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Exploring the Predicament of Direct Participation in Hostilities in the Domain of International Humanitarian Law

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Abstract

Modern conflicts often obscure the line between civilians and combatants, thereby necessitating a universally accepted and comprehensive definition of direct participation in hostilities (DPH), which has yet to emerge. States may be inclined to adopt either restrictive or expansive readings of DPH, depending on their interests, and may even shift between these positions. Such competing approaches complicate the task of policymakers seeking reform it. Efforts to revise DPH are fraught with difficulty, as any modification to DPH carries the risk of harming certain groups of individuals, with no easy resolution in sight. A thorough reconsideration of DPH has thus become necessary. This article first outlines the framework of the law of armed conflict, before assessing the strengths and weaknesses of the doctrine within the broader application of International Humanitarian Law (IHL), including the interpretations advanced by the International Committee of the Red Cross. It concludes by proposing possible solutions to the challenges surrounding DPH interpretation through an interpretivist lens.

Key words. Hostilities. Combatants. Civilians. DPH, LOAC, IHL, ICRC, API and APII.

Introduction.

International Humanitarian Law (IHL), commonly referred to as the Law of War or the Law of Armed Conflict (LOAC), is a body of agreements between States that aim to control and regulate the use of force during armed conflicts. Within these agreements are embedded several terms and concepts that seem precise on paper but blurred in practice during conflict. Direct participation in hostilities (DPH) illustrates this challenge. Reflected in Article 51(3) of the First Additional Protocol to the Geneva Conventions and Article 13(3) of the Second Additional Protocol to the Geneva Conventions, the concept of DPH establishes that during international and non-international conflicts, civilians should not be targeted “unless and for such time as they take a direct part in hostilities.” The ambiguity surrounding DPH enables States and groups to construe it in ways that suit their particular interests, objectives and capacities. A restrictive interpretation sets a high bar, reducing the likelihood of civilians qualifying as direct participants in hostilities. Such an interpretation also restricts the justification for targeting civilians. This

interpretation of DPH could potentially lead terrorists to conceal themselves within civilian settings. Conversely, a broad interpretation of the elements of DPH lowers the threshold, increasing the likelihood of civilians becoming directly involved in hostilities, thereby making it easier the justification of targeting them. Although this interpretation of DPH strengthens the ability to act against terrorists, contractors, and civilian employees, it may simultaneously lead civilians to act more carefully to avoid being seen as directly participating in hostilities. DPH is often regarded as part of customary international law. There is general conceptual agreement that civilians should not be targeted unless, and only for as long as, they take a direct role in hostilities. However, the absence of a clear and universally agreed definition of DPH remains a challenge. To address this, the International Committee of the Red Cross (ICRC), in collaboration with the TMC Asser Institute, has organized expert meetings to formulate interpretive guidance. Even so, agreement on a number of detailed issues surrounding DPH has not yet been achieved.

Establishing a precise and universally accepted definition of DPH would be immensely useful. Attempting to reconcile both restrictive and broad viewpoints through compromise language may only reproduce the same uncertainty found in current definitions. Conversely, adopting a single interpretation could compel some States to drastically alter their staffing and targeting practices to remain compliant with the laws of war. This tension defines the interpretational dilemma surrounding DPH. Like Alexander the Great cutting the Gordian Knot, a transformative approach is essential to overcome it. A revised, modern perspective on DPH will likely stand apart from its classic definition. Nonetheless, it is crucial that this shift meaningfully resolves the central issues of DPH, rather than sidestepping them and creating further uncertainty. The present article explores the challenges inherent in interpreting DPH.

Part II outlines the fundamental principles of LOAC, particularly those relating to DPH. In Part III, the article examines the United States' approach, noting its preference for a narrow interpretation regarding military contractors and civilian personnel, while applying a broader interpretation in counterterrorism targeting, and discusses the implications of this approach. Part IV evaluates a recent Israeli Supreme Court ruling that advances a broad interpretation in the Gaza Strip and considers its consequences. Part V analyzes the difficulties faced by ICRC experts in addressing this issue. Part VI concludes by suggesting possible solutions and reflecting on their significance.

