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Who May Be Lawfully Targeted in Non- International Armed Conflicts?

A Legal Analysis of the Notion of Direct Participation in Hostilities

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Summary

The regulations applicable in non-international armed conflicts, Common Article 3 to the Geneva Conventions I-IV and Additional Protocol II, offer protection to civilians who do not directly participate in the hostilities. There is no commonly accepted definition of direct participation in hostilities in treaty-based international humanitarian law, State practice or international jurisprudence.

This thesis focuses on examining how the notion of direct participation in hostilities is interpreted by looking at various views of the notion. The thesis also examines the consequences of these different views. The International Committee of the Red Cross, whose humanitarian mission is to protect and help people affected by armed conflict, have issued a detailed interpretative guidance with their interpretation of the notion, which is examined and presented in the thesis. Since their guidance has faced wide criticism, the thesis also presents criticism from Michael N. Schmitt, who participated in the project resulting in the guidance but withdrew his name upon reviewing the final draft since he did not support its findings.

Conclusively, the thesis shows that the notion of direct participation in hostilities is ambiguous. The ambiguity has consequences for all actors in international law, both individuals, States and organizations. The absence of a commonly accepted interpretation opens up the possibility for States and organized armed groups to unilaterally interpret the notion and such interpretations are often not made public. This is problematic since low predictability and lack of transparency is never desirable regarding legal problems. Further, the thesis shows that the interpretation of the notion by the International Committee of the Red Cross can be abused by the parties to an armed conflict. Finally, their interpretation stands a risk to not balance the military necessity against humanitarian concerns well enough.

Sammanfattning

Enligt regelverken tillämpliga i icke-internationella väpnade konflikter, gemensamma artikeln 3 i Genèvekonventionerna samt tilläggsprotokoll 2, erbjuds skydd till civila som inte direkt deltar i strid. En gemensam definition av vad som anses vara direkt deltagande i strid existerar inte i tillämpliga traktat i den internationella humanitära rätten och inte heller förser nationell eller internationell praxis någon tydlig tolkning av begreppet.

Uppsatsen fokuserar på att utreda vad begreppet direkt deltagande i strid innebär genom att titta på olika tolkningar av begreppet samt utreda möjliga konsekvenser av dessa tolkningar. Internationella rödakorskommittén, vars humanitära uppgift är att skydda och hjälpa människor som drabbas av väpnade konflikter, har utfärdat en detaljrik vägledning, genom deras tolkning av begreppet direkt deltagande i strid, som undersöks och presenteras i uppsatsen. Då flera invändningar har riktats mot deras tolkning presenteras även kritik framförd av Michael N. Schmitt, som deltog i framtagandet av guiden men som strök sitt namn innan den sista utgåvan då han inte stod bakom tolkningen.

Sammantaget visar utredningen att begreppet direkt deltagande i strid är tvetydigt och att det inte finns en allmänt accepterad tolkning. Detta får konsekvenser för alla aktörer inom folkrätten, både individer, stater och organisationer. Det öppnas en möjlighet för både stater och aktiva väpnade grupper i konflikter att ensidigt tolka begreppet och dessa tolkningar redovisas sällan för allmänheten. Ur ett rättssäkerhetsperspektiv är detta problematiskt, då låg förutsebarheten aldrig är önskvärt i juridiska frågor. Vidare visar utredningen att Internationella rödakorskommitténs tolkning av begreppet i många fall kan missbrukas av parter i väpnade konflikter samt att deras tolkning riskerar att inte ge en väl avvägd balans mellan militär nödvändighet och humanitära problem.

Abbreviations

| | |
|------------------|--|
| AP I | The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) |
| AP II | The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) |
| Common Article 3 | Article 3, common to the 1949 Geneva Conventions |
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal of Rwanda |
| ICTY | International Criminal Tribunal of Former Yugoslavia |
| IHL | International Humanitarian Law |
| VCLT | Vienna Convention on the Law of Treaties |

1 Introduction

1.1 Background

Over the past decades, the use of armed drones has become a central issue of global security and the human rights agenda.¹ Unmanned combat aerial vehicles, i.e. armed drones, are driverless aircrafts equipped with weapon systems. They can be flown either autonomously or by remote control.² What distinguishes them from manned aircraft is their autonomous weapon system that can independently select and attack targets. Hence, after initial activation, the weapon system in itself conducts the targeting processes and actions that are ordinarily controlled by humans.³ Because of their characteristics, armed drones enable States to engage in military operations over long distances without risking casualties among their own forces and with great precision, target specific persons with lethal force.⁴ In that aspect, the use of armed drones points to a depersonalization of the use of force and poses potential risks to global security and individual lives.⁵

The use of armed drones is regarded as a use of force and they are not illegal weapons per se. In the context of armed conflict, they are regulated by international humanitarian law, human rights law as well as customary law.⁶ They are often used as means of warfare and the legal framework regulating who may be lawfully targeted differentiates between international and non-international armed conflicts. In international armed conflicts, “combatants” may be targeted at all times while in non-international armed conflicts, the

¹ Heyns (2015) Preface.

