

DIRECT PARTICIPATION IN HOSTILITIES: BETWEEN A ROCK AND A HARD PLACE

ALESSANDRO SILVESTRI*

ABSTRACT

Modern trends of warfare have witnessed the increasing involvement of civilians in conflict dynamics. This rising phenomenon has sparked considerable discussion in the realm of International Humanitarian Law ('IHL'), which has traditionally protected civilians from the dangers of warfare through the principle of distinction.¹ The response of IHL to these trends is Direct Participation in Hostilities ('DPH'), which foresees that civilian protection in warfare could be suspended 'unless and for such time as' a civilian takes a 'direct part in hostilities'.² This paper aims to unpack the theoretical and practical underpinnings associated with DPH and provide a snapshot of the issues that vex the practical application of DPH on the battlefield. Furthermore, this paper will critically explore the main attempt by the international community to address these issues, namely the 2009 Interpretive Guidance on the Notion of Direct Participation in Hostilities ('Guidance'), which excelled in its logical and structured approach to the matter but ultimately failed in providing solutions to the problems it highlighted.

I INTRODUCTION

International Humanitarian Law ('IHL') has developed throughout the years as the main instrument to find a balance between military necessity of belligerent parties during ongoing conflicts and 'requirements of humanity'.³ One of the main pillars upon which this balance could be found is the 'principle of distinction', which forces belligerent parties to distinguish at all times between civilians and combatants, directing military attacks solely on the latter.⁴ However, trends of modern warfare have underlined how

¹* PhD Candidate in International Humanitarian Law at the University of Western Australia. International Committee of the Red Cross, 'Customary IHL Database', *Rule 1: The Principle of Distinction between Civilians and Combatants*, (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1>.

² *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 51(3); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1987) art 13(3).

³ Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross, 2016) 17-8; *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, opened for signature 29 November/11 December 1868 (entered into force 11 December 1868) ('*St Petersburg Declaration*').

⁴ International Committee of the Red Cross (n 2).

civilians are increasingly involved in conflict dynamics, blurring the line between civilians and combatants.⁵ The response of the international community is to be found in the first two Additional Protocols to the Geneva Conventions ('API' and 'APII'), which state that civilians are protected under IHL 'unless and for such time as they take a direct part in hostilities'.⁶ The concept of Direct Participation in Hostilities ('DPH'), therefore, has gradually become the key to assess these modern trends of civilian participation and judge potential acts or behaviours that could temporarily suspend the general protection that IHL affords to civilians.

The goal of this paper is to provide a snapshot of the subject and inform the reader of both the theoretical and practical underpinnings of civilian participation in hostilities, underlying potential issues and the efforts of the international community to address them, most notably the Interpretive Guidance on the Notion of Direct Participation in Hostilities ('Guidance'). This scope will be achieved in two main sections. This paper will firstly explore the background of modern warfare that has witnessed a shift from isolated battlefields to urban settings, which resulted in an unprecedented mingling of civilians and combatants, with the former now being able to play pivotal roles in conflict dynamics. Second, this paper will introduce the concept of 'Direct Participation in Hostilities' and explore the legal and practical entailments that are associated with it. In particular, the grey areas stemming from the interpretation of the provision will be underlined, most notably the difficulty in identifying a line between 'direct' and 'indirect' participation. The final section will critically assess the most important effort to date by the international community to address this concept, the 2009 Guidance, emphasising its important role in structuring the issue in logical and thematic order but ultimately failing to provide solutions to move past the issues that it identified.

II CIVILIANS IN WARFARE

Means and methods of warfare have considerably changed and evolved throughout the centuries. The old modalities of conflict, perhaps culminated in the World Wars, carried a clear distinction between actors involved in the ongoing hostilities – state combatants – and those who were not, most notably civilians.⁷ Furthermore, conflicts were fought between state armies in locations that were geographically distant from urban centres and civilian-populated areas, entailing it would have been difficult and unlikely to witness a mix of combatants and civilians on the battlefield.⁸ Therefore, this tapestry of warfare facilitated the application of the legal principle of distinction, which lies at the core of IHL. Distinction is the instrument that emanated from IHL to shield civilians from the dangers and brutality of warfare, forcing belligerent parties to distinguish at

⁵ Damien van der Toorn, 'Direct Participation in Hostilities: A Legal and Practical Road Test of the International Committee of the Red Cross's Guidance through Afghanistan' (2010) 17 *Australian International Law Journal* 7.

