protests are dependent on the individual decisions of the protestors. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 729–39.

151. See *Watkin*, *supra* note 87, at 659.

152. The requirement is that the act be “specifically designed to cause the required threshold of harm.” This does not mention that intent needs to be exclusive. It is likely that “specific” has the same meaning as it does for the threshold of harm. The report, however, does not explore examples of an act being designed for two purposes. Experts compiling this report note that, if specific intent is ambiguous, it cannot justify “split second targeting.” INTERPRETIVE GUIDANCE, *supra* note 19, at 1022–27.

153. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027–28.

154. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 874–77.

155. *A Critical Analysis*, *supra* note 98, at 34.

in hostilities, such as when a civilian drives a truck unaware that he or she is transporting munitions.¹⁵⁶ A civilian taking part in a protest, without knowing that the protest is a pretext for a military assault, could be analogized to a civilian being unaware of his or her role in hostilities. That exception, however, is limited and seems inapplicable to situations where the civilian is aware of their actions, but not aware of the greater purpose of their actions.¹⁵⁷ In such a case, the determination of belligerent nexus is likely moot because the organizing activist will retain civilian protection due to a lack of causation, as the organization of a protest is several causal steps removed from any military harm caused.¹⁵⁸

Subjecting this scenario to the Functionality Test will render a different outcome. Under the Functionality Test, the incitement or facilitation of a protest which diverts or misdirects a regime's military resources could be found sufficiently supportive of a military action to overthrow that regime to warrant the loss of the instigators' civilian protections.¹⁵⁹ This would require a finding that the protest had a serious impact on military objectives, and that the social media activist was an important, high level catalyst in direct support of the protest.¹⁶⁰ The regime's agents might also claim that they subjectively perceived the activist as a threat in order to reinforce the importance of the action, if the activist is involved in a large demonstration.¹⁶¹ In such a scenario, because the activist assisted in mobilizing a large amount of demonstrators, the importance of his function would be quite high.¹⁶² Although this test is highly dependent on facts, it is also highly subjective and open to a great deal of interpretation,¹⁶³ subject only to the

156. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027.

157. *See id.* at 1027.

158. *See* Watkin, *supra* note 87, at 659.

159. Stigall suggests that military goals can also include winning the allegiance of the local population, which, while certainly a political goal, may also be considered a military goal. This is analogous to the use of civilians to reconstruct Afghan infrastructure, which possibly meets the Functionality Test due to that mission being critical to overall military goals. *See* Stigall, *supra* note 22, at 907.

160. *See id.* at 896–97.

161. For an in depth explanation of the subjective criteria used to apply the Functionality Test, see Moore, *supra* note 18, at 21.

162. *See* Keck, *supra* note 17, at 144–45.

163. *Id.* at 145.

civilian's functional level of support and his or her importance to military goals.¹⁶⁴ The Functionality Test does not limit itself to the military significance of actions, as the Protocol I Test does, but examines the civilian's military role.¹⁶⁵ The protestors would likely retain protection because they would not, individually, be important enough, or contribute enough functional support, to become military targets.¹⁶⁶

C. Use of Social Media to Incite Military Defections from the Regime.

Civilian social media activists may also attempt to cause defections from the regime's military forces with the secondary goal of augmenting the ranks of armed opposition groups, as was the case in Syria.¹⁶⁷ Under the Protocol I Test, defection would meet the threshold of harm as the regime's military capacity would be directly diminished by the removal of its soldiers from battle.¹⁶⁸ Mere recruitment of fighters for the opposition, on the other hand, would fail to meet the threshold of harm.¹⁶⁹ This is due to the fact that the threshold of harm is not met when the opposition increases its own military capacity without independently causing military harm to the regime.¹⁷⁰

Causation is difficult to demonstrate, as enticing or convincing a soldier to defect is, at least, a causal step removed from the hostile act, especially because the defecting soldier's action is a choice independent from the enticement of the activist.¹⁷¹ Even if defection could be characterized as a collective action,

164. Moore, *supra* note 18, at 21.

165. *See id.*

166. Law of War Memo, *supra* note 115, §3.

167. In this story, it should be noted that documented attempts to encourage defection where undertaken by combatants of the armed opposition, not by sympathetic civilian efforts. Solomon & Hamilton, *supra* note 7. The Syrian opposition has also attempted to encourage defections through YouTube, though by a member of the Free Syrian Army and not an unaffiliated civilian. *See Saad, supra* note 73.

168. *Deconstructing Direct Participation in Hostilities, supra* note 26, at 714–15. The threat of defection alone can have significant military consequences, such as grounding the air force for fear of losing planes to the opposing force. *See* Rod Nordland, *Latest Syrian Defectors are from Higher Ranks*, N.Y. TIMES, June 25, 2012, at A9.

169. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1018–19.

170. *A Critical Analysis, supra* note 98, at 27–28.

171. *See* INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

enticement would not form an integral part of that action,¹⁷² as defection is possible without such enticement. The normal causation element, as well as the collective operations exception, could possibly be met if the social media activist and opposition materially facilitated defection by providing safe passage or some similar aid.

Belligerent nexus is entirely dependent on the existence of facts indicating that the defection campaign was objectively designed to harm the regime's military, rather than build the combat power of the armed opposition.¹⁷³ This is because a belligerent nexus refers to the objective design of an act to achieve a valid threshold of harm.¹⁷⁴ A social media activist inciting defections would likely fail the Protocol I Test due to negative findings of causation and belligerent nexus because the harmful action was causally remote and not conclusively designed with the purpose to harm the regime's military.

The Functionality Test would find the inducement of defections to be direct participation in a conflict, especially if the defectors joined the ranks of the opposition.¹⁷⁵ The function of causing defection and recruiting soldiers would seem to be of the highest order in an internal conflict.¹⁷⁶ This point is even more pronounced as the Functionality Test does not require that causation be limited to a single causal step like the Protocol I Test.¹⁷⁷ Under the Functionality Test, the requisite level of importance of a social media activist needs to be determined based upon a factual examination of how instrumental the ac-

172. See *A Critical Analysis*, *supra* note 98, at 29–31.

173. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 736.

174. The elements of this test are cumulative; therefore, the succeeding elements must refer to a valid preceding fact. If both a valid and an invalid threshold of harm are found, but belligerent nexus is met for only the invalid threshold of harm, direct participation will not be found. *A Critical Analysis*, *supra* note 98, at 27.

175. Moore, *supra* note 18, at 21.

176. Recruiting fighters and drawing them from the enemy seems to be a more vital function than civilian reconstruction was in the Afghanistan conflict discussed by Stigall. See Stigall, *supra* note 22, at 906–07.

177. The Protocol I Test requires causation within a single step while the Functionality Test only requires the act be in direct support of operations. Compare INTERPRETIVE GUIDANCE, *supra* note 19, at 1020, with Moore, *supra* note 18, at 21.

tivist was in facilitating defections.¹⁷⁸ A finding on the military importance must also consider the opposing regime's evaluation of a social media activist's importance.¹⁷⁹ A regime's evaluation would likely attach equal or greater importance than the opposition's evaluation, to regime soldiers defecting and joining the ranks of the opposition. It is also important to note that a social media activist would lose protection under this test by either exclusively encouraging defections or exclusively recruiting fighters, as both activities are important elements of the opposition's military mission.¹⁸⁰ Notably lacking is a requirement that the social media activist intend to affect the military balance of power by causing defections and aiding recruitment.¹⁸¹

D. Use of Social Media to Acquire Foreign Aid for the Opposition.

Social media can also be used as a tool to document the abuses of the regime and the virtues of the opposition in the hope of obtaining outside aid for the struggle against the regime.¹⁸²

178. The importance of social media as a tool of Psychological Operations to aid a military effort can be analogized to the importance of journalism as a Psychological Operations tool. Moore explores if a journalist embedded with a military unit would be considered to be taking a direct part in hostilities. He notes that when the military exerts sufficient control over the journalist and the goals of the military and journalist align, then the journalists could possibly be targeted under the Functionality Test. See Moore, *supra* note 18, at 24–26.

179. Law of War Memo, *supra* note 115, §3.

180. See Stigall, *supra* note 22, at 896.

181. Moore requires that independent journalists be brought under military control before they can pass the Functionality Test. This seems to be a special case, however, as the activity in which such journalists play a role is a military controlled Information Operations campaign. Because this is described as a plan integrating many types of information and disseminating it according to a mission specific plan, the goal could not logically be advanced without some instruction, coordination, or facilitation by the military. Other activities could possibly constitute direct participation under the Functionality Test without such close integration with military goals. For examples see Moore, *supra* note 18, at 21.

182. This website shows that the documentation of regime abuses may result in pressure for foreign governments to intervene or otherwise provide aid. Geoffrey Mock, *Desperate Reprisals, Documenting the Syrian Regime's Abuses*, AMNESTY INT'L (June 20, 2012), <http://blog.amnestyusa.org/middle-east/desperate-reprisals-documenting-the-syrian-regimes-abuses>.

