

Clarifying the Notion of

DIRECT PARTICIPATION IN HOSTILITIES

under International Humanitarian Law

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The Evolving Face of Warfare:

- Predominantly non-international armed conflicts
- Shift of battlefield into civilian population centers
- Intermingling of armed actors with civilians
- Civilian involvement in military operations
- Outsourcing of traditional military functions
- Armed actors in civilian clothing
- Confusion in the distinction between legitimate targets and protected persons
- Increased risk of erroneous & arbitrary attack

Basic Rules on Lawful Targeting of Persons under IHL

Principle of Distinction

Persons not protected against direct attack

Organized Fighting Forces
belonging to the Parties to
an Armed Conflict

Civilians
Directly Participating in Hostilities

Persons protected against direct attack

Civilians

Armed Forces
- Medical & Religious Personnel
- Personnel *hors de combat*

Basic Rule on DPH:

Civilians are protected against direct attack unless and for such time as they directly participate in hostilities.

(Art. 51 [3] AP I; Art. 13 [3] AP II; Art. 3 [1] GC I to IV; Rule 6 CLS)

- **No definition** in treaty law, state practice, jurisprudence
- **Lack of criteria** for the distinction between peaceful civilians and civilians directly participating in hostilities
- **Lack of guidance** as to applicability to hostile civilians of the paradigms of law enforcement and of hostilities

ICRC Clarification Process

- **Informal research process** aiming to clarify the notion of 'direct participation in hostilities'.
- **Purpose:** Enhancing the protection of the civilian population from erroneous or arbitrary targeting.
- **5 Expert Meetings (2003 – 2008):** 50 legal experts from a wide variety of backgrounds.
- **Publication (2009):** ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL'.
- **The Interpretive Guidance:**
 - Does not change, but aims to clarify, the law.
 - Provides ICRC's recommendations on how existing IHL should be interpreted in contemporary armed conflicts.
 - Is not legally binding.

Questions to be Addressed:

I. Concept of Civilian

Determines the circle of persons who may not be directly attacked
"unless and for such time as they take a direct part in hostilities"

II. Concept of Direct Participation in Hostilities

Determines the individual conduct which entails loss of civilian
protection against direct attack

III. Modalities of Suspension of Protection

Determine:

- Duration of loss of protection
- Precautions and presumptions in situations of doubt
- Restraints on force used against lawful military targets
- Consequences of regaining civilian protection

I. Concept of Civilian under IHL:

Generic: Civilians are those persons who are not members of organized armed forces or groups belonging to a state or non-state party to an armed conflict.

(Arts 50, 43 AP I; Arts 1, 13 AP II; Art. 3 GC I-IV)

Regular Armed Forces: Formal membership regulated in domestic law.

Irregular Armed Groups: Functional membership based on **continuous combat function** (i.e. function involving DPH).

➤ **Private Contractors, Intelligence Services, etc.:** Are civilians within the meaning of IHL, unless they assume continuous combat function for a party to an armed conflict.

➤ **Organized Criminals:** The same criteria apply to terrorists, hostage-takers, drug-cartels and other organized criminals.

II. Direct Participation in Hostilities

Basic Components:

"Hostilities": Collective resort to means and methods of warfare between parties to an armed conflict.

"Participation in" Hostilities: Individual involvement in collective hostilities between parties .

"Direct" or "Indirect" Participation: Indicates intensity and degree of individual involvement.

"Hostile Acts": Collective concept of "hostilities" corresponds to the sum total of all "hostile acts" carried out by individuals "directly participating" in hostilities.

II. Direct Participation in Hostilities

Three Cumulative Elements:

- 1. Threshold of Harm:** The act in question must be likely
 - to adversely affect the military operations or military capacity of a party to the conflict or,
 - to inflict death, injury or destruction on persons or objects protected against direct attack.
- 2. Direct Causation:** There must be a direct causal link between the act in question and the harm likely to result:
 - from that act, or
 - from a concrete and coordinated military operation of which that act constitutes an integral part.
- 3. Belligerent Nexus:** act must be designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

II. Direct Participation in Hostilities

Beginning and End of a Hostile Act

A specific act amounting to “direct participation in hostilities” also includes:

- **Preparation** of a specific act;
- **Deployments to** the location of its execution;
- **Return from** the location of its execution.

III. Modalities of Loss of Protection

1. Temporal Scope of Loss of Protection

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities.

Members of organized armed forces or groups of a party to the conflict lose civilian protection for the duration of their membership.

III. Modalities of Loss of Protection

2. Precautions and Presumptions in Doubt

All "feasible" precautions must be taken in determining whether:

- a person is a civilian
- a civilian is directly participating in hostilities

In case of doubt, persons are presumed to be protected against direct attack.

III. Modalities of Loss of Protection

3. Restraints on Force in Direct Attack

The **means and methods**, as well as **kind and degree of force** used against persons not entitled to protection against direct attack:

1. must not exceed what is **actually necessary to accomplish a legitimate military purpose** in the concrete circumstances, and
2. must **not otherwise be prohibited** by IHL or other branches of international law.

➤ **Source:** Military necessity & humanity as expressed in national military manuals, Martens clause, prohibition of unnecessary suffering etc.

III. Modalities of Loss of Protection

4. Consequences of Regaining Civilian Protection

Civilians who have ceased to directly participate in hostilities, as well as

Members of organized armed groups who have disengaged from their combat function:

1. may no longer be directly attacked, but
2. remain subject to arrest and prosecution
3. DPH is not, as such, prohibited by IHL

Thank you for your attention!

Questions?

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