² Britannica Encyclopedia, “Unmanned Aerial Vehicle”, <https://www.britannica.com/technology/unmanned-aerial-vehicle>.

³ ICRC, “International Humanitarian Law and the Challenges of Contemporary Armed Conflict”, p. 44, <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts#gs.khl8cp>.

⁴ Heyns (2015) Preface.

⁵ Ibid.

⁶ Alston, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions” (Alston, UN-report) p. 10–11, <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

term does not exist.⁷ Instead, States are permitted to target only civilians who “directly participate in hostilities”.⁸ There is no commonly accepted definition of “direct participation in hostilities”, therefore it is interesting to look at what the term means in the context of non-international armed conflict.⁹

1.2 Purpose and Research question

The purpose of this thesis is to examine how the notion of “direct participation in hostilities” is interpreted and how it affects the parties to an armed conflict as well as international law concerning armed conflicts. The notion is examined in relation to non-international armed conflicts. The analysis will be concentrated on two main questions:

1. Who are considered to be in “direct participation in hostilities” in non-international armed conflicts?
2. What consequences, including problems, are caused by the interpretations of the notion?

1.3 Delimitations

The use of armed drones raises several questions in international law regarding issues such as state sovereignty and human rights, however, this is outside the scope of this thesis. Although other regulations may question the use of armed drones, the thesis only focuses on the notion of direct participation in hostilities.

The thesis is focused on non-international armed conflict and the regulations applicable in those conflicts. Since international humanitarian law includes various rules and principles, the thesis will highlight some of those applicable in armed conflicts but will only briefly present them. The principle of

⁷ Art 48, Additional Protocol I (AP I); art 51 (2), AP I.

⁸ Art 13 (3), Additional Protocol II (AP II);

⁹ Alston, UN-report, p. 19.

distinction, a principle closely related to the topic of direct participation in hostilities, can be discussed in great detail but is only briefly presented due to the scope of the thesis.

As for the part where different views of the notion are presented, only the most relevant examples determining what conduct amounts to direct participation in hostilities are included. The same applies to the presented criticism to the ICRC's interpretation, where only the view of one critical reasoning author is presented along with his most relevant arguments. The limitation is due to the lack of space, although there are other authors that discuss the matter.

1.4 Methodology, Material and Perspective

This thesis is a legal examination that aims to define and evaluate the regulations behind the notion of direct participation in hostilities in non-international armed conflicts, why the legal dogmatic method has been used. In order to answer the research questions, the thesis compiles multiple international humanitarian law sources, which are thereafter analyzed.¹⁰ The method used is motivated by the ambiguity of the topic which requires further clarity.

The thesis mainly uses recognized legal sources of international humanitarian law such as international treaties, conventions, case law and legal doctrine. Most material is gathered from the International Committee of the Red Cross's (ICRC) casebook, that compiles the applicable legislative documents, the Geneva Conventions I-IV and their associated Additional Protocols (AP I and AP II). The ICRC casebook allows access to legal sources recognized as legitimate contributions to the area by the ICRC including various case studies. The ICRC is commissioned by the international community to determine customary law and is given mandate by the parties to the Geneva

¹⁰ Kleineman (2019) p. 21 and 26.

Conventions to help victims of armed conflicts. This includes the clarification and development of international humanitarian law, why their interpretation of the notion is used in this thesis.¹¹ In order to answer the first research question, the ICRC's Interpretative Guidance on the Notion of Direct Participation has been examined, as well as a critical analysis of the guidance authored by Michael R. Schmitt. The Guidance is an expression solely of the ICRC's view of the notion and is not of legally binding nature since only treaties or State practice followed out by a sense of legal obligation on a certain issue can produce binding law.¹² The critical analysis by Schmitt is examined to present criticism to the ICRC's interpretation. Schmitt was a participant in the project resulting in the guidance, however, since he did not support the findings, he, among others, withdrew his name upon reviewing the final draft.¹³ Schmitt's critical analysis is used to highlight the implications the notion of direct participation in hostilities bring for the parties to an armed conflict.

The thesis is permeated with a critical perspective, emphasized in the analysis. The critical perspective is mainly applied to the interpretation of the notion of direct participation and the implications it brings for the parties in an armed conflict. The thesis critically scrutinizes the different views of the term "direct participation in hostilities" and highlights the uncertainty of the interpretations.

1.5 Outline

The descriptive part of the thesis, the second and third chapters, presents the legal regulations of armed conflicts and those specifically applicable in non-international armed conflict. In order to answer the first research question,

¹¹ Kestemont (2018) p. 30; Article 5 (2)(g) and 5 (2)(c), Statutes of the International Red Cross and Red Crescent Movement, 1986; ICRC's role in the interpretations of the Conventions and Protocols, § 8, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=514012CC1D2DA6C8C1258115004AE0CC>.

¹² Henriksen (2019) p. 24.