This aid may take the form of punitive action against the regime,¹⁸³ efforts to deny the regime military advantage,¹⁸⁴ direct aid to the opposition,¹⁸⁵ or even foreign military intervention against the regime.¹⁸⁶ Regardless of the aid secured by the pressure created by social media activists, securing international aid could never be considered direct participation under the Protocol I Test, although some elements of the test may be satisfied. The threshold of harm would be met by some of these forms of aid if they either adversely affect the regime's military capacity by denying them weapons and support or if they result in the infliction of military damage by, for example, encouraging a foreign government to attack the regime.¹⁸⁷ A social media activist who attracts international aid that results in the arming or training of the opposition would fail to cause military damage consistent with the threshold of harm, due to the fact that building the opposition's military capacity fails to inflict sufficient military harm on the regime.¹⁸⁸ There is, however, a possibility that coercive economic sanctions could cause sufficient military harm to meet the threshold of harm, if military capacity is sufficiently damaged.¹⁸⁹

Causation will not be found when a social media activist garners international support to aid the opposition or harm the

183. *E.U. Expands Sanctions, Moves Toward Oil Embargo*, REUTERS (Aug. 19, 2011), <http://www.reuters.com/article/2011/08/19/syria-eu-sanctions-idUSB5E7IL02720110819>.

184. Foreign supplies of weapons were intercepted en route to the Syrian regime. Richard Spencer et. al., *Britain Stops Russian Ship Carrying Attack Helicopters for Syria*, TELEGRAPH, June 19, 2012.

185. Weapons can be used to arm the opposition as they were in Libya. Rod Nordland, *Libyan Rebels Say They're Being Sent Weapons*, N.Y. TIMES, Apr. 16, 2011, at A10.

186. The North Atlantic Treaty Organization provided international air support to the Libyan opposition. Richard Spencer, *Libya: Coalition Forces Prepare Two-Pronged Blitz to Finish off Gaddafi*, TELEGRAPH (May 28, 2011, 5:37 PM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8543882/Libya-Coalition-forces-prepare-two-pronged-blitz-to-finish-off-Gaddafi.html>.

187. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 715–20.

188. *A Critical Analysis*, *supra* note 98, at 27.

189. It seems possible to interpret the Protocol I Test to find military harm through economic sanctions that diminish military forces. See INTERPRETIVE GUIDANCE, *supra* note 19, at 995–96.

regime because such action is part of the general war effort and more than a single causal step removed from the harm. First, because the aid is supplied by another power with independent volition, the provision of aid will necessarily be more than a single causal step removed from any action by the social media activist that may have caused it. The social media activist must raise international awareness, the populace of the nation rendering aid must then exert pressure, the government of that nation must decide to render such aid, and then the aid must be delivered. Second, the social media activist's attempt to acquire such international aid will be considered a part of the general war effort because it is a high level, civilian government, wartime operation, similar to diplomacy or the purchase of necessary military supplies.¹⁹⁰ Furthermore, such aid is not geared toward a specific operation, but to generally degrading the regime's military capacity or increasing the opposition's military capacity.¹⁹¹

Even if causation were found, a belligerent nexus is unlikely to be found, as the social media activist's campaign was likely intended to induce the international community to inflict political, rather than military, harm.¹⁹² Belligerent nexus is especially problematic for economic sanctions, as it is probable, again, that the enacting state pursued them in order to force the regime to make political concessions rather than inflict military harm.¹⁹³ It is difficult to ascribe a specific purpose to a social media activist's campaign to bring international attention to a conflict. It is more logical to assume that the activists are attempting to secure whatever type of aid they can, not specific aid for a single military operation.

In contrast, the Functionality Test is more amenable to finding direct participation for instances of social activism which

190. For examples of the application of the causation element of the Protocol I Test see *id.* at 1020.

191. Only in cases where an allied attack is coordinated with the opposition could causation be direct, otherwise the opposition is simply helping to create a broad political action through the participation of the ally. It is unlikely, however, that the social media activist's pressure would exhibit enough direct connection to have caused such a specific attack. See *id.* at 1021–23.

192. See Keck, *supra* note 17, at 143.

193. Here some sanctions were targeted at specific members of the regime, presumably to influence their decision making. *E.U. Expands Sanctions, Moves Toward Oil Embargo*, *supra* note 183.

result in international aid for the opposition.¹⁹⁴ Securing the aid of a major international power could prove decisive in altering the military balance in a conflict.¹⁹⁵ The Functionality Test, however, does require that an action be taken in “direct support” of combat operations.¹⁹⁶ Because seeking international aid is not directly aligned and integrated with the opposition’s military goals, but instead aimed at broader political goals, the Functionality Test would also fail to find direct participation in hostilities due to a lack of direct support.¹⁹⁷

IV. EVALUATION OF CURRENT INTERPRETIVE APPROACHES AND SUGGESTED IMPROVEMENTS.

The use of either the Protocol I Test or the Functionality Test to determine when a civilian has lost protection through participation in hostilities does not adequately address the balance between the social media activist’s right to free expression¹⁹⁸ and a regime’s right to defend itself against a legitimate, internal military threat.¹⁹⁹ Both tests function satisfactorily at the extremes—prohibiting the military targeting of a political protest organizer or a social media activist who can help secure

194. Stigall notes that the Functionality Test is more expansive than the Protocol I Test. *See* Stigall, *supra* note 22, at 896–97.

