

IHL AND THE CHALLENGES OF CIVILIAN INVOLVEMENT IN ARMED CONFLICT: EXAMINING THE CRUX OF THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES

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ABSTRACT

International humanitarian law (IHL) is the branch of public international law responsible for the regulation of conduct of belligerents and it seeks to protect individuals who are not taking an active part in hostilities from the effects of armed conflict. This segment of the law has been facing serious challenges in contemporary armed conflicts due to the continuous involvement of civilians in activities that are of military nature. This paper seeks to explore the notion of direct participation in hostilities with a view to giving civilians the maximum protection they deserve in time of armed conflict without necessarily impairing imperative military necessity. It considers specific acts that will be termed as taking a direct part in hostilities, which will consequently deprive a civilian his immunity against direct attack. The paper will further discuss the nitty-gritty of the notion of direct participation in hostilities and the various critiques it receives from military perspectives coupled with its possible practical difficulty in terms of implementation. It also discusses the beginning and end of civilian direct participation in hostilities and the revolving door of civilian protection. The paper posits that notwithstanding the various contributions in trying to resolve the problems associated with direct participation in hostilities, the notion has remained critical and needs further clarification. The paper recommends that belligerents should respect their obligation in terms of civilian protection despite the challenges facing civilian involvement in the contemporary armed conflict.

Keywords: Civilian, Armed Conflict, Distinction, Direct Participation in Hostilities

Introduction

Civilians are one of the categories of persons who deserve to be protected during armed conflict. The immunity of civilians is conditioned upon their non-participation in conduct that qualifies as taking a direct part in hostilities. It is clear from the provisions of the law that civilian protection lasts as long as they do not take an active part in hostilities. This means that whenever a civilian engages in activities that cross the red line drawn by the law, he automatically loses his immunity and consequently becomes a legitimate target. Obviously, the erosion of civilian protection by virtue of participation in hostile activities has not been disputed. However, the main subject of contention concerning civilian immunity rests on the question as to what constitutes taking a direct part in hostilities that will deprive a civilian the protection accorded to him by the law.

It is against this background that the paper intends to consider direct participation as a specific act that erodes civilians' protection. In doing so, the paper looks at the constituent elements that qualify a particular act as taking an active part in hostilities. The paper discusses when does act of direct participation could be said to have begun and ended. It further discusses the position of a civilian who engages in an act of direct participation in hostilities in a sporadic manner, the situation that is best described as the revolving door of civilian protection.

1. The Act of Direct Participation in Hostilities

The notion of direct participation in hostilities has been an outstanding problem that centers on the protection and immunity civilians should enjoy in times of armed conflict. The law of armed conflict has afforded protection to civilians against direct attack during hostilities and the protection continues unless and for such time as they take a direct part in hostilities.¹ The use of the phrase "unless and for such time" in the provisions of the Geneva Conventions and the Additional Protocols defies any precise interpretation,² but it "serves as the basis for soldiers and commanders in determining when it is appropriate to target civilians."³ Despite the significance of the phrase, it remains the point of contention challenging the involvement of civilians in contemporary armed conflicts.⁴ The law did not substantiate on the acts that amount to taking a direct part in hostilities but there

¹Additional Protocol II, Article 13 (3); Article 3 Common to Geneva Conventions; Additional Protocol I, Articles 51 (3). Hostilities has been defined as the resort "to means and methods of injuring the enemy". Article 22, Annex to the 1907 Hague Regulation IV respecting the Laws and Customs of War on Land

² ICRC Customary Study, at 22

³ Collin Allan, "Direct Participation in Hostilities From Cyberspace" (February 2013), at 5 <http://works.bepress.com/collin_allan/1> viewed 20 November 2013

⁴ Additional Protocol I, Articles 51 (3); Additional Protocol II, Article 13 (3)

is no contention concerning the loss of protection by civilians who take a “direct part in hostilities”. It is a well-established rule of warfare that civilians lose protection against direct attack once they engaged in an act that constitutes direct participation in hostilities.⁵