¹³ Schmitt, *The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis* (Schmitt, *A Critical Analysis*), p. 6.

different views of the notion of direct participation in hostilities is presented in the fourth chapter. The analysis then answers the second research question by discussing the presented views and their consequences.

2 Legal Regulations of Armed Conflicts

2.1 Sources of international humanitarian law

Concerns have been raised about the use of armed drones and their compliance with international law, in particular with international humanitarian law (IHL).¹⁴ There are various legislative rules regulating attacks on objects and individuals during armed conflict.¹⁵ The underlying purpose behind the regulations is to limit the effect of war by creating a balance between “the necessities of war” and “the requirements of humanity”.¹⁶ IHL governs the conduct of hostilities when armed conflict occurs between States, between a State and an organized armed group and organized armed groups between themselves.¹⁷ A wide range of rules exist, found in the Hague Conventions and their annexed Regulations, The Geneva Conventions I-IV, their Additional Protocols I-II, and in several additional treaties.¹⁸ The contents of the Geneva Conventions I-IV as a whole reflect customary law, but only specific provisions in the Additional Protocols are considered as such.¹⁹ To the extent where IHL is not applicable, does not provide a rule regulating the situation or the rule is unclear and cannot be interpreted through the common principles of IHL, it is appropriate to take guidance from human rights law.²⁰

¹⁴ Weizmann (2018) p. 89.

¹⁵ Ibid, p. 90.

¹⁶ Ibid.

¹⁷ Henriksen (2019) p. 282-286.

¹⁸ Weizmann (2018) p. 90; treaties covering topics including children, cultural property, weapons and the environment.

¹⁹ Henriksen (2019) p. 281.

²⁰ Alston, UN-rapport, p. 10.

2.2 Key principles of the conduct of hostilities

The legal regulations applicable in armed conflicts differentiate between international and non-international armed conflicts.²¹ There are, however, certain principles applicable in both. This thesis is focused on non-international armed conflict, why it is vital to understand the core principles that permeate armed conflicts in general.²²

2.2.1 The principle of distinction

Parties to an armed conflict are obliged to distinguish between civilian persons and objects on one hand and combatants and military objectives on the other, where only the latter may be lawfully targeted.²³ This has been identified as a rule of customary law and is accordingly binding for all States, even those not bound by the Additional Protocols.²⁴ The principles' customary nature mean that it applies in both international and non-international armed conflicts. Thus, the primary legal status of a person or an object as civilian has decisive consequences.

In international armed conflicts, *combatants*, i.e. members of the armed forces of a party to the conflict, may be lawfully targeted as well as civilians for such time as they take direct part in hostilities.²⁵ However, the term combatant does not exist in non-international armed conflict. Instead, parties to the conflict need to distinguish between civilians and civilians who take *direct part in hostilities*.²⁶ Members of armed State forces are not considered civilians, regardless of their individual conduct or of the function they assume within

²¹ Henriksen (2019) p. 282–286.

²² Weizmann (2018) p. 101.

²³ Art 48, Art 52(1) and (2), AP I.

²⁴ Rule 1, ICRC Customary IHL Study, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

²⁵ Art 50 (1), AP I; Art 51(3), AP I.

²⁶ Art 13 (3), AP II.

the armed forces and are therefore, permitted targets.²⁷ It is more complicated in the case of members of an organized armed group that is party to the conflict, since not all members are considered to be taking direct part in hostilities. Therefore, it is debated whether *any* member supporting those engaged in combat may be targeted or only those who have a “*continuous combat function*”.²⁸

2.2.2 The rule of proportionality and the principle of military necessity

Parties to the armed conflict need to make an assessment based on proportionality in order to see what impact a potential attack has on non-military persons and objectives. In order for an attack to be lawful, the collateral damage must be proportionate in relation to the military advantage the attack would achieve.²⁹ When determining whether an attack is proportionate, the assessment needs to be based on the information available to the perpetrator at the time of the attack.³⁰

Closely related is the principle of military necessity, which permits measures that are necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL. In armed conflicts, the only legitimate military purpose is to weaken the military capacities of the other parties to the conflict.³¹

2.2.3 Precautions in attack

In addition, Article 57 of AP I requires that precautions in attack must be taken, stating that parties must “do everything feasible to verify that the

²⁷ ICRC, Interpretative Guidance on the Notion of Direct Participation (ICRC Guidance), p. 31.

²⁸ Ibid, p. 33-36; continuous combat function covers the preparation, execution or command of acts constituting direct participation in hostilities; Weizmann, (2018), p. 101.

²⁹ Art 51 (5)(b), AP I; Rule 14, ICRC Customary Law Study, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14.

³⁰ Ibid, p. 109; ICTY, *Prosecutor v. Galic*, IT-98-29-T, § 58.

³¹ ICRC, “Military Necessity”, <https://casebook.icrc.org/glossary/military-necessity>

objectives to be attacked are neither civilians nor civilian objects”. The rule is of customary nature.³² Thus, the parties to an armed conflict are obliged to undertake precautionary steps to ensure that everything feasible is done to prevent and minimize harm to civilians and civilian objects. What is considered feasible precautions are “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.³³

³² Rule 15, ICRC Customary IHL Study, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15.