Research Methodology.

This article employs a doctrinal research methodology to examine the doctrine of Direct Participation in Hostilities (DPH), focusing on its components and the legal positions associated with it. By systematically analyzing legal rules, legislative texts, and judicial decisions, the study seeks to interpret and harmonize the uncertainties surrounding DPH within International Humanitarian Law (IHL). It aims to evaluate the existence and impact of these ambiguities on the effective enforcement of IHL. In this regard, the research investigates the distinction between civilians and combatants and critically assesses the legal characterization of DPH. Moreover, it identifies gaps within the existing IHL framework arising from the indeterminate nature of DPH and discusses how the overreach of authority may disrupt constitutionalism and compromise the basic structure of the Constitution of Pakistan.

Significance of Study.

This study examines DPH and its intricacies through the principle of distinction, focusing on how obligations are imposed on combatants by differentiating them from civilians. By analyzing case studies and precedents, it seeks to clarify ambiguities, provide practical guidance, and offers recommendations aimed to enhance understanding and to support a more refined application of International Humanitarian Law.

Law of Armed Conflict and Direct Participation in Hostilities.

The fundamental principle of LOAC is that combatants and military targets must be differentiated from civilians and civilian property, with the attacks directed at the former while sparing the latter. This concept, referred to as distinction, forms the core of DPH. Its origins lie in the Just War tradition and it was first codified in the 1863 Lieber Code, which guided the conduct of the Union Army during the U.S. Civil War. Distinction applies in both international and non-international armed conflicts and aims to prevent the escalation to total war. In contemporary warfare, however, the proximity of civilians, combatants, civilian sites, and military objectives makes applying distinction increasingly challenging.

Under the principle of distinction, individuals in armed conflicts are classified into two mutually exclusive groups: combatants and civilians. In international conflicts involving two or more High Contracting Parties to the Geneva Conventions, combatants include regular military personnel as well as certain irregular forces that operate alongside them. Potential combatants, including militias and volunteer organizations, are required to meet four key conditions: being under accountable command, displaying a fixed distinctive sign visible from a distance, carrying weapons openly, and conducting operations according to the established laws and customs of war. In non-international conflicts, occurring within a single state between government forces and organized armed groups, any group that meets these conditions may also be classified as combatants and may be lawfully targeted.

The definition of who is a combatant closely parallels to who qualifies for prisoner of war (POW) status. Civilians, by contrast, are defined in a residual sense, meaning those who are not combatants are considered civilians. Although the U.S. Supreme Court recognized the expression “unlawful combatant” in the *ex parte Quirin* case, this classification does not have formal standing in international treaty law. Article 52 of Additional Protocol I defines military objectives as those objects which, because of their nature, location, purpose, or use, contribute effectively to military action and whose destruction, capture, or neutralization offers a clear military advantage at the time. Any object not meeting these criteria is treated as a civilian object.

International law establishes distinct privileges for combatants and civilians. Combatants are permitted to engage in warfare and cannot be tried by enemy authorities for lawful military actions, except where such actions amount to war crimes. They may be targeted by enemy forces, except when they are *hors de combat* or serving as medical or religious personnel. If captured, they are granted POW status. Civilians, in contrast, are protected from attack as long as they refrain from participating in hostilities. Although they are not granted POW status if detained, they are still entitled to certain legal protections. In addition to the principle of distinction, the legality of an attack depends on adherence to proportionality and military necessity, even though these considerations are less central to DPH. Even when directed at a legitimate military objective, an attack is prohibited if the anticipated incidental harm to civilians or civilian property would be excessive in comparison to the concrete and direct military advantage expected. This reflects the idea that civilian immunity is not absolute, as some collateral damage may be tolerated under limited conditions. It is also important to recognize that proportionality assessments are inherently uncertain measured in good faith prior to the attack, therefore, should the estimate prove erroneous, it should be evaluated based on information available at the time rather than in hindsight. Military necessity further requires that only those targets offering a genuine military advantage be attacked. Any anticipated military gain must be clear, immediate, and concrete, not based on speculation. In pursuing this objective, commanders must restrict themselves to the minimum means necessary. Although military necessity involves an element of personal judgment, the urgency or justification for attacking particular facilities can vary over time as circumstances change.