195. Securing the aid of a powerful ally, like the North Atlantic Treaty Organization, seems to have been decisive to the outcome of the conflict in Libya. Interview by Bettina Klein of Deutschlandfunk radio with Egon Ramms, Retired General, Federal Republic of Germany (Aug. 26, 2011), *available at* <http://www.dw.de/nato-has-played-a-decisive-role-in-libya/a-15346089>. Such aid, however, pales in comparison even to a civilian who maintains a vital weapons system. *See* Moore, *supra* note 18, at 21. Furthermore, it has been suggested that influencing a civilian population can meet the Functionality Test as being a critical function for victory, like influencing the Afghan population with reconstruction projects. Securing international aid seems no further removed from battlefield functions than influencing a domestic population to facilitate traditional military operations. *See* Stigall, *supra* note 22, at 906–07.

196. Moore, *supra* note 18, at 21.

197. For an example of the consideration of direct support in the case of embedded journalists under the Functionality Test, *see id.* at 24–26.

198. International law protects rights of expression. International Covenant on Civil and Political Rights, *supra* note 10, art. 19.

199. Joseph, *supra* note 15.

general foreign aid.²⁰⁰ The Protocol I Test may fail to allow a regime to defend itself when a social media activist is instrumental in encouraging defections or when that activist organizes a protest specifically for military advantage. The Protocol I Test is generally too restrictive to accommodate targeting of civilians that in some circumstances are performing important and indispensable military functions that are too diffuse to form a particular instance of specific military harm but which may still be distinguished from the general war effort.²⁰¹ On the other hand, the Functionality Test has been criticized as too malleable and arbitrary, conditioning direct participation upon the subjective importance of a civilian's role in a strategy that may not be widely known.²⁰² The Functionality Test also fails to give adequate weight to the civilian's individual intent, which could lead to loss of protection for a social media activist that unwittingly causes important military harm, such as organizing a protest that distracts regime soldiers, leading to an opposition attack.²⁰³ The Functionality Test has further been criticized for failing to provide a predictable, bright line where direct participation ends and where indirect participation, like financing, which is too far removed from hostilities under the Functionality Test, begins.²⁰⁴

200. Social media could be one of the means used to create public pressure on foreign governments to intervene in an intrastate conflict, implicating military consequences. See *the Colonel Charges Ahead*, *supra* note 82.

201. See Keck, *supra* note 17, at 145 (citing *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 737–38). The social media activist's potential analogue, depending on exact activity, in an organized military is that of an Information Operations or Psychological Operations specialist. It is likely that such activities could be traced to a specific military harm, as their effects may be diffuse and cumulative. They are, however, employed on the "tactical" level, meaning that they are targeted more specifically than just being a part of the general war effort. U.S. DEP'T OF ARMY, *supra* note 24, at 2–3; The U.S. Army defines tactical as the "level of war at which battles and engagements are planned and executed to achieve military objectives." The tactical level is differentiated from the Operational and Strategic level where broad objectives and campaigns are achieved by a connected series of tactical engagements. U.S. DEP'T OF ARMY, ARMY DOCTRINE PUBLICATION NO. 3-90, OFFENSE AND DEFENSE 1 (2012).

202. Keck, *supra* note 17, at 145.

203. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36.

204. Stigall notes that Afghan drug traffickers that financed the insurgency may have been targeted. Stigall, *supra* note 22, at 897 (citing CHRISTOPHER M.

