Direct participation in hostilities: questions & answers

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The ICRC recently published an interpretative guidance clarifying what international humanitarian law says concerning civilians directly participating in hostilities. The aim is to help distinguish between civilians who must be protected against attack and those who, in very exceptional circumstances, lose protection against direct attack. This Q and A summarizes the guidance.

1. What does the notion of "direct participation in hostilities" mean?

2. What are the current challenges arising in relation to civilian participation in hostilities?

3. What has the ICRC done to address these challenges?

4. What are the main questions addressed in the ICRC's Interpretive Guidance?

5. What is the status of the ICRC's Interpretive Guidance document?

What does the notion of "direct participation in hostilities" mean?

The primary aim of international humanitarian law (IHL) is to protect the victims of armed conflict and to regulate the conduct of hostilities. Those involved in the fighting must make a basic distinction between combatants, who may be lawfully attacked, and civilians, who are protected against attack unless and for such time as they directly participate in hostilities.

What are the current challenges arising in relation to civilian participation in hostilities?

Throughout history, civilians have contributed to the general war effort, for example by producing and supplying weapons, equipment, food, and shelter, or by offering political and financial support. These activities have typically been conducted far from the battlefield. Traditionally, very few civilians have been involved in actual combat.

Over recent decades, the nature of warfare has changed significantly, and several factors have contributed to blur the distinction between civilians and combatants. Military operations have moved away from distinct battlefields and are in increasingly conducted inside population centres, such as Gaza City, Grozny or Mogadishu. Civilians have become more involved in activities closely relating to actual combat. Combatants do not always clearly distinguish themselves from civilians, preferring for example to operate as "farmers by day and fighters by night." Moreover, in some conflicts, traditional military functions have been outsourced to private contractors or other civilians working for State armed forces or for organized armed groups.

In the course of its extensive humanitarian work in contemporary armed conflicts the ICRC has realised that the
unclear distinction between civilian and military functions and the increasing involvement of civilians in military operations have caused confusion as to who is a legitimate military target and who must be protected against direct attack. As a result of this confusion, civilians are more likely to fall victim to erroneous, unnecessary or arbitrary attacks, while soldiers, unable to properly identify their enemy, face an increased risk of being attacked by persons they cannot distinguish from civilians.

What has the ICRC done to address these challenges?

The ICRC held several meetings between 2003 and 2008 which brought together 40 to 50 legal experts from academic, military, governmental and non-governmental circles, all of whom attended in their personal capacity. Based on the discussions and on research conducted during the expert process, the ICRC drafted its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL" (Interpretive Guidance). In course of the expert process it was not feasible to reach a unanimous view on the questions addressed. While the wide variety of views expressed during the expert discussions are recorded and published in separate expert meeting reports, the Interpretive Guidance provides the ICRC's own recommendations as to how provisions of IHL relating to the notion of direct participation in hostilities should be interpreted. The Guidance is influenced by the expert discussions, but does not necessarily reflect a majority opinion of the participating experts on the various issues addressed.

What are the main questions addressed in the ICRC's Interpretive Guidance?

The Interpretive Guidance aims to answer the following key questions:

Who is a civilian and, therefore, entitled to protection against direct attack unless and for such time as they directly participate in hostilities?

What conduct amounts to direct participation in hostilities and, therefore, leads to the loss of a civilian's protection against direct attack?

What modalities govern the loss of protection against direct attack?

Who is a civilian for the purposes of the principle of distinction?

It is important to distinguish members of State armed forces or organized armed groups (whose function it is to conduct hostilities on behalf of a party to an armed conflict) from civilians (who do not directly participate in hostilities, or who do so merely in a spontaneous, sporadic, or unorganized way). According to the ICRC's Interpretive Guidance, all persons who are not members of State armed forces or of organized armed groups belonging to a party to an armed conflict are civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities.

In international and non-international armed conflicts, State armed forces include all organized armed forces, groups or units under a command responsible to a State party to the conflict. In non-international armed conflicts such as civil wars, organized armed groups constitute the armed forces of a non-State party to the conflict.

It can be difficult to tell the difference between members of organized armed groups and the civilian population. Civilians support insurgencies in many different ways including, at times, by directly participating in hostilities in a spontaneous, sporadic or unorganized way. However, civilians cannot be regarded as members of an organized
armed group unless they assume a "continuous combat function," i.e. unless they assume continuous function involving their direct participation in hostilities. Members of organized armed groups do not have the same privileged status as combatants of State armed forces and, therefore, can be subject to domestic prosecution even for simply taking up arms.