⁶ *API* art 51(3); *APII* art 13(3).

⁷ Charles Garraway, 'Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"' (2011) 87 *International Law Studies U.S. Naval War College* 177, 178; Cynthia Marshall, 'Civilians with Skin in the Game: The Law of War Manual's Rejection of the ICRC Guidance on Direct Participation in Hostilities' (2017) 225(2) *Military Law Review* 259, 260.

⁸ Emily Camins, 'The past as prologue: the development of the 'direct participation' exception to civilian immunity' (2008) 90(872) *International Review of the Red Cross* 853, 853.

all times between combatants and civilians, and to direct all military operations solely against the former.⁹ The corollary of this IHL pillar is that '[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations'.¹⁰ The legal extension of protection to the civilian population, alongside with other IHL principles, namely proportionality and military necessity, has placed numerous constraints over the means and methods of warfare employed by belligerent forces, which have no *carte blanche* in their conduct of military operations and must account at all times for the presence of civilians.¹¹

The moral and ethical assumption underpinning the principle of distinction is exemplified in the dual dichotomy – civilian-innocent and combatant-threat – which serves its purpose if the dichotomies are fulfilled. Means and methods of warfare, however, have transformed throughout the years. Among the many changes that conflicts have witnessed, it is the increasing permeation of civilians within the dynamics of warfare that has proven to be a true 'revolution in military affairs'.¹² In other words, contemporary warfare has seen the line between civilians and combatants blur, with civilians gradually playing more important roles in the conduct of military operations.¹³ In particular, the number of civilians taking up arms and participating in hostilities is rising, accompanied by the growing outsourcing of traditional military tasks, such as maintenance and operation of military equipment, to civilian contractors.¹⁴ It is then clear that the dual dichotomy of civilian-innocent and combatant-threat is no longer completely fulfilled according to the rules of modern warfare. This calls for an

⁹ International Committee of the Red Cross (n 2); Yoram Dinstein, 'Distinction and the Loss of Civilian Protection in Armed Conflict' (2008) 84 *International Law Studies* 183; Yoram Dinstein, 'The Principle of Distinction and Cyber War in International Armed Conflicts' (2012) 17(2) *Journal of Conflict & Security Law* 261; Igor Primoratz, *Civilian Immunity in War* (Oxford University Press, 2007).

¹⁰ *API* art 51(1); *APII* art 13(1); International Committee of the Red Cross, 'Customary IHL Database', *Rule 5: Definition of Civilians* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5>.

¹¹ International Committee of the Red Cross, 'Customary IHL Database', *Rule 14: Proportionality in Attack* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14>; International Committee of the Red Cross, 'Customary IHL Database', *Rule 15: Precautions in Attack* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15>; International Committee of the Red Cross, 'Customary IHL Database', *Rule 17: Choice of Means and Methods of Warfare* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule17>; Georg Nolte, 'Thin or Thick? The Principle of Proportionality and International Humanitarian Law' (2010) 4(2) *Law & Ethics of Human Rights* 245; Samuel Estreicher, 'Privileging Asymmetric Warfare (Part II)? The "Proportionality" Principle under International Humanitarian Law' (2011) 12(1) *Chicago Journal of International Law* 143; Rotem Giladi, 'Reflections on Proportionality, Military Necessity and the Clausewitzian War' (2012) 45(2) *Israel Law Review* 323.

¹² Michael N Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees' (2005) 5(2) *Chicago Journal of International Law* 511, 511; Nicolette Boehland, Center for Civilians in Conflict, *The People's Perspectives: Civilian Involvement in Armed Conflict* (Report, 2015).