As a result of this contention, attempts were made by experts concerning the acts that amount to direct participation in hostilities including the ICRC as well as certain Judicial Tribunal decisions.⁶ It is important to mention that as far as no definition of the phrase “unless and for such time as they take a direct part in hostilities” is found in the Geneva Conventions and the Protocols, any effort to define it must be done in good faith by taking into consideration the objectives and purpose of the treaty.⁷ For instance, in commentaries to the Additional Protocol I made by the ICRC considers direct participation in hostilities to mean “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”⁸ Another instance where the notion of taking direct part in hostilities was defined can be seen in the ICTY decision in the *Galic case*,⁹ where the Tribunal describes it follows- “acts of war which by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces.” Further attempt to clarify the challenging issues associated with civilian protection in contemporary conflicts was recently made by the ICRC.

The ICRC has summoned experts on IHL from various institutions and organisations to work out a clear position of the concept of direct participation in hostilities.¹⁰ The meeting of the experts ended up with an “interpretive guidance on the notion of direct participation in hostilities”. The ICRC study has been a leading material and one of the most comprehensive documents regarding this segment of the rule of IHL.¹¹ There is no gainsaying the fact that the ICRC document has endeavored to synchronise various interpretations on the notion of direct participation in hostilities, however, certain parts of the document have been subjected to various criticisms from some experts including those who participated in the ICRC study. Nevertheless, the ICRC study on the notion of direct participation in hostilities defined direct participation in hostilities as “specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict”.¹²

This definition has tried to provide mid-way position, which will serve as a balance between imperative military necessity and humanitarian consideration in time of armed conflict. Before the emergence of this definition, some experts at the meetings of the ICRC study have argued for a broader definition in order to cover wide range of activities, which may serve as an incentive for civilians to keep away from hostile acts. On the other hand, other experts at the meetings have argued for a narrow definition that will maximise the protection of civilians by covering just few hostile acts.¹³ However, a narrow definition can be questioned on the fact that civilians may systematically abuse the strict definition by taking undue advantage of their immunity and carry out hostile acts.¹⁴ In the end, the ICRC study shows that acts of civilians may constitute ‘direct’ or ‘indirect’ participation in hostilities. The ‘direct act’ involves “acts of violence which pose an immediate threat of actual harm to the adverse party” and consequently erodes civilian immunity.¹⁵ While, ‘indirect act’ entails acts that “merely support the adverse party’s war or military effort” and as such do not serve as exception to civilian immunity.¹⁶

Therefore, the challenges bedeviling the effective protection of civilians in contemporary armed conflicts depends largely on the certainty and clarity with which direct participation in hostilities is understood by military personnel. This prompted Melzer to state that:

⁵ Nils Melzer, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, vol. 42 (2010) International Law and Politics, at 837

⁶ Nils, The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, at 2 Article 31 (1), Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

⁷ See 2 Article 31 (1), Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

⁸ ICRC Commentary on Additional Protocol I, at 618

⁹ *Prosecutor v Stanislav Galic*, Case No. IT-98-29-T, ICTY Judgment, Trial Chamber, 5 December 2003, at para. 48. The Inter-American Commission on Human Rights describes direct part in hostilities to mean “participating in an attack that is intended to cause physical harm to enemy personnel or objects”. Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia, at para. 46 <www.asylumlaw.org/docs/colombia/oas99_colombia.pdf> viewed 10 November 2013 (hereinafter “Inter-American Commission on Human Rights Third Report”)

¹⁰ Nils, The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, at 3; David Jason, at 730

¹¹ Michelle, at 4

¹² Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (Geneva: ICRC, 2009), at 43 (hereinafter “ICRC Interpretive Guidance”)

¹³ See generally on the argument for narrow and wide interpretation of direct participation in hostilities, ICRC Background Paper for the Expert Meeting on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, Geneva, (2004), <<http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>> viewed on 25 November 2013 (hereinafter “ICRC Background Paper 2004”). It is significant to note that the problem “taking a direct part in hostilities” is not a mere semantic as the word “direct” was interpreted to carry the same meaning with “active”. *Prosecutor v Akayesu*, Case No. ICTR-94-4-T, ICTR Judgement, (September 2 1998), at para. 629. See also the use of the words “active” and “direct” in the provisions of Article 3(1), common to Geneva Conventions, Additional Protocol I, Articles 51 (3) and Additional Protocol II, Article 13(3).