³³ Ibid.

3 Non-International Armed Conflicts

3.1 The definition of non-international armed conflict

According to Article 3, common to the four Geneva Conventions (Common Article 3), non-international armed conflicts are armed conflicts in which one or more non-state armed groups are involved.³⁴ The violence needs to occur between either a State and a privately organized armed group or between two or more such groups.³⁵ Since Common Article 3 does not offer a definition of an armed conflict per se, nor does it provide guidance of what type of violence is required for a conflict to receive status as a non-international armed conflict, the provision has been interpreted by the International Tribunal of Former Yugoslavia (ICTY) and the ICRC. The most widely cited definition is by the ICTY, where the court found that an armed conflict exists “*whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*”.³⁶ Further, the ICTY found that two conditions must be met in order for conflicts to qualify as non-international armed conflicts. First, *the level of violence must surpass a certain minimum threshold*, meaning that it is required that the fighting is sufficiently intense. The second condition relates to the requirement that both parties must be *militarily organized*.³⁷ The two requirements from the Tadic case correspond with the ICRC’s definition and use of Common Article 3.³⁸

³⁴ Common Art 3, Geneva Conventions I-IV; the article contains a number of minimum guarantees that must be applied by all parties in “the case of armed conflict not of an international character occurring in the territory of one the High Contracting Parties”.

³⁵ Henriksen (2019) p. 282.

³⁶ *Prosecutor v Tadic*, IT-94-1-A, 2 October 1995 § 70.

³⁷ *Prosecutor v Tadic*, IT-94-1-A, 7 May 1997, § 562.

³⁸ ICRC, Treaties, State Parties and Commentaries, para 427-428, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC>.

In addition to the two criteria of intensity and organization, AP II provides a higher threshold for what constitutes a non-international armed conflict. AP II applies to armed conflicts between a state and an organized armed group under responsible command that is capable of exercising “such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.³⁹ Thus, a requirement of territorial control is introduced. Contrary to Common Article 3, AP II does not apply to armed conflict occurring only between non-state armed groups.⁴⁰ However, AP II is not considered as customary law and is only applicable between State parties to the treaty.⁴¹ The two regulations share two common criteria for a conflict to classify as a non-international armed conflict: an intensity of fighting and a minimum level of organization of armed groups.

3.2 Who may be lawfully targeted in non-international armed conflicts?

In addition to the key principles governing all armed conflicts, there are specific regulations applicable in non-international armed conflicts. The minimum rights guaranteed in Common Article 3 are applicable as well as AP II in its entirety. In these regulations, certain restrictions on who may be lawfully targeted in an attack are stated. Common Article 3 and AP II must be applied in compliance with the key principles in armed conflicts.⁴²

Common Article 3 offers international minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations specifically stated in the article.⁴³ Humane and non-discriminatory treatment is offered under the provision. Thus, the provision implies that those who *actively* participate will not be protected. Further on, AP I offers

³⁹ Art 1(1), AP II.

⁴⁰ ICRC, “Non-international Armed Conflict”, <https://casebook.icrc.org/glossary/non-international-armed-conflict>.

⁴¹ Henriksen (2019) p. 281.

⁴² See chapter 2.2.

⁴³ Protection is offered to members of armed forces who have laid down their arms and those placed “hors de combat” by sickness, wounds or detention etc.

protection to the civilian population unless and for such time as they take direct part in hostilities, which reflects customary law and hence makes the provision applicable in non-international armed conflict.⁴⁴

AP II has a similar provision, granting protection to “all persons who do not take a *direct* part or who have ceased to take part in hostilities”. This asserts that civilians lose their protection and become targetable for such time as they take direct part in the hostilities.⁴⁵ The term “active” in Common Article 3 and “direct” in AP II refer to the same quality and degree of individual participation in hostilities.⁴⁶

⁴⁴ Art 51 (3), AP I; Rule 6, ICRC Customary IHL Study, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule6.

⁴⁵ Art 13 (1) & (3), AP II; Art 4 (1), AP II.

⁴⁶ ICRC Guidance, p. 43; The International Criminal Tribunal for Rwanda affirmed the synonymous meaning of the notions of “active” and “direct” participation in hostilities in *Prosecutor v. Akayesu*. ICTR-96-4-T, § 629.

4 Different Views of the Notion “Direct Participation in Hostilities”

4.1 Background

In order to understand who may be lawfully targeted in non-international armed conflict, it is vital to examine how the notion of “direct participation in hostilities” is interpreted since only these persons may be targeted.⁴⁷ There is no common definition of “direct participation in hostilities” in treaty IHL, nor does State practice or international jurisprudence provide a clear interpretation of the notion.⁴⁸ Thus, the concept needs to be interpreted in good faith in accordance with the ordinary meaning given to it in its context and in the light of the object and purpose of IHL.⁴⁹ The ICRC provides their interpretation in their Interpretative Guidance on the Notion of Direct Participation. The Guidance is the result of a large research effort to explore the concept of direct participation in hostilities. Approximately 40 international law experts including government attorneys, military officers, representatives of non-governmental organizations and academics participated in the process.⁵⁰ Nonetheless, the Guidance has been criticized and the criticism will be presented in chapter 4.3.