A. Evaluation of the Protocol I Test

The Protocol I Test does not allow for the loss of protection when a civilian traceably, but not directly, causes a specific instance of military harm under the “no more than one causal step” standard.²⁰⁵ This is a helpful distinction in separating true participation in hostilities from the general war effort.²⁰⁶ The distinction does not, however, allow for the fact that some actions may not be direct, but still cause specific and traceable harm, with the intent to cause diffuse military harm, in support of broad, rather than specific, military goals. For instance, Psychological Operations are employed by modern armies to degrade an enemy force’s morale and will to fight, not just those defending specific objectives,²⁰⁷ whereas participation in the general war effort involves activities like the production of ammunition for general use.²⁰⁸ While ammunition could traceably be used to achieve a specific objective, it is inherently building a general military capacity to be employed as needed in later operations.²⁰⁹ Organizing civilian perceptions through social media could be considered part of a general war effort, like producing ammunition to build general military capacity, or it could be considered an actual application of military capacity against the regime, albeit in a general, rather than specific, manner.²¹⁰ Actions that could be analogized to a tactical military application should, however, be considered direct participation as they are no longer a part of the “general war ef-

BLANCHARD, AFGHANISTAN: NARCOTICS AND U.S. POLICY 16 (2009), available at <http://www.fas.org/sgp/crs/row/RL32686.pdf>.

205. See Watkin, *supra* note 87, at 658.

206. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

207. The United States Army publishes extensive doctrine on how to use Psychological Operations against civilian and military audiences to achieve military goals or support traditional forces in achieving their military objectives. U.S. DEP’T OF ARMY, *supra* note 24, at 1–2 to 1–4.

208. INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

209. Schmitt explains that employing capacity and, in some cases like constructing an Improvised Explosive Device, building capacity, should meet the direct causation standard to allow a military to defend itself from such activities. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 727.

210. The ICRC does use production of propaganda as an example of an activity within the general war effort. The ICRC also notes, however, that propagandists can lose their protection if they directly participate in hostilities. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1019–22.

fort,”²¹¹ whether a social media activist’s efforts caused diffuse military harm or harm to a specific target. Shaping public opinion to support a general, albeit tactical, military end is an accepted application of Psychological Operations or Information Operations.²¹² Giving blanket protection to civilians who take part in such activities creates a double standard, as a regime that retains similar Information Operations and Psychological Operations capabilities in its military would remain subject to targeting by the opposition while a civilian engaging in such activities could intentionally cause military harm without being targeted.²¹³ The Protocol I Test would, however, extend civilian protection to Information Operations and Psychological Operations activities by social media activists since they are at least one step removed and arguably part of the general war effort.²¹⁴

The Protocol I Test’s strict direct causation requirement has also been criticized more broadly because it fails to include civilians that make deadly and effective contributions to a conflict.²¹⁵ Michael Schmitt criticizes the Protocol I Test because

211. Although not targeting a specific military objective, the use of social media to cause a direct harm is more analogous to a tactical operation than undertaking an activity to build capacity for a war effort through financing, which is a traditional example of an activity within the general war effort. Edward Linneweber, *To Target or Not to Target? Why ‘Tis Nobler to Thwart the Afghan Narcotics Trade Through Nonlethal Means*, 207 MIL. L. REV. 155, 171 (Spring 2011).

212. Here goals such as shaping the public perception of the enemy and the civilian population are seen as indispensable support to a military operation. They can be geared generally toward promoting battlefield victory and are much wider than supporting narrow military goals like capturing a specific objective. See Moore, *supra* note 18, at 12; U.S. DEP’T OF ARMY, *supra* note 24, at 1-1 to 1-4.

213. If the Protocol I Test is applied and found to exclude civilian Information Operations from direct participation in hostilities, members of the regime’s armed forces would be targetable based solely on membership in the armed forces. International Committee of the Red Cross, *Rule 4: Definition of Armed Forces*, *supra* note 68; See INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

214. Keck references the conservative approach that grants greater immunity to those more closely associated with the general war effort and in general seeks to minimize findings of direct participation in hostilities. Keck, *supra* note 17, at 131.

215. Schmitt writes that constructing an improvised explosive device or a bomb vest for a suicide bomber would be examples excluded under the Protocol I Test’s approach to causation, but are still integral to causing the requi-

activities, like building an Improvised Explosive Device, are excluded because they are more than one causal step removed from harm, while military commanders implicitly feel that such bomb makers must be targeted, as targeting them is the most effective way to interdict such weapons.²¹⁶ Similarly, a social media activist can only cause indirect harm, that is, harm more than one causal step removed, because they merely enable, or indirectly cause, such harm through the physical actions of others, such as protestors or defectors.²¹⁷

Furthermore, the Protocol I Test characterizes the activity in question based on the objective purpose of its design, and can impute a belligerent nexus to all participants without considering individual intent.²¹⁸ This ascribes a belligerent nexus to all participants in either spreading the message of the activist or participating in a subsequent protest, provided that a belligerent nexus is found for the overall purpose of the activity and the other elements of the test are met.²¹⁹ Individual participants are excused from a collective finding of belligerent nexus only when they “are totally unaware of the role they are playing in the conduct of hostilities” or the participants are deprived of freedom of action.²²⁰ This exception, however, is intended to be extremely limited.²²¹ To fall into this exception the protestor would have to be unaware that they were distracting soldiers at all; ignorance that the protestors were distracting soldiers to enable a military strike by the opposition would not be sufficient for this exception.²²² This is consistent with the ICRC example, where the transportation of an explosive is only

site military threshold of harm. Schmitt criticizes limiting the consideration of integral acts, more than one step removed from causing the threshold of harm in all cases, not only in collective actions. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 725, 729–30.