¹⁴ Michelle Lesh, “Loss of Protection: Direct Participation in Hostilities”, at 4 <law.huji.ac.il/upload/Lesh_LossofProtection.pdf> viewed on 20 November 2013

¹⁵ “IHL and Civilian Participation in Hostilities in the OPT” Policy Brief October 2007, Harvard University Program on Humanitarian Policy and Conflict Research, at 8

¹⁶ Inter-American Commission on Human Rights Third Report, at para. 54. However, according to the Israeli Supreme Court in the *Targeted Killings* case, direct participation covers not only the commission of attacks, but also direct support for the commission of such acts, including intelligence-gathering, the transportation of combatants, the operation, supervision, service to combatants or their weaponry, enlisting or sending combatants to commit hostilities, and deciding and planning the attack. *Targeted Killing* case, para. 35

“In the absence of such clarity, armed forces operating in a hostile environment might be inclined to consider any civilian showing the slightest enmity as directly participating in hostilities, which would amount to a *de facto* presumption of loss of protection irreconcilable with the fundamental principle of distinction”.¹⁷

It is obvious that the notion of direct participation in hostilities needs to be clarified and the protection of civilians can only be effective when military personnel being the people that carry out hostilities on behalf of belligerents are aware and conversant with the notion.

2 Elements of Taking a Direct Part in Hostilities

There are certain requirements that a particular act must cumulatively satisfy before it amounts to direct participation in hostilities as defined by the ICRC study. The constitutive elements are threshold of harm, direct causation and belligerent nexus.

2.1 The Requirement for Threshold of Harm

One of the essential elements of direct participation in hostilities is threshold of harm. Threshold of harm requires that “a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction of persons or objects protected against direct attack”.¹⁸ Looking at this requirement, it shows that a specific act which has likelihood of affecting the military operation or capacity of a belligerent will satisfy the element.¹⁹ In other words, a specific act that will probably cause the required harm on objective assessment of the situation suffices without necessarily causing the actual harm.²⁰ It is significant to mention that a recent study, which also touches on direct participation in hostilities shows that ‘intent’ supposed to be a vital feature in the definition of threshold of harm. Consequently, intent being additional factor “has the effect of lowering the standard for civilians’ actions that may satisfy the threshold of harm requirement.”²¹

Moreover, it is part of the requirement for threshold of harm that a harm expected out of a specific act must be of military nature, which includes the killing or injuring of military personnel as well as where the act cause adverse effect on the military operation or capacity of the party to the conflict will suffice the requirement.²² The following constitute act of direct participation in hostilities: guarding captured armed forces; “clearing mines placed by the adversary”; interference with military computer networks of adversary; and tapping high command information of the adversary.²³ However, a specific act of hostility does not include where a civilian refused to engage in activities that may assist the enemy operations, say failure to thwart intrusion by adversary regardless of the civilians’ motive for the refusal.²⁴

It is worthy to mention that direct participation excludes activities by civilians, which are designed to ease or assist a party’s military capacity or operation.²⁵ This position was criticised based on the fact that in warfare, “actions that weaken one side in a conflict contribute to the wherewithal of the other, and vice versa. But if a distinction is to be drawn, it must be recognised that the strengthening of enemy capacity may be just as much a concern for commanders in the field as the weakening of one’s own forces.”²⁶ At this juncture, it is significant to bring to fore the Tallinn Manual, a recent document which also addresses the challenges of civilian participation in hostilities. The manual provides that an act of civilians which improves the military operation of one’s own military capacity will constitutes direct participation in hostilities, so that the civilian can be targeted by the enemy.²⁷