4.2 The ICRC’s interpretation of the notion of direct participation in hostilities

Note that the ICRC view civilians differently depending on if they have a continuous combat function within an organized armed group or not.⁵¹

These persons are not discussed further due to the previously mentioned

⁴⁷ Common Art 3, Geneva Conventions I-IV; Art 13 (1) & (3), AP II; Art 4 (1), AP II.

⁴⁸ ICRC Guidance, p. 41.

⁴⁹ Art 31 (1), Vienna Convention on the Law of Treaties.

⁵⁰ ICRC Guidance, Foreword.

⁵¹ Alston, UN-report, p. 20.

delimitations. This chapter focuses on all other civilians who directly participate in hostilities.

4.2.1 Restriction to specific acts

According to the ICRC's Guidance, the notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.⁵² Depending on the quality and degree of involvement, the participation may be direct and indirect where only the latter entitles to protection from direct attack.⁵³ The ICRC states that direct participation does not refer to a person's status, function within or affiliations with a group, but to his or her engagement in specific hostile acts.⁵⁴

Furthermore, the ICRC states that even in cases where civilians engage in hostile acts repeatedly, each specific hostile act constitutes the direct participation, even though it might be tempting to regard their continued intent to carry out unspecified hostile acts in the future. This is due to the fact that in operational reality, it would be too difficult for the parties to the conflict to determine whether civilians not currently preparing or executing a hostile act have previously done so on a recurrent basis and whether they have the continued intent to do so again. The ICRC means that basing continuous loss of protection on such speculative criteria, would inevitably result in inaccurate or arbitrary attacks against civilians, which would undermine their protection under IHL.⁵⁵

⁵² ICRC Guidance, p. 44.

⁵³ Ibid, p. 43.

⁵⁴ Ibid, p. 44.

⁵⁵ Ibid, p. 44–45.

4.2.2 Constitutive elements of direct participation in hostilities

According to the ICRC, the specific hostile act that amounts to direct participation must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.⁵⁶

4.2.2.1 Threshold of harm

In order for a specific act to qualify as direct participation in hostilities, a certain threshold of anticipated harm must be met. To meet this threshold, “the specific act must be likely to adversely affect the military operations or military capacities of a party to an armed conflict.” Thus, when the act is expected to cause harm of a military nature, the threshold will generally be met regardless of quantitative gravity, meaning that any consequences that adversely affect the opponent is sufficient.⁵⁷ Contrary to when a specific act is performed to cause harm of a specifically military nature, the threshold may be fulfilled even in the absence of such military harm, if the act is likely to cause death, injury or destruction on persons or objects protected against direct attack.⁵⁸ For example, sniper attacks against civilians are likely to fulfill this requirement and therefore, qualify as direct participation in hostilities regardless of any military harm to the opposing party to the conflict.⁵⁹ Thus, there are two alternatives for a specific act to meet the first of the three cumulative requirements to qualify as direct participation in hostilities.⁶⁰

⁵⁶ ICRC Guidance, p. 46.

⁵⁷ Ibid, p. 47-48.

⁵⁸ Ibid, p. 49.

⁵⁹ Ibid.

⁶⁰ Ibid, p. 47-50.

4.2.2.2 Direct causation

In addition to the threshold of harm, the ICRC states that there must be a direct causal link between the 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, in order for a specific act to qualify as direct participation.⁶¹ The mere term “direct” participation implies that there can be “indirect” participation as well, which does not result in loss of protection against direct attack.⁶² In order for the specific act to qualify as “direct”, there must be a sufficiently close causal relation between the act and the resulting harm. The ICRC states that direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that “only” builds up or maintains the capacity of a party to harm its adversary is exempt from direct participation. For example, if a civilian stores or transports weapons for a party to the conflict, it might be helpful for the party in question, but the conduct only has an indirect impact on the military capacity or operations of that party. The same conduct would classify as direct participation if carried out as an integral part of a specific military operation designed to directly cause the amount of harm required to meet the threshold.⁶³

4.2.2.3 Belligerent nexus

The last requirement for a specific act to constitute “direct participation” is belligerent nexus; the act must be specifically designed to directly cause the amount of harm required to meet the threshold in support of a party to the conflict and to the detriment of another. The three criteria are cumulative, meaning they all must be fulfilled for a specific hostile act to constitute direct participation. Direct participation in hostilities is restricted to specific acts so closely related to the hostilities conducted between parties to the armed conflict that they constitute an integral part of those hostilities. Thus, as long as the armed violence is not performed in order to harm a party to the armed

⁶¹ ICRC Guidance, p. 51.

⁶² Ibid.