¹³ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (Penguin Books, 2006) 280; van der Toorn (n 5); Chris Field, 'Asymmetric warfare and Australian national asymmetric advantages : taking the fight to the enemy' (Working Paper No. 136, Land Warfare Studies Centre, November 2009).

¹⁴ Michael N Schmitt, 'The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis' (2010) 1 *Harvard National Security Journal* 5 ('The Interpretive Guidance Critical Analysis'); Mirko Sossai, 'Status of Private Military Companies' Personnel in the Laws of War: The Question of Direct Participation in Hostilities' (2008) 18 *The Italian Yearbook of International Law* 1; Lindsey Cameron, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013); Bruce E Stanley, *Outsourcing security: private military contractors and U.S. Foreign Policy* (Potomac Books, University of Nebraska Press, 2015).

appropriate exploration of the evolving role of civilians and the legal avenues that are available to address this growing phenomenon.

III DIRECT PARTICIPATION IN HOSTILITIES

A Theoretical Snapshot

To address the increasing civilian involvement in hostilities, the international community responded in 1977 with the legal instruments embedded in API and APII which explored new legal avenues for IAC and NIAC respectively. API states that: ‘Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities’.¹⁵ Civilian general protection is, therefore, conditional. The framework designed to shield civilians from the dangers of warfare can be suspended when and if civilians engage in acts or behaviours that amount to ‘direct participation’ and will be regained once these acts or behaviours cease.¹⁶ While the concept may appear straightforward, its practical implications on the battlefield could pave the way for interpretational issues. For instance, a civilian taking up arms and shooting at a combatant undoubtedly represents a lucid example of direct participation. However, driving a truck containing ammunitions that would be then used in the ongoing hostilities has divided experts and shows how fragile the line between direct and indirect participation could be.¹⁷ Furthermore, doubts also arise concerning the ‘unless and for such time as’ requirement contained in the provision. Specifically, it is unclear whether a civilian would immediately regain protection under IHL seconds after, for instance, detonating a bomb near a military base.

The need becomes apparent, therefore, to explore whether the international community has agreed on criteria or guidelines that could be used to aid assessments of DPH acts or behaviours and translate law onto the battlefield. The short answer to this question is, unfortunately, a negative one. As stated by the Customary IHL Study of the ICRC, ‘a clear and uniform definition of direct participation in hostilities has not been developed in State practice’.¹⁸ There have been attempts by academics and experts to frame the concept and pinpoint the main issues that have prevented the international community from finding agreement on a comprehensive and universal definition of DPH.¹⁹ Most notably, some scholars have argued that the legal instruments of DPH contained in articles 51(3) API and 13(3) APII are not sufficiently equipped to deal with the bulk of civilian participation in modern warfare which, in turn, would explain why the international community has not been able to find common ground in the understanding of DPH.²⁰

¹⁵ API art 51(3); APII art 13(3).

¹⁶ Nils Melzer, ‘Direct Participation in Hostilities: Operationalizing the ICRC’s Guidance’ (2009) 103 *American Society of International Law Proceedings* 299, 300 (‘Direct Participation’).

¹⁷ Michael N Schmitt, ‘“Direct Participation in Hostilities” and 21st Century Armed Conflict’ in Horst Fischer (ed), *Crisis Management and Humanitarian Protection* (Berliner Wissenschafts-Verlag, 2004) 510, 512.

¹⁸ International Committee of the Red Cross, ‘Customary IHL Database’, *Rule 6: Civilians’ Loss of Protection from Attack* (Web Page) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6>.

¹⁹ Eric Christensen, ‘The Dilemma of Direct Participation in Hostilities’ (2010) 19(2) *Journal of Transnational Law and Policy* 281, 281.

²⁰ Randall Bagwell and Molly Kovite, ‘It Is Not Self Defense: Direct Participation in Hostilities Authority at a Tactical Level’ (2016) 224(1) *Military Law Review* 1, 6.