The second aspect of the requirement for threshold of harm does not actually centres on military nature. It provides that if the specific act of civilians inflicts death or injury on civilians, or it destroys objects that are protected under the law of armed conflict, the act satisfies the requirement for threshold of harm.²⁸ The activities that qualify in this respect include the bombardment of civilian towns or villages as well as shelling of civilian urban residential areas that have not been used for military purpose.²⁹ Meanwhile, some experts argue that this second requirement for threshold of harm must not be limited to

¹⁷ Nils, *Targeted Killing in International Law*, at 333

¹⁸ ICRC Interpretive Guidance, at 47

¹⁹ Kenneth, *Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, at 658

²⁰ ICRC Expert Comments, at 23

²¹ Collin, at 7. The recent study is a manual known as Tallinn Manual on the International Law Applicable to Cyber Warfare Prepared by the International Group of Experts at the Invitation of the NATO Cooperative for Cyber Defence Center of Excellence (2013) (hereinafter “Tallinn Manual”). The ICRC interpretive guidance used the word “likelihood”, while the Tallinn manual sticks to “intent” or “actual”, and this serves as one of the areas of divergence between the two documents in respect of this constitutive elements of direct participation in hostilities. The manual is available at <nuclearenergy.ir/wp-content/uploads/2013/11/tallinn_manual.pdf> For discussion of the manual from *jus ad bellum* context see Myrna Azzopardi, “The Tallinn Manual on the International Law Applicable to Cyber Warfare: A Brief Introduction on its Treatment of *Jus Ad Bellum* Norms” vol.3 (2013) ELSA Malta Law Review

²² ICRC Interpretive Guidance, at 54

²³ *Ibid*

²⁴ Inter-American Commission on Human Rights Third Report, at para. 56

²⁵ ICRC Interpretive Guidance, at 5

²⁶ Michael, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: A Critical Analysis*, at 29

²⁷ Tallinn Manual, at 102

²⁸ Michael, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, at 721

²⁹ *Prosecutor v. Strugar*, Case No. IT-01-42-T, ICTY Judgment, (31 January 2005), at 282-289.

words such as “death”, “injury” or “destruction”, but rather, it should include “forc[ing] inhabitants of a particular ethnic group to leave an occupied area during a conflict in which ethnicity factored”.³⁰ To crown it all, any specific act of civilians, which does not cause ‘harm of military nature’ and does not inflict death or injury on civilians nor does it destroy civilian objects will not satisfy the requirement of threshold of harm.³¹

2.2 Direct Causation Requirement

The requirement for a direct causation for a specific act states that “there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”³² The essence for the need for direct causation is provided with a view to distinguishing ‘general war effort’ as well as ‘war sustaining activities’ from the genuine conduct of hostilities. It further strikes a distinction between acts that qualify as direct participation and the acts that are indirect participation.³³ For this purpose, ‘general war effort’ is designated as “all activities objectively contributing to the military defeat of the adversary.”³⁴ For instance, “design, production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure are part of the general war efforts.”³⁵ On the other hand, the ‘war-sustaining activities’ are the other important activities that help in supporting the ‘general war effort’, which include media activities, economic activities, political propaganda, and production of agricultural or other industrial goods.³⁶

It is argued that it is indeed, the general war effort and war sustaining activities that would at the end of the day culminate into ultimate harm that will reach the required threshold for direct participation in hostilities.³⁷ In essence, these activities are the ones that build up and sustain the ability of the opponent to cause the required threshold of harm, which was argued to be distinct from the actual conduct of hostilities that is specifically calculated to cause the harm.³⁸ This means that general war effort as well as war sustaining activities could not be part of direct participation in hostilities. Additionally, it has been made clear that one of the essential elements of direct participation in hostilities is that “there must be a sufficiently close causal relation between the act and the resulting harm,” or else, general war effort and war sustaining activities will fall under direct participation, which can deprive civilians their protection.³⁹ Therefore, for a specific act to be “direct” participation, it must be an act that is capable of causing the required harm in just ‘one causal step’.⁴⁰ This will be a ground for the exclusion of ‘indirect’ activities to adversary such as the supply of fuel, electricity, transportation of weapons and financial services notwithstanding the fact these conducts have a positive impact on the military capability of the adversary.⁴¹ It is important to highlight that where a civilian decides to contribute as one of several lookouts in an ambush attack, such a civilian would be directly participating in hostilities “although his contribution may not be indispensable to the causation of harm.”⁴² This further depicts that the fact that a specific act of a civilian is indispensable to the causation of harm will not make it satisfies the criterion of direct causation.⁴³

