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# The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities"

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**T**he fact that the nature of conflict has changed is not in dispute. The question that is being asked is how this has affected the traditional law of armed conflict, particularly as it has developed in the modern era. Modern codification of the law began almost simultaneously on opposite sides of the Atlantic. In the United States, during the Civil War, Dr. Lieber drafted the Lieber Code,<sup>1</sup> designed for the Unionist forces. Meanwhile, in Europe, Henry Dunant, following his experience at the Battle of Solferino, was working to fulfill his dream of providing succor to the victims of armed conflict. The first emanation of this was the Geneva Convention of 1864.<sup>2</sup>

What was of particular interest in both these initiatives is the emphasis on those who took a direct part in hostilities. In both Europe and the United States, conflict was restricted to defined geographical areas. The limits on the range of weaponry meant that this could be so. Thus there was, for the most part, a clear distinction

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between the “battlefield” and other areas, and between those who took a direct part in hostilities and those who did not. Battles were largely set pieces between armed forces and did not involve the civilian population. At the first battle of Bull Run in July 1861, civilian sightseers came down from Washington in order to take vantage points on the surrounding hills. They thought they were entirely safe but even then, they learned a sharp lesson as, to their total surprise, the Union forces were routed and the civilians found themselves caught up in the ignominious retreat.

As weaponry increased in power, the battlefield turned into the battlespace. The growing range of artillery and of airpower meant that no longer could war be limited to armed forces. Civilians were becoming involved, at first as victims of the new weaponry as occurred in the area bombings of the Second World War, and then as participants. As war became all-encompassing and the difference between front lines and rear areas began to evaporate, total war involved the mobilization of the whole population. Some were in the armed forces; others went into other occupations supporting the war effort, e.g., working in ammunition factories or transport units.

One of the key principles of the law of armed conflict has always been that of distinction; a clear separation is to be kept between those who take a direct part in hostilities and those who don't. Those who don't are protected from direct attack and those engaging in conflict are required to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and destruction or damage to civilian objects. On the other hand, the growing involvement of civilians in activities relating to conflict in itself caused difficulties. Where is the dividing line to be drawn? The dilemma was met in 1977 by a provision that civilians enjoy protection from attack “unless and for such time as they take a direct part in hostilities.”<sup>3</sup>

Until comparatively recent times, the distinction between direct and indirect participation in hostilities was comparatively uncontroversial. It was agreed that working in industries supporting the war effort, such as ammunition factories, did not amount to “direct participation,” though, as the factory itself would remain a military objective, this might not be too much of a protection. On the other hand, those who committed “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces”<sup>4</sup> were seen as taking a direct part in hostilities and thus losing their protection. However, as the nature of warfare has changed, so have the participants. Now, in the battlespace, there are many different actors. The regular armed forces sometimes seem to be almost in a minority. The complexity of weaponry has led to a growing number of civilian contractors hired to maintain, repair and in some cases even

operate equipment. Unmanned aerial combat vehicles can be operated by personnel situated thousands of miles away from the conflict area. The cost of maintaining military personnel has also led to the contracting out of many support functions, particularly logistics. The merging of front lines and rear areas has meant that rear area security, often in the past carried out by civilian personnel, has now developed into a major industry so that private military and security companies bid for contracts all over the world in areas where they will be operating in areas of conflict.

Even the nature of fighting forces has changed. While in international armed conflict regular armed forces continue to predominate, there are an increasing number of armed groups and even individuals who involve themselves in the hostilities. In non-international armed conflict, one party is by definition “irregular.” How does the principle of distinction apply to all these new actors in the battlespace?

Linked to this is the growing overlap between the law of armed conflict and human rights law. Some continue to argue that these two separate parts of public international law are indeed separate and there is no overlap. However, for most, particularly States that are members of the Council of Europe and thus subject to the European Convention of Human Rights,<sup>5</sup> that is no longer even an arguable position. How then do the protective provisions of human rights law, which do not contain the same distinctions between civilians and direct participation, being technically applicable to all, apply in situations of armed conflict?

To complicate matters still further, the lines between conflict and law enforcement have themselves become blurred. Terrorism, which in the past was looked upon as a domestic problem to be dealt with under the law enforcement paradigm, has become ideological “warfare” extending across international boundaries. Terrorists have acquired weaponry and equipment, the power of which would be the envy of many States.

All these factors have led to increasing strain on the laws of war as we know them. Are the restraints of the Geneva Conventions “quaint” and “obsolete” in this “new paradigm”?<sup>6</sup> Or are we merely seeing a development of previous types of warfare which do not affect the underlying principles?

