

**Clarifying the Notion of**

**DIRECT PARTICIPATION IN HOSTILITIES**

**under International Humanitarian Law**

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# The Evolving Face of Warfare:

- Predominantly non-international armed conflicts
- Shift of battlefield into civilian population centers
- Intermingling of armed actors with civilians
- Civilian involvement in military operations
- Outsourcing of traditional military functions
- Armed actors in civilian clothing

➤ Confusion in the distinction between legitimate targets and protected persons

➤ Increased risk of erroneous & arbitrary attack

# Basic Rules on Lawful Targeting of Persons under IHL

## Principle of Distinction

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graph TD; A[Principle of Distinction] --> B[Persons not protected against direct attack]; A --> C[Persons protected against direct attack];
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**Persons  
not protected against direct attack**

**Organized Fighting Forces  
belonging to the Parties to  
an Armed Conflict**

**Civilians  
Directly Participating in Hostilities**

**Persons  
protected against direct attack**

**Civilians**

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

# Basic Rule on DPH:

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

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

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

# ICRC Clarification Process

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

# Questions to be Addressed:

## I. Concept of Civilian

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

## II. Concept of Direct Participation in Hostilities

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

## III. Modalities of Suspension of Protection

Determine:

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

# I. Concept of Civilian under IHL:

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

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

**Regular Armed Forces:** Formal membership regulated in domestic law.

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

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

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

## II. Direct Participation in Hostilities

### Basic Components:

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

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

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

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

## II. Direct Participation in Hostilities

### Three Cumulative Elements:

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

## **II. Direct Participation in Hostilities**

### **Beginning and End of a Hostile Act**

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

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

# III. Modalities of Loss of Protection

## 1. Temporal Scope of Loss of Protection

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

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

# III. Modalities of Loss of Protection

## 2. Precautions and Presumptions in Doubt

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

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

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

# III. Modalities of Loss of Protection

## 3. Restraints on Force in Direct Attack

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

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

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

# III. Modalities of Loss of Protection

## 4. Consequences of Regaining Civilian Protection

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

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

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

**Thank you for your attention!**

**Questions?**

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