What conduct amounts to direct participation in hostilities?

Persons participate directly in hostilities when they carry out acts, which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity. If and for as long as civilians carry out such acts, they are directly participating in hostilities and lose their protection against attack.

Examples of causing military harm to another party include capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example through sabotage, erecting road blocks or interrupting the power supply of radar stations. Interfering electronically with military computer networks (computer network attacks) and transmitting tactical targeting intelligence for a specific attack are also examples. The use of time-delayed weapons such as mines or booby-traps, remote-controlled weapon systems such as unmanned aircraft, also "directly" causes harm to the enemy and, therefore, amounts to direct participation in hostilities.

"Indirect" participation in hostilities contributes to the general war effort of a party, but does not directly cause harm and, therefore, does not lead to a loss of protection against direct attack. This would include, for example, the production and shipment of weapons, the construction of roads and other infrastructure, and financial, administrative and political support.

The difference between "direct" and "indirect" participation can be difficult to establish but is vital. For example, the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and would therefore constitute direct participation in hostilities. However, transporting ammunition from a factory to a port far from a conflict zone is too incidental to the use of that ammunition in specific military operations to be considered as "directly" causing harm. Although the ammunition truck remains a military objective subject to attack, driving it would not amount to direct participation in hostilities and, therefore, the civilian driver could not be targeted separately from the truck.

Not all violent acts occurring in an armed conflict amount to direct participation in hostilities. In order to constitute direct participation, a violent act must not only be objectively likely to directly cause harm, but it must also be specifically designed to do so in support of one party to an armed conflict and to the detriment of another. Violent political demonstrations, a bank robbery unrelated to the war, or an incident where large numbers of fleeing civilians block a road, not to help one party to an armed conflict but to try to protect themselves from the hostilities, are examples of acts that do not amount to direct participation in hostilities.

What modalities govern the loss of protection against direct attack?

For such time as they directly participate in hostilities, civilians lose their protection against attack. But what are the rules and principles which regulate the use of force against them? In what circumstances do they regain protection? The Interpretive Guidance comes to the following conclusions:

While members of organized armed groups belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function), civilians lose
protection against direct attack for the duration of each specific act amounting to direct participation in hostilities. This includes any preparations and geographical deployments or withdrawals constituting an integral part of a specific hostile act.

In order to avoid the erroneous or arbitrary targeting of civilians, parties to a conflict must take all feasible precautions in determining whether a person is a civilian and, if that is the case, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

Loss of protection against direct attack – whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed group) – does not mean that the persons concerned fall outside the protection of the law. Even attacks against legitimate military targets are subject to legal constraints, whether based on IHL, or on other branches of international law, such as human rights law. Any military operation must comply with the rules of IHL, which prohibit or restrict certain means and methods of warfare. Moreover, the principles of military necessity and humanity require that no more death, injury, or destruction be inflicted than is necessary to achieve a legitimate military purpose in the prevailing circumstances. While combatants cannot be required to subject themselves or the civilian population to additional risk in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her the chance to surrender where there manifestly is no need for lethal force to be used.

IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, such participation does not in itself constitute a war crime. However, civilians having directly participated in hostilities can be prosecuted for any offence that they may have committed under domestic law even if, in doing so, they did not violate IHL. The fact that civilians regain full protection against direct attack when they cease to directly participate in hostilities does not rule out the use of necessary and proportionate force against them in accordance with law enforcement standards. The same is true of members of organized armed groups after they cease to assume their continuous combat function.

What is the status of the ICRC’s Interpretive Guidance document?

The Interpretive Guidance does not intend to change existing rules and principles of IHL, but facilitates their coherent interpretation.

While influenced by the expert discussions, it does not necessarily reflect a majority opinion of the participating experts on the various issues addressed. Instead it represents the views of the ICRC as a neutral and independent humanitarian organization that has been mandated by States to promote IHL and work for a better understanding of the law. A comprehensive overview of the expert discussions is provided in separate expert meeting reports, which will be published along with the Interpretive Guidance.

While the Interpretive Guidance is not legally binding, the ICRC hopes that it will be persuasive to States, non-State actors, practitioners and academics alike and that, ultimately, it will help better protect the civilian population from the dangers of warfare.