The International Committee of the Red Cross (ICRC) realized at an early stage after 9/11 that the principle of distinction might be under threat and that it was necessary to seek to establish guidelines to assist governments to differentiate between those who are protected from direct attack and those who are not. At the center of this issue is the phrase “taking a direct part in hostilities.” Who qualifies as a “civilian”? What is the meaning of “direct part”? What are the consequences of losing protection?

In conjunction with the TMC Asser Institute, the ICRC established an expert process in 2003 to see if answers could be found to these questions. The experts

held five meetings between 2003 and 2008 but, although there was much agreement, that agreement did not extend to many of the key issues. As usual, it is the hard cases where the differences came to the fore.<sup>7</sup>

At the end of the process, the ICRC decided to issue its own *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.<sup>8</sup> The ICRC made it plain that the *Interpretive Guidance* “is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts.”<sup>9</sup> Unanimity would have been difficult as, on some of the key issues, the division was wide and the views strongly held on all sides. Indeed, a number of the experts, particularly those who held government positions (though all experts took part in their private capacity), felt it necessary to withdraw from the process as the nature of the *Interpretive Guidance* became clear. As a result, the *Interpretive Guidance* has been highly controversial and subject to strong criticism.<sup>10</sup> At the same time, Dr. Nils Melzer, the ICRC’s author of the *Interpretive Guidance*, and others have defended the text.<sup>11</sup>

But what is the debate about? The first issue is on the definition of “civilian,” particularly in non-international armed conflict. The *Interpretive Guidance* holds that organized armed groups of a party to the conflict do not qualify as civilians. However, in non-international armed conflicts, because of the difficulty in defining members of such groups and the risk that “membership” might then lead to persons who were members of political or social wings of such groups losing protection, “members” are limited only to “individuals whose continuous function it is to take a direct part in hostilities (‘*continuous combat function*’).”<sup>12</sup> To some, this was going too far in that it created a new group of individuals who were not “combatants,” since there is no combatant status in non-international armed conflict, but who were no longer classed as “civilians.” To others, it did not go far enough, in that “continuous combat function” did not properly equate to the regular armed forces opposed to the group. Those in support functions such as the logistician, cook or even lawyer, who might be considered as “combatant” members if in the regular armed forces, would normally not qualify as legitimate targets under the “continuous combat function” test.

In relation to the constitutive elements of direct participation in hostilities, the *Interpretive Guidance* suggested three cumulative conditions. The relevant section states:<sup>13</sup>

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The 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 on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the 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 (direct causation), and
3. the 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 (belligerent nexus).

These three constituent elements, threshold of harm, direct causation and belligerent nexus, may be thought to be helpful and seem to have received general approval. While there may be differences on the edges such as whether voluntary human shields come within “direct causation,”<sup>14</sup> the concepts themselves seem to be well grounded both in existing law and in practice.

Perhaps the most controversial part of the *Interpretive Guidance* has proved to be the third part, namely, the consequences of the loss of protection. It states in Recommendation IX that

[i]n addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.<sup>15</sup>

This has been interpreted by some as introducing a rule of graduated use of force whereby lethal force may only be used, even against combatants, only if it is “actually necessary.” The *Guidance* includes a quote from Jean Pictet that

[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.<sup>16</sup>

A number of experts in the process, mainly from government backgrounds, saw this as the introduction of a human rights standard into international humanitarian law and vigorously opposed it. They argued that no such rule existed in law in that the traditional interpretation was that a combatant who had the right to

conduct hostilities in accordance with the law of armed conflict also could be targeted at any time and in any place. It was accepted that on many occasions, where it was possible to do so, capture might be a preferable option but it was not a rule of law. There were also concerns over the use of the word “actually.” Did this introduce an *ex post facto* element into the decision-making process? If the “armed” person facing the soldier turned out to have no bullets in his weapon, was it “actually necessary” to kill him?

The debate has been bitter and the issues have sometimes become confused. The *New York University Journal of International Law and Politics* published a Forum consisting of four articles by critics from Canada, the United States and the United Kingdom of the *Interpretive Guidance*, all of whom had been involved in the expert process.<sup>17</sup> The same volume published a lengthy riposte to the critics by Dr. Melzer.<sup>18</sup> What seems clear is that the *Interpretive Guidance* has launched an extensive debate, one which will be continued in this volume of the “Blue Book” series.