216. *Id.* at 725, 729.

217. INTERPRETIVE GUIDANCE, *supra* note 19, at 1019–21.

218. *Id.* at 1025–29.

219. Schmitt distinguishes belligerent nexus from subjective intent by noting that children fighting for a belligerent party would lack subjective intent, but still have a belligerent nexus due to the overall design of the act in question. This can be extrapolated to show that an individual lacking subjective intent for any reason could foreseeably exhibit a belligerent nexus. *See Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735.

220. INTERPRETIVE GUIDANCE, *supra* note 19, at 1027.

221. *See id.* at 1027.

222. *See id.* at 1027.

excused if the driver does not know it is an explosive, but the same transportation presumably would not be excused if the driver were aware of the explosive, and only unaware of the purpose of the explosive.²²³ Based on this analysis, the Protocol I Test is not suitable to situations involving social media activists because damage to the regime is discounted as indirect and the belligerent nexus is imputed to all knowing participants no matter their individual subjective motivations.²²⁴

B. Evaluation of the Functionality Test.

The Functionality Test is generally better suited towards considering the rights of the regime, though at the expense of the important rights of civilians. The Functionality Test recognizes that military damage which cannot be directly found within a single causal step to cause a specific instance of military harm can still be traceably attributable to the civilian's action.²²⁵ This connection is important because a social media activist could prove to be vital to military operations, and support those operations in a functionally significant way, if he were to incite a protest that tied up a large military force or if he were to cause military defections.²²⁶ Therefore the Functionality Test's replacement of the Protocol I Test's requirements for threshold of harm and causation with an evaluation of the value and gravity of the activity²²⁷ allows the regime greater flexibility to take action against new military capabilities with broad battlefield effects, such as the Information Operations of a social media activist, without tying such action to a single military objective.²²⁸ This would allow targeting of social media activists that cause significant military harm by encouraging defections. It would also address Michael Schmitt's criticism of the Protocol I Test's threshold of harm; the Protocol I Test fails to acknowledge that positively increasing the opposition's mili-

223. *See id.* at 1027.

224. *See Deconstructing Direct Participation in Hostilities, supra* note 26, at 735.

225. *See id.* at 729–33. This test does not focus on the geographic proximity of causation to actual military harm. *See Moore, supra* note 18, at 21.

226. *See Keck, supra* note 17, at 145.

227. *Moore, supra* note 18, at 21.

228. Watkin criticizes the Protocol I Test for limiting direct participation to military harm caused at the tactical level. *See Watkin, supra* note 87, at 659.

tary capacity necessarily harms the regime by activities like securing fighters or arms through aid.²²⁹

The Functionality Test still suffers from inherent arbitrariness, as a social media activist can be targeted based on the subjective importance of his or her activity.²³⁰ This concern is partially addressed by the requirement that functionality and importance be assessed through the eyes of the regime as well as the perspective of the opposition.²³¹ Adopting a standard that is too strict, however, to respond to the necessities of modern warfare will prove unworkable and ultimately be ignored as irrelevant.²³²

The Functionality Test has some glaring shortcomings when applied to social media activism. First, the Functionality Test does not examine intent because it was originally developed to evaluate a civilian with a connection to an organized military. The test assumes that the civilian in question is providing a function with an obvious military goal, like repairing a valuable weapon,²³³ or is providing a service under the control and direction of a military force towards a military goal, like a civilian conducting an interrogation to gather military intelligence.²³⁴ A civilian social media activist will not telegraph his or her intent so readily, based solely on an examination of the activity in question. Many participants in a protest organized through social media will act based on motivations that differ from the organizer's original intent.²³⁵ These participants may even be ignorant of the "designed" purpose of the larger act.²³⁶ Second, this test is too subjective to be predictable. A civilian may not know how militarily important the regime thinks the

229. *A Critical Analysis*, *supra* note 98, at 28.

230. Keck, *supra* note 17, at 145.

231. See Moore, *supra* note 18, at 24.

232. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 699.