The requirement for direct causation can equally be inferred in contemporary computer-centric warfare, where persons who are far away from the battleground perform critical functions to the success of military attacks.⁴⁴ Perhaps, that is the rationale for making direct causation to include acts which do not own their own cause the required harm, but they form an integral part of a coordinated military operation that causes the required threshold of harm.⁴⁵ The implication of the position is that where a specific act of individual is considered in isolation does not cause the required harm is immaterial, likewise the individual

³⁰ Michael, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: A Critical Analysis, at 29

³¹ ICRC Background Paper 2004, at 14-15

³² ICRC Interpretive Guidance, at 51

³³ Nils, The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, at 7; ICRC Commentary on Protocol I, at para. 1945.

³⁴ ICRC Revised Draft, Interpretive Guidance on the Notion of “Direct Participation in Hostilities”, Geneva, (November 2006), at 39 <<http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>> viewed on 25 November 2013. (hereinafter “ICRC Revised Draft 2006”). The revised draft was based on the Fourth Expert Meeting on the Notion of “Direct Participation in Hostilities under IHL”.

³⁵ ICRC Commentary on Protocol I, at para. 1945

³⁶ ICRC Revised Draft 2006, at 39

³⁷ Jeffrey T.G. Kelsey, “Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare” vol. 106:1427, (May 2008) Michigan Law Review, at 1447

³⁸ ICRC Draft Interpretive Guidance on the Notion of “Direct Participation in Hostilities”, Geneva, (2006), at 29 <<http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>> viewed on 25 November 2013 (hereinafter “ICRC Draft Interpretive Guidance”)

³⁹ See generally ICRC Background Paper 2004 on the pertinent questions that center on war effort.

⁴⁰ Nils, The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, at 7

⁴¹ David Jason, at 743

⁴² ICRC Interpretive Guidance, at 54

⁴³ Ibid

⁴⁴ Geoffrey S. Corn “Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions” vol. 2 (2008) Journal of National Security Law & Policy, at 257. Corn has pointed out that there are estimated 100,000 civilians who are supporting the military in the conflict in Iraq and he reiterates that US military function depends on civilian support. This stresses the continues involvement and importance of civilians in the contemporary warfare.

⁴⁵ ICRC Draft Interpretive Guidance, at 31. If an operation requires the use of unmanned aerial plane that requires “computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander”, all these individuals have directly participated in hostilities. ICRC Draft Interpretive Guidance, at 31

location regarding geographical proximity to the battleground will not justify a conclusion that an act has a direct causal link or not.⁴⁶

2.3 Belligerent Nexus as a Requirement

When a specific act satisfies the requirement of threshold of harm and direct causation, the act has to satisfy the requirement of belligerent nexus before it qualifies as direct participation in hostilities. The requirement of belligerent nexus demands that “an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.”⁴⁷ Accordingly, belligerent nexus should not be linked with the mindset of a person committing a specific act; it tries to evaluate the “objective purpose of the act”.⁴⁸ In other words, the requirement of belligerent nexus does not concern with the individual mindset of the civilian taking a direct part in hostilities. This shows that for a person who actively participates in hostilities, the law is less concerned with the mental responsibility, willingness, or the force behind his participation.⁴⁹ The legal implication of this shows that a civilian who takes a direct part in hostilities will assume full responsibility for his act whether or not he was forced to participate or he is a child below the age of recruitment in military.⁵⁰ A question may be asked as to the position of a driver transporting a ‘remote controlled bomb’ who has no knowledge of what he is transporting as well as the role he is playing in the hostilities.⁵¹