However, while direct participation may seem to be the key to the “civilianization” of warfare, there are a number of other issues which should not be forgotten. One is the growing use of private companies to fulfill what were previously considered to be military tasks. Increasingly, as mentioned earlier, Western forces are outsourcing specific functions to such companies. Logistics are now heavily reliant on civilian contractors, whether it is the cook who provides the food in the mess tent or the weapons technician who provides an in-theater repair capability for a complex weapons system. Transportation is now heavily civilianized and this became a factor in the direct participation debate. However, more problematic is the growing number of companies providing security in complex emergencies. These can range from static guards for civilian businesses to bodyguards for senior government officials.

How far can or should such companies become involved in military activities? What are the limits on their participation and to what extent does the contextual situation change the status of the personnel? Is training of military personnel in a peacetime environment acceptable but not in a country racked by conflict? Where are the dividing lines?

The regulation of private military and security companies has been a matter of concern to governments and indeed to responsible companies within the industry. An initiative by the Swiss government in cooperation with the ICRC led to the signing on September 17, 2009 of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict.<sup>19</sup> This document, initially signed by seventeen States, led to efforts to develop an international code of conduct that would set forth norms and standards for the provision of private

security services with some form of accountability mechanism. These efforts, which included an active collaboration of members of the private security industry with the Swiss Department of Foreign Affairs, the Geneva Centre for the Democratic Control of Armed Forces and the Geneva Academy of International Humanitarian Law and Human Rights, resulted in the International Code of Conduct for Private Security Service Providers in November 2010<sup>20</sup> signed by fifty-eight companies.

Underlying all of these discussions is the even more fundamental issue of the relationship between the law of armed conflict and human rights law. As the boundaries between law enforcement and armed conflict become increasingly blurred, it becomes harder for the soldier to know which is the predominant paradigm.

Traditionally, the law of armed conflict and human rights law have been seen as separate and distinct. One was the law of war and the other the law of peace. Never the twain should meet. However, that separation no longer can be upheld. Quite apart from the problems of delineation across the spectrum of violence, the two systems of law have also deliberately sought to expand their own spheres of influence.

At the end of the Second World War, in keeping with the traditional divide, the law of armed conflict belonged almost exclusively to international armed conflict—war between States. In 1949, the first tentative steps were made to extend some provisions to non-international armed conflicts through the medium of Common Article 3.<sup>21</sup> At the same time, the United Nations in its attempts “to save succeeding generations from the scourge of war” sought to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>22</sup> In December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights.<sup>23</sup> Although “universal,” no direct mention is made in the Declaration of time of war. It is only in later documents such as the European Convention for the Protection of Human Rights of November 1950 (entering into force in September 1953)<sup>24</sup> and the International Covenant on Civil and Political Rights of 1966<sup>25</sup> that there is reference to wars and states of emergency.

Common Article 3 is important because it extended only small parts of the law of armed conflict into non-international armed conflict. These parts dealt with the protection of individuals (“Geneva law”) and not the conduct of hostilities (“Hague law”). However, that has now changed. In the Diplomatic Conference that led to the adoption of the two 1977 Additional Protocols to the 1949 Geneva Conventions, detailed proposals were put forward to extend the “Hague-type” provisions introduced in Additional Protocol I,<sup>26</sup> and thus applicable only to international armed conflict, into Additional Protocol II,<sup>27</sup> dealing with non-international armed conflict. For the most part, these attempts were unsuccessful and Additional Protocol II contains primarily “Geneva-type” law. However, the tide was already

turning and today there is an increasing trend for law of armed conflict treaties to apply across the board to all types of conflict. The ICRC's study *Customary International Humanitarian Law*,<sup>28</sup> published in 2005, supported this trend, coming to the conclusion that almost all "Hague-type" law was now applicable to all conflicts, both international and non-international.

At the same time, the International Court of Justice<sup>29</sup> and a number of human rights bodies,<sup>30</sup> in particular the European Court of Human Rights,<sup>31</sup> were confirming that human rights law applied at all times, including in times of conflict and public emergency, subject only to derogation and to the relationship between human rights law and the law of armed conflict as the *lex specialis*. Unfortunately, while the principle seemed to be established, the devil, as always, is in the detail and the nature of the relationship between human rights law and the law of armed conflict has not been adequately defined.