⁶³ Ibid, p. 53.

conflict or in support of another party, it cannot be considered as “participation” in hostilities.⁶⁴

4.2.3 Beginning and end of direct participation

Since civilians in non-international armed conflicts are protected against direct attack as long as they do not participate directly in the hostilities, it is important to determine the beginning and the end of such participation. According to the ICRC, direct participation for civilians is limited to each single hostile act that the person in question performs. The earliest point of direct participation would be the concrete preparatory measures for that specific hostile act, for example loading bombs onto an airplane for a direct attack on military objectives in an area of hostilities, therefore, the participation terminates when the activity ends.⁶⁵ After termination, the person in question regains full civilian protection against direct attack.

Preparatory measures must be so closely linked to the actual performance of the specific hostile act that they already constitute an integral part of that act. However, it is not sufficient for a preparatory measure to occur immediately before or in close geographical proximity to the performance of the specific act in order for it to constitute direct participation in hostilities. Hence, in the example with loading bombs on the airplane, it will be considered as direct participation in hostilities although the actual operation where the bombs will be used, is not carried out until the next day. Conversely, it will not be considered direct participation if a civilian transports bombs to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future. This would be seen as a general preparatory measure and qualify as “indirect” participation.⁶⁶ Likewise, transport of personnel, weapons and gathering of intelligence constitute preparatory measures amounting to direct participation, if carried out in close link to the performance of a specific

⁶⁴ ICRC Guidance, p. 58–59.

⁶⁵ Ibid, p. 66.

⁶⁶ Ibid.

hostile act. General preparation not amounting to direct participation would be the conduct of purchasing and smuggling weapons or general recruitment of personnel to a party.⁶⁷ However, the ICRC stresses that the examples mentioned only illustrates the principles that govern the determination of the temporal aspect of participation and that an individual assessment must be made regarding each specific hostile act depending on the situation.⁶⁸

Moreover, when an individual requires geographical deployment in order to perform a specific hostile act, the deployment constitutes an integral part of the act, amounting to direct participation. The direct participation begins once the individual moves a certain way in order to carry out a specific operation in another geographical location. Conversely, the direct participation ends when the individual is physically separated from the operation, for example by storing or hiding the equipment used in the operation or by continuing with activities outside the specific operation.⁶⁹ However, the ICRC stresses again the importance of a case-by-case assessment since they state that whether a particular individual is engaged in deployment or returns from the performance of a specific hostile act depends on various situational factors, which “cannot be comprehensively described in abstract terms.”⁷⁰

4.3 Criticism given to the ICRC’s view

Michael N. Schmitt, one of the participants in the project resulting in the Interpretative Guidance, issued a critical analysis of the guidance. Due to the fact that he did not support its findings, he, among others, withdrew his name upon reviewing the final draft.⁷¹ He criticizes the ICRC’s view of direct participation and, in some cases, adds alternative solutions.

⁶⁷ ICRC Guidance, p. 66

⁶⁸ Ibid p. 67.

⁶⁹ Ibid.

⁷⁰ Ibid, p. 68.

⁷¹ Schmitt, A Critical Analysis, p. 6.

4.3.1 Threshold of harm

Schmitt states that the limited notion of “harm” in the constitutive elements are controversial since the threshold requires that the specific act is likely to adversely effect the opposing party’s military capacity or operation. This view excludes actions by civilians that are performed to benefit a party’s military operations or capacity. Schmitt means that that view is problematic since acts that benefit and harm the parties in a conflict are relative in warfare: if a specific act benefits one party it indirectly means that the other party is weakened and vice versa.⁷² Therefore, Schmitt states that if a distinction needs to be made, it must recognize the fact that strengthening of one party to the conflict may be just as much of a concern for commanders in the field as the weakening of one’s own forces.⁷³

Further, Schmitt questions the narrow demarcation that a specific act must be likely to adversely affect the opposing party’s military capacity in order to be considered as direct participation in hostilities, since some acts may indirectly affect the opposing party’s military adversely. He exemplifies this problem with the use of improvised explosive devices (IEDs) by Iraqi insurgent forces that causes a great number of casualties in Iraq.⁷⁴ IEDs are home-made bombs constructed from military or non-military components, often used by organized armed groups. IEDs often disrupt lines of communication, traffic and injure and kill civilians.⁷⁵ By using IEDs, Iraqi insurgent forces do not necessarily perform specific hostile acts that constitute direct participation in hostilities since the explosives are not specifically used to attack the opposing party’s military, but IEDs has necessitated investments in counter-technologies by the opposing party. Thus, the use of IEDs indirectly affect the military opposing party adversely but does not necessarily constitute direct participation in hostilities.⁷⁶

⁷² Schmitt, *A Critical Analysis*, p. 27–28.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Britannica Encyclopedia, “*Improvised explosive devices*”, <https://www.britannica.com/technology/improvised-explosive-device>.

⁷⁶ Schmitt, *A Critical Analysis*, p. 27-28.