Additionally, a specific act may cause the required threshold of harm as well as having a direct causation but it does not have belligerent nexus, therefore it will not constitute direct participation in hostilities.⁵² A good example can be seen from a situation where fleeing civilians blocked a road that is considered strategic to a particular military operation. This will not amount to direct participation since it was not calculated to “support one party to the conflict” at the detriment of harming the other party.⁵³ On the contrary, if the civilians blocked the strategic road with a view to allowing the withdrawal of forces as well as to delay the arrival of the adversary, the blockage will be considered direct participation in hostilities.⁵⁴ The requirement for an act to be “in support of a party to the conflict” and “to the detriment of another” is viewed as a rigid requirement when considered from a pragmatic stand. The two issues i.e “support one party” and “detriment of another” were supposed to be read disjunctively rather than conjunctively.⁵⁵ So that direct participation in hostilities will include a situation where a specific armed group not party to a conflict but carries out attack against state forces with a view to achieving a particular goal, which may be detrimental to the state forces without necessarily supporting the other armed groups who are parties to the conflict.⁵⁶

3 The Beginning and End of Taking a Direct Part in Hostilities

It is now clear that a specific act of civilians that satisfies the three constitutive requirements of direct participation in hostilities will certainly erode civilian immunity. However, the outstanding problem now is the question of when does a specific act of direct participation begin and end. An act of direct participation covers “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.”⁵⁷ This shows that a particular act of direct participation will begin with the preparatory measures and it will end by returning from the location of its execution.⁵⁸

Accordingly, preparatory measure for a direct participation in hostilities has to be connected to a specific activity so that measures preparatory to general activities are not considered direct as to constitute part of a specific act of direct participation.⁵⁹ Therefore, measures preparatory that is “aiming to carry out a specific hostile act qualify as direct participation in hostilities, whereas preparatory measures aiming to establish the general capacity to carry out unspecified hostile acts do not” qualify.⁶⁰ A good example is where a civilian contributes by loading bombs onto a plane, which is in preparation for an aerial bombardment on military objectives in the war area will obviously qualify as a measure preparatory to a specific hostile act that amounts to

⁴⁶ICRC Interpretive Guidance, at 55; ICRC Draft Interpretive Guidance, at 37

⁴⁷ ICRC Interpretive Guidance, at 58

⁴⁸ Id, at 59

⁴⁹ Ibid

⁵⁰ Ibid. Cf McDonald’s position where he states that “it seems that one necessary mental element is that the civilian participant must intend to gain a military advantage or cause harm to the enemy”. See McDonald A., “The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities”, A Paper Presented at the University of Teheran at a Round Table on the Interplay Between International Humanitarian Law and International Human Rights Law, (April 2004).

⁵¹Ibid. Cf the Tallinn Manual, at 102

⁵²Michael, Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: A Critical Analysis, at 29-30

⁵³ Ibid. In case self defence or defence of protected civilians against violence such as murder, looting, rape, other sexual violence, etc by marauding soldier may cause the required threshold of harm with direct causation, but it is not done to “support a party to the conflict and cause harm to another”. Therefore, such use of force in defensive manner cannot be considered as direct participation in hostilities. See ICRC Interpretive Guidance, at 58

⁵⁴ ICRC Expert Comments, at 25. See The final version of the ICRC Draft Interpretive Guidance.

⁵⁵ Tallinn Manual, at 102

⁵⁶ Michael, Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: A Critical Analysis, at 34.