The extension of "Hague-type" law into non-international armed conflict itself causes difficulties. Whereas "Geneva law" is primarily concerned with the interests of victims and thus tends to give primacy to the interests of humanity over military necessity, "Hague law" is more of a balance. It is accepted in the law of armed conflict that in conflict there will be damage to civilian property and civilian lives will be lost. However, the principle of proportionality seeks to keep this damage and loss of life within reasonable bounds, taking into account the nature of conflict.

Human rights law sits reasonably comfortably alongside "Geneva law" but less comfortably with "Hague law." The concept of balance is more limited in human rights law, particularly in those areas that are of most importance in conflict. Thus the rules for the use of force in the law of armed conflict are difficult to reconcile with the right to life under human rights law.

While conflict was a distinct activity conducted, for the most part, away from civilian locations, these divergences were reasonably unimportant. However, in "wars amongst the people," they become critical and need to be resolved.<sup>32</sup> Indeed, the reconciliation of human rights law and the law of armed conflict in a manner that provides a comparatively seamless and coherent set of rules across the spectrum of violence may be the challenge of the next generation of international lawyers.

The civilianization of warfighting poses many challenges to the accepted legal framework. Some of the work being done and the concepts being explored are examined in these following contributions by the members of the panel I chaired. Much, however, remains to be done. Unless the problems and challenges are recognized and faced, they will never be met and resolved. The characteristics of conflict may be changing but that does not mean that the need for regulation is changing too. The laws of war have stood the test of time down the centuries,

adapting as required to meet new situations. The essential balance between humanity and military necessity has underpinned the regulation of conflict through those centuries, adjusting to meet each new challenge, each “new paradigm.” Our task is to ensure that that balance is maintained in the world as we face it in the first quarter of the twenty-first century.

### Notes

1. U.S. Department of War, Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, *reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

2. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 365.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(3), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 1, at 711, 736 [hereinafter Additional Protocol I].

4. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 944 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987).

5. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 610, 615 (Ian Brownlie & Guy S. Goodwin-Gill eds., 5th ed. 2006).

6. See Memorandum to the President from Alberto R Gonzales, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *reprinted in* THE TORTURE PAPERS – THE ROAD TO ABU GHRAIB 118 (Karen Greenberg & Joshua Dratel eds., 2005), *available at* <http://www.slate.com/features/whatistorture/LegalMemos.html>.

7. The full record of the expert proceedings can be found on the ICRC website, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709?opendocument>.

8. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf) [hereinafter Interpretive Guidance].

9. *Id.* at 9.

10. See, e.g., Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5 (2010).

11. See Nils Melzer, *The ICRC’s Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, [http://www.oas.org/dil/esp/XXXVI\\_curso\\_The\\_ICRC\\_Clarification\\_Process\\_Nils\\_Melzer.pdf](http://www.oas.org/dil/esp/XXXVI_curso_The_ICRC_Clarification_Process_Nils_Melzer.pdf) (last visited Nov. 30, 2010); Dieter Fleck, *Direct Participation in Hostilities by Nonstate Actors and the Challenge of Compliance with International Humanitarian Law*, PUBLIC DIPLOMACY MAGAZINE, Summer 2010, at 40, *available at* <http://publicdiplomacymagazine.com/direct-participation-in-hostilities-by-nonstate-actors-and-the-challenge-of-compliance-with-international-humanitarian-law/>; Dapo Akande, *Clearing*

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*the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 180 (2010).

12. Interpretive Guidance, *supra* note 8, at 27.
13. *Id.* at 46.
14. *Id.* at 56–57. *Contra* Michael Schmitt, *Deconstructing the Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 697, 732–34 (2010).
15. Interpretive Guidance, *supra* note 8, at 77.
16. *Id.* at 82.
17. See the series of articles in Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 637 (2010).
18. *Id.* at 831.
19. For an explanation of the background to the document and the document itself, see the Swiss Federal Department of Foreign Affairs website at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf>.
20. Available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf>.
21. Common Article 3 to the four 1949 Geneva Conventions applies to all cases “of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 459, 461.
22. U.N. Charter pmbl.
23. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 5, at 23.
24. *Supra* note 5.
25. International Covenant on Civil and Political Rights arts. 4, 8, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 5, at 358, 359, 361.
26. Additional Protocol I, *supra* note 3.
27. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 1, at 775.
28. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2 volumes) (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
29. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 106–13 (July 9); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 216 (Dec. 19).
30. U.N. Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).
31. There have been a number of cases arising out of the situation in eastern Turkey, Chechnya and northern Cyprus. There are also cases waiting hearings arising from the Georgia/Russia conflict of August 2008.
32. See RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* (2005).