B *The Mixed Results of International Efforts – The Interpretive Guidance on the Notion of Direct Participation in Hostilities*

The growing unease of the international community vis-à-vis DPH has prompted the ICRC, traditionally the main actor in the field of IHL, to gather a group of leading scholars and task them with developing a framework for the understanding of DPH that resulted in the 2009 Guidance.²¹ While this document is non-binding by nature, it still carries a considerable degree of importance and influence across the globe due to the pivotal position of the ICRC in IHL and the involvement of leading scholars and experts in the field. Before exploring the main arguments of the Guidance, it is worth pointing out that this work has attracted significant animosity from scholars and experts in the field.²² However, the unprecedented and greatly underestimated success of the Guidance was the opportunity it presented to pinpoint the issues of DPH in clusters and direct the attention of the international community to these issues in a more pro-active manner. There had been no attempt before the Guidance to create a comprehensive work that listed and explored all the practical problems associated with DPH. In doing so, the Guidance was able to lay the groundwork for theorising potential solutions to these issues and *de facto* facilitating future studies and projects on the matter. In particular, there are three clusters of issues identified in the Guidance – legal definition of civilians, ‘direct’ participation (rather than indirect) and the temporal jurisdiction of DPH.

1 *Who is considered a civilian for the purposes of the principle of distinction?*

As explored in the previous section, the line between civilians and combatants has increasingly blurred through the years. Furthermore, this problem is amplified in the context of NIAC, where members of organised armed forces lack a proper definition under IHL, creating a *de facto* legal limbo in the application of IHL to organised armed forces and their members.²³ Therefore, there was a profound need to determine criteria to assess the legal status of all actors involved in conflict. The Guidance has responded to this issue by upholding the ‘mutual exclusiveness’ dichotomy between civilians and combatants and introducing the concept of ‘Continuous Combat Function’ as a criterion to distinguish between civilians who commit a DPH act and members of

²¹ Nils Melzer, International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Guidance, 2009) (‘Interpretive Guidance’).

²² Schmitt, ‘The Interpretive Guidance Critical Analysis’ (n 14); Michael N Schmitt, ‘Deconstructing Direct Participation in Hostilities: The Constitutive Elements’ (2010) 42 *International Law and Politics* 697 (‘Deconstructing Direct Participation’); Kenneth Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretive Guidance’ (2010) 42 *New York University Journal of International Law and Politics* 641; Marshall (n 7).

²³ NIAC, by definition, are fought by at least one non-state party, entailing the presence of an organised armed group as a belligerent force in the conflict. Given the relatively recent rise of NIAC, the international community has not been able to properly define organised armed forces and their members. See Geoffrey Corn and Chris Jenks, ‘Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts’ (2011) 33(2) *University of Pennsylvania Journal of International Law* 313.

organised armed forces.²⁴ These recommendations have been met with criticism by the international community, which considered them utterly unfeasible on the battlefield.²⁵

2 *What conduct amounts to direct participation in hostilities?*

The second cluster navigates the practical difficulties in drawing a line between direct and indirect participation in hostilities. Throughout the years, the international community had made a few suggestions with respect to specific acts or behaviours that amount to direct participation. For instance, using weaponry, serving as intelligence agents, or participating in sabotage missions are clear examples of DPH.²⁶ Conversely, the sale of food supplies or medications, financial aids, and propaganda have traditionally been viewed as forms of indirect participation in hostilities.²⁷ The Guidance has attempted to contribute to this debate by designing three cumulative criteria to assess civilian behaviours on the battlefield – threshold of harm, direct causation, and belligerent nexus.²⁸ The international community has responded with uncertainty regarding the practical feasibility of these criteria and opposed the criteria with the argument that it entails an exaggerated degree of under-inclusiveness in assessing civilian DPH.²⁹