233. See Moore, *supra* note 18, at 24.

234. See Hill, *supra* note 49, at 13–14. The U.S. military's use of this test has been most developed in evaluating its own civilians. It is important to note that the intent of these civilians is not really at issue as they voluntarily associated themselves with the military. The example of an embedded journalist losing protection is controversial, but is, according to Moore, predicated on the amount of military control and integration to which they are subject. See Moore, *supra* note 18, at 21, 24–26.

235. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

236. See *id.*

civilian's act is, and therefore will not have notice of whether he or she can be targeted based on his or her activities.²³⁷

C. Suggested Improvements to the Functionality Test in the Social Media Context.

Because the Functionality Test better addresses the complexities of social media activism in the context of the Arab Spring, its shortcomings must be addressed with additional safeguards. The Functionality Test should be augmented with a requirement that the activist not only demonstrate subjective intent to cause military harm, but also that his or her action not be a part of the general war effort, in that the action does more than merely build military capacity.²³⁸

A measure of intent should be required to safeguard against the potential overreach of the Functionality Test.²³⁹ As the Protocol I Test's idea of belligerent nexus fails to distinguish individual motivations for action,²⁴⁰ subjective intent to cause military harm should be used in conjunction with the Functionality Test to ensure that each targeted civilian intends to cause military harm in excess of protected political expression. This would ensure that a civilian will not lose protection just because his or her social media activities—or activities incited by social media—are incidentally and functionally important to a military operation.²⁴¹ This will also allow each individual involved in the act to be evaluated independently, in order to ensure that those not intending to cause military harm do not lose their civilian protections.²⁴²

This standard may be difficult to administer during the chaos of civil unrest, but would not be any more prone to error or abuse than objectively divining the purpose of entire activities

237. Keck notes that the Functionality Test hinges on the importance of the civilian's activity. See Keck, *supra* note 17, at 145.

238. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 727.

239. Stigall holds the view that this test "is too broad to serve as a legitimate standard to safeguard civilians and far too malleable to legitimately uphold the principle of distinction." Stigall, *supra* note 22, at 912–13.

240. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

241. See *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 735–36, for examples comparing subjective intent and belligerent nexus.

242. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1025–29.

under the belligerent nexus requirement.²⁴³ The ICRC recognizes that a complex test to determine direct participation will be difficult to administer, and thus recommends the use of caution and a presumption of protection if a civilian's status is uncertain.²⁴⁴ Further in the context of social media activism, a regime will likely have more time to carefully consider targeting a civilian. This is because a social media activist will likely be removed in space and time from the military harm because they are acting remotely to influence the actions of others.²⁴⁵

The subjective intent element should also consider whether any military harm caused by a social media activist at the expense of the regime is in support of another party.²⁴⁶ The consideration of intent to support another party at the expense of the regime makes clear that the hostile act should be intended to support a group militarily opposing the regime. Inclusion of such a consideration of intent will help to ensure that civilians are not targeted for an act that only incidentally supports the opposition, while allowing civilians who truly wish to aid the opposition in their military struggle to be targeted.

There is a need for further safeguards to confine the loss of civilian protections to cases where civilian actions are truly acting in support of a military objective. These safeguards can protect a social media activist who is not providing true military aid by ensuring his or her undertaking is not within the general war effort.²⁴⁷ The Functionality Test does require that an action be in direct support of military operations, however, that is not a standard suited to a diffuse intrastate conflict where a social media activist's efforts may not be integrated with the opposition forces' activities as required by this element.²⁴⁸

Although the Protocol I Test's requirement for direct causation within a single causal step may be too confining for mod-

243. *See id.* at 1027.

244. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at, 875–77; INTERPRETIVE GUIDANCE, *supra* note 19, at 1037–38.

245. *See* Solomon & Hamilton, *supra* note 7.

246. Melzer posits that belligerent nexus requires that the action be intended to harm one party while supporting another. *Keeping the Balance Between Necessity and Humanity*, *supra* note 59, at 871–73.

247. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 708.

248. *See* Moore, *supra* note 18, at 24, 21.

ern warfare, its exclusion of activities supporting the general war effort is useful in preserving the notion that some civilians can generally support a country or faction at war without broad swaths of a state's civilian population losing their protections from military targeting.²⁴⁹ Certain efforts mentioned by the ICRC, like designing weapons, producing weapons, or maintaining transportation infrastructure, fit the traditional definition of the general war effort.²⁵⁰ The general war effort restriction should be slightly refined to encompass the building of general military capacity, but exclude employing that capacity in either a general or specific sense.²⁵¹ Activities truly contributing to the general war effort deserve protection, but other activities, though not necessarily specific military actions, may result in specific military consequences, and therefore, should result in lost protection even if causation is removed by several steps, as in the case of an activist who generally causes military defections.²⁵² This standard should adopt the Protocol I Test's exclusion of activities within the general war effort, instead of the Functionality Test's wider definition of direct support. Adoption of the refined restriction on activities within the general war effort would help ameliorate the dangers of overreach inherent to the Functionality Test.²⁵³ Moreover, this standard would help to further distinguish the use of social media to build general public support for a revolt from a more particular use of social media to militarily affect the regime or to achieve a particular military objective.