4.3.2 Direct causation

The Interpretative Guidance states that the harm caused by the specific hostile act must be performed in one casual step in order to constitute direct participation in hostilities. Schmitt questions this requirement due to that there are specific acts that should amount to direct participation in hostilities even though they are not performed in one casual step. He exemplifies with a civilian gathering information on the movement of a party and who then reports the information to a mission planning cell of another party to the conflict. Although the mission planning cell does not act on that information immediately since they need to take other factors, such as risk and value, into account, the initial information from the civilian is crucial for the mission planning cell in the first place.⁷⁷ Schmitt believes that the reference to “one casual step” used by the ICRC is unfortunate since it exempts the gathering of intelligence from the notion of direct participation. Gathering of intelligence may not be decisive for a certain military operation, however, the operation will most likely have a greater chance of success thanks to it. Thus, Schmitt means that the fact that intelligence is not indispensable does not exclude its ambition to be direct participation and should therefore count as such.⁷⁸

Schmitt further questions the ICRC’s categorization of direct and indirect participation. Based on the “one casual step”-criterion, civilians who store or transport weapons for a party to the conflict only has an indirect impact on the military capacity or operations of that party. Storing IEDs are therefore labeled as indirect participation. Since the use of IEDs is an effective tactic against superior forces, as shown in conflicts as in Iraq, Schmitt means that the labeling of storing IEDs as indirect participation illustrates the weakness of the categorization. IEDs are often assembled and stored by members of armed groups in close proximity to a battlefield and even though it is not known in advance when the IEDs will be used, nor the exact location, the

⁷⁷ Schmitt, *A Critical Analysis*, p. 29.

⁷⁸ *Ibid*, p. 30.

IEDs will likely be used soon after their assembly. Schmitt states that “in this sense, the assembler of an IED is comparable to a “lookout” who reports the movement of enemy forces down a road. The precise attack for which the information will be used may be uncertain initially. However, because positional information is of fleeting value, it is likely to be used within a certain time frame and in a particular area; hence the general agreement that serving as a lookout represents direct participation”.⁷⁹ Thus, the ICRC equalizes the assembly of an IED with the weapon production in a factory far away from the battlefield, which Schmitt means further indicates the flaw of the categorization.⁸⁰

4.3.3 Belligerent nexus

Schmitt further criticizes the belligerent nexus-criterion similarly to his criticism against the threshold of harm; when one party is harmed, another one is strengthened. The criterion requires that the act must be “in support of a party to the conflict and to the detriment of another”, instead, Schmitt suggests that it should be “an act in support or to the detriment of a party”. He believes that his alternative would better suit non-international armed conflicts where several armed groups are active and where one group engages in operations against another party without intending to assist other groups.⁸¹

4.3.4 The temporal aspect of direct participation

In the ICRC’s view, direct participation begins with the preparatory measure to a specific hostile act and the measure must constitute an integral part of that act. In other words, the crucial factor is the extent to which an act that takes place prior to or after a hostile act amounts to a concrete component of an operation. Instead, Schmitt presents an alternative approach: looking to the chain of causation. The period of participation should instead extend as far

⁷⁹ Schmitt, *A Critical Analysis*, p. 30-31.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, p. 34.

before and after a hostile action as a causal connection exist. Schmitt once again exemplifies with the assembly of an IED, which the ICRC only consider as direct participation when the assembler begins the final steps necessary to use the IED. In Schmitt's presented view, the acquisition of material, the actual construction and the emplacement of the IED would all amount to preparatory measures qualifying as direct participation.⁸²

Schmitt further questions the temporal aspect from a military standpoint since, in asymmetrical warfare, parties to the conflict typically launch surprise attacks such as IEDs or land mines. These attacks usually occur long after the launching party have departed the area, which in the ICRC's view, is when the direct participation would have ended.⁸³ In order for the opponent to be able to counter future attacks, the most efficient alternative is to use intelligence to locate the other party's "hideouts" and to attack these. However, by the ICRC's approach, the launching party is protected once they return from the attack. Thus, Schmitt criticizes the ICRC's view for not balancing the military necessity against humanitarian considerations well enough. Schmitt offers an alternatively approach where "a civilian who directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal". This means that the civilian may be attacked between the episodes of participation. Schmitt states that his approach is more representable for an appropriate balance of military necessity and humanitarian concerns.⁸⁴ Schmitt acknowledges that with his approach, it might be difficult to determine when a direct participant no longer intends to perform further hostilities. However, he defends his approach by stating that the perpetrator is required to take feasible steps to verify that the target is not protected as civilian.⁸⁵

⁸² Schmitt, *A Critical Analysis*, p. 36-37.

⁸³ *Ibid*, p. 38.

⁸⁴ *Ibid*.

⁸⁵ *Ibid*, p. 39.

To conclude, Schmitt highlights that the ICRC's view of direct participation may not work out the way it is intended, applied in actual conflicts. He stresses the issue that the ICRC repeatedly takes positions that cannot be seen as an appropriate balance of the military needs of states and humanitarian concerns.