⁵⁷ ICRC Interpretive Guidance, at 65

⁵⁸ ICRC Background Paper for Expert Meeting on Direct Participation in Hostilities Under International Humanitarian Law, 2nd June 2003, Hague, at 5

⁵⁹ ICRC Revised Draft 2006, at 51

⁶⁰ Ibid

direct participation in hostilities.⁶¹ The qualification of a ‘measure preparatory’ as direct participation is made regardless of the time and space of the attack provided that it has a direct causal link with the attack.⁶² A good example of a measure preparatory to a general capacity to carry out unspecified act is a driver of an ammunition truck. Where the driver is conveying ammunition from the factory to a storage place for subsequent delivery to the battleground with the aim to carry out “unspecified attack” is considered a general preparatory measure, which does not form direct participation in hostilities.⁶³

The other requirement for the beginning of direct participation is “deployment to a location”. This simply refers to the earlier physical displacement of person for the purpose of carrying out a specific operation. Thus, deployment to a location forms an integral part of the intended hostile act and consequently, it constitutes taking an active part in hostilities.⁶⁴ Equally to, in case of ‘return’ from a specific hostile act, the return also forms an integral part of the hostile act and it constitutes direct participation in hostilities.⁶⁵ Therefore, return from execution of a hostile act ends when the “individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.”⁶⁶ It is significant to point out at this juncture that it is not every hostile act that requires ‘deployment’ and ‘return’, which means they cannot be used to determine the beginning and end of direct participation in such situations. For instance, in computer network attacks or other weapons that are remotely controlled, ‘deployment’ and ‘return’ cannot be used to determine the beginning and end of direct participation. In such situations, the time for direct participation must be restricted to the measures preparatory that forms an integral part of the act and the time “immediate” to the execution of the hostile act.⁶⁷ How to determine the precise meaning to be given to the word “immediate” in this context has not been elaborated, but it certainly has to be determined using utmost care and based on a reasonable evaluation of the prevailing circumstances.⁶⁸

4. The Notion of ‘Revolving Door’

There is no gain saying the fact that civilians enjoy protection from direct attacks only for such period as they do not engaged in an act of direct participation in hostilities.⁶⁹ This is a clear indication that civilian protection during armed conflict is premised upon their non-involvement in activities that qualify as direct participation in hostilities. Therefore, a civilian loses immunity only “for such time” as he partakes in hostile act without absolutely losing his civilian character.⁷⁰ In essences, civilians lose immunity temporarily for the time they are carrying out a hostile act and regain immunity when they disengage from the act of direct participation.⁷¹

The assertion can be inferred from the provision of the Geneva Conventions and the Additional Protocols, which provide that civilians should be protected “unless and for such time” as they engaged in act of direct participation in hostilities.⁷² To give effect to these provisions could mean that civilians’ protection will be lifted at the time of carrying out a hostile act and it will be restored immediately they withdrawal from the specific hostile act in question.⁷³ In other words, civilians lose and gain their immunity within a regular interval of their participation in hostilities as well as their withdrawal from the hostilities respectfully. This periodic and temporary lose and gain of protection by civilians who participate in hostilities in a sporadic manner is described as the “revolving door” of civilian protection.⁷⁴

The notion of revolving door of civilian immunity is a significant concept in trying to address the problem of ‘farmer by day’ and ‘fighter by night’. The justification for the notion of revolving door of civilians’ immunity was based on the need to ensure relative protection for civilians who at the interval of non-participation pose no military threat.⁷⁵ However, the notion of ‘revolving door’ has been criticized based on the contention that a civilian who participates at night as a fighter and turns to be a farmer by the day should be made to lose his immunity throughout without regaining protection.⁷⁶ Bill equally levies criticism against the notion of revolving door as follows:

⁶¹ ICRC Interpretive Guidance, at 66

⁶² Bill Boothby, “‘And for Such Time as’: The Time Dimension to Direct Participation in Hostilities” vol. 42 (2010) International Law and Politics, at 747

⁶³ “ICRC Draft Interpretive Guidance, at 38

⁶⁴ Bill, at 750. According to the author, direct participation in hostilities commences even prior to “physical displacement” that is envisaged in the ICRC study. He it has to cover period of preparation for the physical displacement because the displacement itself constitutes direct participation.