CONCLUSION

The widespread use of social media during the Arab Spring represents the confluence of several developments in conflict.

249. Here, the general war effort should be understood as disregarding geographic proximity under the ICRC guidance. INTERPRETIVE GUIDANCE, *supra* note 19, at 1023.

250. *Id.* at 1021–22.

251. An example of building specific capacity would be to train or recruit personnel for a specific military act, like to attack a specific building or position. It would also include a civilian that built an IED for a specific attack or emplacement. A civilian that worked at a traditional munitions factory, which built ammunition to support general military uses to be determined later in the conflict would, however, build general military capacity. *Deconstructing Direct Participation in Hostilities*, *supra* note 26, at 718–19.

252. See Solomon & Hamilton, *supra* note 7.

253. Stigall, *supra* note 22, at 911–13.

Primarily, the Arab Spring illustrates an increase in intrastate conflicts,²⁵⁴ a proliferation of the use of social media in military and political conflicts,²⁵⁵ and an amplified importance of Information Operations in military conflict²⁵⁶ against the global trend of increasing civilianization of warfare.²⁵⁷ These trends create an environment where the traditional laws of war, and their requisite protection of civilians, are increasingly outmoded.²⁵⁸ The use of social media in such internal conflicts strains the current understanding of civilian protection and has the potential to be used much like other weapons on the battlefield.²⁵⁹ Yet, because social media can also be used for protected activities like political expression, careful evaluation is required before civilian protection can be stripped from social media activists.²⁶⁰

The protection of civilians from targeting, except civilians who take “direct part in hostilities,” is an essential cornerstone of international law.²⁶¹ Current interpretations do not, however, strike an acceptable balance between the concerns of a regime that is defending itself and the social media activist who is exercising his recognized political rights.²⁶² The Protocol I Test adheres to a time when civilians were often considered passive victims of warfare.²⁶³ As such, this test grants great protections to the social media activist without regard to the serious military impact they could have.²⁶⁴ The overly restrictive concepts of direct causation and belligerent nexus ensure

254. The author notes that conflicts, predominantly within states, have generally increased during the twenty first century, and have continued that trend during the Arab Spring. Malin Nilsson, *The Trends in Armed Conflicts Today*, PEACE MONITOR (Oct. 12, 2011), <http://peacemonitor.org/?p=142>.

255. *Twitter, Facebook and YouTube's role in Arab Spring (Middle East Uprisings)*, *supra* note 2.

256. JOINT PUBLICATION 3–13, *supra* note 56, at II-1.

257. Wegner & Mason, *supra* note 44, at 836.

258. *See 21st Century Armed Conflict*, *supra* note 40, at 510–12.

259. Zambelis notes that social media is used to inflict harm on the enemy and act as a “force multiplier.” *See Zambelis*, *supra* note 24, at 19, 20.

260. *See INTERPRETIVE GUIDANCE*, *supra* note 19, at 1026.

261. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, *supra* note 11, art. 51, sec. 3.

262. *Id.* at art. 51, sec. 3; *See Joseph*, *supra* note 15.

263. *21st Century Armed Conflict*, *supra* note 41, at 510–12.

264. Again, Zambelis notes how social media can be used to inflict harm on a military organization. *See Zambelis*, *supra* note 24, at 19, 20.

that it is almost impossible for a social media activist to lose civilian protection.²⁶⁵ The Functionality Test recognizes that civilians could become a legitimate target due to their importance on the battlefield and their indispensable military functions.²⁶⁶ This test, however, lacks the necessary safeguards to provide predictability and adequate protections to civilians that do not intend to create a military advantage through their actions.²⁶⁷ The Functionality Test acknowledges the value of information activities in warfare and should be fortified with safeguards, to ensure that social media activists are only targeted in the rare instances when they exhibit a subjective intent to cause military harm that is separate from the general war effort.²⁶⁸

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265. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1016–22.

266. Moore, *supra* note 18, at 21.

267. Articulations of the Functionality Test do not explicitly adopt consideration of intent, subjective or otherwise. The Protocol I Test, however, explicitly adopts belligerent nexus, which can be described as collective subjective intent. See Keck, *supra* note 17, at 143–45.

268. See INTERPRETIVE GUIDANCE, *supra* note 19, at 1020.

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