5 Analysis

In the following chapter, I will discuss and analyze the notion of direct participation in hostilities and what consequences the different views of the notion bring. The chapter contains my own opinions.

Since there is no commonly accepted definition of direct participation in hostilities in treaty IHL, State practice or international jurisprudence, the ICRC tried to resolve the issue in the Interpretative Guidance. However, the previous chapters have shown that despite their efforts, their interpretation is contested and therefore does not constitute a commonly accepted definition. As a consequence, it has been left open to States' own interpretation to determine what constitutes "direct participation in hostilities". This is problematic since it creates uncertainty to all affected by, and those obliged to comply with, the regulations. It poses a challenge if the regulations applicable in international law are open to States' own interpretations since the whole body of law becomes ineffective and loses its purpose in establishing common rules. Considering that low predictability is never desirable regarding legal problems, it is especially questionable if States' own interpretations of the notion are not made public. The fact that States' interpretations are not made public may also increase the likelihood that States independently expand their concept of direct participation in hostilities beyond acceptable boundaries.

Moreover, I believe that by acting on its mission to protect victims in armed conflicts, the ICRC's aim with the Interpretative Guidance is to limit what conduct amounts to direct participation in hostilities in order to protect civilians. This may work in theory but, as shown by Schmitt, can be misused in actual conflicts. Due to the lack of a commonly accepted definition of the notion and the fact that the ICRC repeatedly refer to the fact that what qualifies as direct participation is situational, I believe that the case-by-case assessments may be abused in conflicts. In the absence of an accepted basis for determining who may be lawfully targeted, there is a risk that in the end,

the parties to the conflict will choose the interpretation best suited for their own intentions. To exemplify, the ICRC's interpretation requires that the specific hostile act amounting to direct participation must be an integral part of a specific military operation. This is a subjective criterion that raises the question of how a party to the conflict can distinguish between a supposed integral act of a specific military operation and an act considered as "indirect" help to the opposing party. Due to the subjectivity of the criterion, a party could exploit this by defending their targeting of a civilian by saying that the specific act the civilian conducted was an integral part of a specific military operation and that the civilian therefore was considered as taking direct part in hostilities, although that may not be the case.

Furthermore, from a military perspective, I agree with Schmitt that the ICRC's interpretation creates an imbalance between humanitarian concerns and military necessity. An illustrative example is Schmitt's criticism against the temporal aspect of the direct participation where he exemplifies with the deployment of IEDs, where the deploying party cannot be lawfully targeted once they depart from where they placed the IED. Thus, the opposing party only has a small window of time where they may lawfully attack the deploying party. This proposed temporal aspect makes it difficult to plan efficient counterattacks, an important aspect of strategic warfare. Further, I agree with Schmitt's criticism to the ICRC's requirement that the harm caused by the specific hostile act must be performed in "one causal step" in order to qualify as direct participation. In his example of the assembly of an IED, this criterion exempts the acquisition of materials, the construction and the emplacement of an IED from direct participation in hostilities. I agree with Schmitt that a better approach would be to look at the chain of causation, where the period of participation extends as far as before and after a hostile action as a causal connection exist. The window of time the ICRC's proposes is too narrow.

Although I agree with Schmitt to some extent, it is challenging to determine how the balance between military necessity and humanitarian concerns

otherwise ought to be. Maybe it is more important to protect the civilians that do not participate in an armed conflict at the expense of undesirable protection of those that potentially should not be protected. As indicated by the key principles of conduct in armed conflict, the civilian population is after all, one of the most valuable subjects that ought to be protected in conflict. But due to their value, there is a potential risk that actors in conflicts misuse civilian protection for their own gain.

To conclude, I think that the current regulation with its ambiguous interpretation – with the ICRC’s interpretation focusing on the protection of civilians on one hand and Schmitt’s criticism focusing on the military necessity – is in need of review. The idea behind the ICRC’s Interpretative Guidance, creating general directives and guidelines, is necessary and it provides a useful starting point for discussion. However, the fact that several participants to the project withdrew their names from the final draft illustrates the ambiguity of the topic. Given that the Interpretative Guidance was issued ten years ago, and several technical developments have been made since, it would be appropriate if experts in human rights and IHL, the ICRC and State representatives, in particular those from key military powers, reviewed the legal framework and agreed upon a common definition. This would be in line with the purpose of international law, i.e. to establish a common legal framework. Further, it would provide transparency and clarity so that every actor involved could know what conduct constitutes direct participation in hostilities. This is desirable, for instance, to those using armed drones, but more importantly to all actors in non-international armed conflicts.

Although a review of the matter is well needed, I am afraid that it is more easily theorized than put into practice. I do not believe that parties to an armed conflict are interested in being tied down by further legal regulations, when they currently have the freedom to make their own interpretations. In my opinion, the military advantage will in many situations be of greater concern than the protection of the civilian population. Given the sole purpose of armed

conflict, I do not believe that all parties are willing to clarify the notion of direct participation in hostilities.

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