3 *What modalities govern the loss of protection against direct attack?*

Finally, the Guidance gathered key issues and questions such as conditions of onset and termination of DPH, consequences of regaining immunity, precautions in situations of doubt, and application of force against targets.³⁰ The international community has met the recommendations advanced by the Guidance in this regard with fierce criticism. Parks, for instance, has stated these criteria have ‘no mandate, no expertise and [are] legally incorrect’.³¹ The majority of critiques, however, were advanced specifically against the Guidance’s recommendations on the loss of protection against direct attack. The international community expected the Guidance to solve the so-called ‘Revolving

²⁴ For pragmatic reasons of word-limit, it falls outside of the scope of this paper to explore the concepts of ‘mutual exclusiveness’ and ‘Continuous Combat Function’. For further information, see Melzer, *Interpretive Guidance* (n 21) 9; Melzer, ‘Direct Participation’ (n 16) 300.

²⁵ Watkin (n 22) 649; Bill Boothby, ‘And for Such Time as: The Time Dimension to Direct Participation in Hostilities’ (2010) 42 *New York University Journal of International Law and Politics* 741, 741-2; Schmitt, ‘Deconstructing Direct Participation’ (n 23) 697-8.

²⁶ *Prosecutor v Strugar (Public Judgement)* (International Tribunal for the Prosecution for the Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Appeals Chamber, Case No IT-01-42-A, 17 July 2008) [177] (*‘Strugar’*); *Public Committee v Government of Israel (Judgement)* (Supreme Court of Israel, Israel, Case No HCJ 769/02, 13 December 2006) (*‘Public Committee’*) [34].

²⁷ *Public Committee* (n 26) [34]; *Strugar* (n 26) [177].

²⁸ Melzer, ‘*Interpretive Guidance*’ (n 21) 46-64.

²⁹ Schmitt, ‘Deconstructing Direct Participation’ (n 22) 720; APV Rogers, ‘Direct Participation in Hostilities: Some Personal Reflections’ (2009) 48(1-2) *Military Law and the Law of War Review* 143, 146; Shannon Bosch, ‘The International Humanitarian Law Notion of Direct Participation in Hostilities - A Review of the ICRC Interpretive Guide and Subsequent Debate’ (2014) 17 *Potchefstroom Electronic Law Journal* 998.

³⁰ Melzer, ‘*Interpretive Guidance*’ (n 21) 48.

³¹ W Hays Parks, ‘Part IX of the ICRC Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect’ (2010) 42 *New York University Journal of International Law and Politics* 769.

Door' phenomenon, which is the legal gap that allowed civilians to routinely engage in DPH activities and cease them to regain protection, thus the revolving door metaphor.³² However, the Guidance's claim that the 'Revolving Door' phenomenon was a necessity and not a malfunction of DPH generated harsh criticism and delegitimised the influence of the Guidance in the international community.³³

IV CONCLUSION

Direct Participation in hostilities has been a subject that has widely vexed scholars and experts in recent years. The increasing mingling of civilians and combatants on the battlefield has created the necessity for the international community to take stock and establish guiding and deciding criteria for DPH. The scope of this paper was to provide a snapshot of the growing civilian engagement in hostilities and explore the overarching legal framework regulating this phenomenon. Particularly, it was highlighted how the law paves the way for potential grey areas that demand more specific criteria to aid its practical application on the battlefield. The most notable attempt to tackle this issue was the 2009 Guidance, which was able to narrow down the main themes associated with DPH – the legal categorisation of civilians and combatants, the meaning of 'direct' participation as opposed to indirect, and the modalities governing the loss of protection under IHL – most notably, the temporal jurisdiction of DPH. The outcomes of this effort are mixed. The Guidance did a remarkable job in exploring the subject in a logical and structured manner, while arguably failing at providing feasible solutions to the problems that they underlined. Finally, the foundations laid by the Guidance will serve as a starting point for future studies, which, given the relevance and significance of the subject, are needed now more than ever.

³² van der Toorn (n 5); W Hays Parks, 'Air War and the Law of War' (1990) 32 *Air Force Law Review* 163; Boothby (n 25).

³³ Melzer, 'Interpretive Guidance' (n 21) 40; Boothby (n 25); van der Toorn (n 5).