⁶⁵ Kai, at 357

⁶⁶ Bill, at 745. See also the argument in Michael, Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: A Critical Analysis, at 37

⁶⁷ ICRC Interpretive Guidance, at 68

⁶⁸ Ibid

⁶⁹ ICRC Discussion Note for Working Session I to VII, at 15

⁷⁰ ICRC Background Document on Organised Armed Groups, at 11

⁷¹ Inter-American Commission on Human Rights Third Report, at para. 55

⁷² Additional Protocol II, Article 13 (3), Article 3 (1), Common to Geneva Conventions and Additional Protocol I, Article 51 (1)

⁷³ ICRC Commentary on Protocol I, at 618; ICRC Background Document on Organised Armed Groups, at 11

⁷⁴ Background Document Working Sessions VI and VII on Temporal Scope of “Direct Participation in Hostilities”, Geneva, (2005), at 6 <<http://www.icrc.org/eng/resources/documents/article/other/direct-participation-article-020709.htm>> viewed on 25 November 2013 (hereinafter “Background Document on Temporal Scope of Direct Participation”)

⁷⁵ Michael, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, at 727

⁷⁶ William, at 32; Nils, Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities, at 880-913

“If the ICRC view is that unorganised but regular DP by civilians still involves the application of the revolving door, this is also likely to be unacceptable to states, not least because of the unnecessarily ambiguous position it creates for their armed forces who, whether their primary role is infantryman or cook, can legitimately be targeted at all times during an armed conflict”.⁷⁷

Therefore, the losing and gaining of immunity by civilians is a good idea that proffers better protection to civilians, particularly those who spontaneously participate in hostilities. Importantly, the application of revolving door of civilian protection should be restricted to civilians who participate in sporadic manner, which excludes members of armed groups who have “continuous combat function”.⁷⁸ Therefore, once a member of an armed group has assumed a continuous combat function, such a member is deprived of protection throughout the period of membership with continuous combat function.⁷⁹

The non-applicability of the revolving door of civilian protection to members of an armed group with continuous combatant function is based on the understanding that members of armed group should be treated based on the individual function they discharged within their group. This in effect shows that members of an armed group who have continuous combat function in a group should not be treated as mere civilians who participate in hostilities.⁸⁰ The implication is that any member of an armed group who assumes continuous combat function loses civilian immunity all through and has become a legitimate target at all times.⁸¹ Therefore, when it comes to the issue of revolving door of civilian protection, members of armed groups with continuous combat function cannot benefit from such protection because they absolutely lose their civilian protection. Conversely, this equally means that members of armed groups who do not have continuous combat function fall under the civilian category who should enjoy the revolving door of civilian protection.

Conclusion

Direct participation in hostilities as an exception to civilian immunity has remained one of the contending aspect of principle of distinction. It has remained one of the serious challenges of IHL, particularly with the growing trend of civilian involvement in contemporary armed conflicts. Direct participation in hostilities is a specific hostile act carried out by a person as forming part of the hostilities between belligerents in an armed conflict. For a specific hostile act to constitute direct participation in hostilities, it has to meet the designated constitutive elements i.e. threshold of harm, direct causation and belligerent nexus. Any civilian who engages in activities that meet the constitutive elements of direct participation in hostilities will lose his immunity. Importantly, direct participation in hostilities excludes certain acts that do not amount to taking a direct part in hostilities such as the general war effort and war sustaining activities. It is suggested that parties to an armed conflict should respect the protection accorded to civilians during hostilities and should endeavor to respect civilian immunity despite the challenges facing civilian participation in hostilities.

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⁷⁷ Id, at 758

⁷⁸ ICRC Background Document on Organised Armed Groups, at 5. Continuous combat function can be identified “through the carrying of uniforms, distinctive signs, or certain weapons [openly]. Yet it may also be identified on the basis of conclusive behaviour, for example, where a person has repeatedly directly participated in hostilities in support of an organised armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.” ICRC Expert Comments, at 35

⁷⁹ Kai, at 358

⁸⁰ Geoffrey, Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts, at 335; Patrick, at 3

⁸¹ Ibid. See also *Public Committee Against Torture in Israel v Government of Israel*, (*Targeted Killings* case) (2006) H CJ 769/02, at 35

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