ICRC's perspective of Direct Participation in Hostilities.

At the time this report was prepared, the ICRC experts had not yet finalized their findings. During their most recent meeting in 2005, they concluded that no universally accepted definition of direct participation in hostilities (DPH) existed. Nonetheless, they agreed that it was feasible to develop interpretive guidance and explanatory commentary on the concept. Although complete agreement was not reached, the experts identified certain unambiguous examples, including civilians who carry out attacks against enemy armed forces as direct participants, whereas civilians employed in ammunition manufacturing are not considered to be directly participating.

Between these two extremes, the experts identified several areas of disagreement. Their deliberations focused primarily on the meaning of hostilities, the notion of causal proximity, and the element of hostile intent. As previously highlighted, the ICRC experts generally agreed that "hostilities" should be understood as more limited than "armed conflict" but not as narrow as the concept of an attack. In addition, most experts concurred that activities supporting the war effort, such as employment in an ammunition factory, do not constitute hostilities. Some experts advocated for a restrictive interpretation of hostilities to ensure that civilians do not unnecessarily lose their protection from attack. Whereas a broader interpretation could promote civilian safety by discouraging any involvement in hostile activities. On the issue of causal proximity, the experts were broadly aligned in their view that DPH requires a direct and foreseeable link between an individual's actions and potential harm, or a clear intent to produce such harm. They rejected the notion that a weak or distant causal relationship would suffice. For example, it was suggested that general training activities of soldiers may not qualify, but training designed for a particular operation would fall within the scope of DPH.

Lastly, the experts ultimately reached unanimous agreement in rejecting hostile intent as a defining element of direct participation in hostilities (DPH). They reasoned that soldiers cannot reasonably be expected to make immediate judgments about an individual's intent and should instead rely on observable, objective indicators. Although firm conclusions on several related issues remained limited, it appears that most experts favored a narrower interpretation of DPH. While such an approach enhances the protection of civilians, it may also create opportunities for terrorists to conceal themselves among civilians.

The temporal scope of DPH, along with the notion of a membership approach, emerged as one of the most contentious topics. Several experts were critical of defining participation based solely on group membership. They pointed out that demonstrating clear and voluntary withdrawal from an armed group would be highly challenging for individuals seeking to restore their immunity. One expert maintained that Article 51(3) of the First Additional Protocol is grounded in conduct rather than status. Furthermore, another expert highlighted that the provision contains an explicit temporal component, indicating that the drafters were aware of and accepted the possibility of a "revolving door" problem.

The experts further disagreed on the question of whether civilians may be targeted while traveling to engage in, or returning from, hostilities. In response, those who opposed the membership approach agreed that any uncertainty should be resolved in favor of civilian protection, requiring soldiers to presume non-participation. Although no unified position was reached, it was noted that adopting a membership approach would resolve disputes concerning the timing of DPH. Still, opponents of this approach appeared to accept the resulting complexity, as it elevates the standard for determining participation and thereby reinforces civilian protection.

Several key issues are still to be resolved before the ICRC experts finalize their report. Consensus has generally been achieved on issues that were relatively uncontroversial from the outset. In contrast, where disagreements persist, they tend to center on competing narrow and broad interpretations of

DPH. Governments across the globe not only replicate these debates but sometimes advocate both positions simultaneously. As warfare evolves, states will adapt their practices, and their interpretations of LOAC and DPH will change accordingly. However, without a substantial rethinking of DPH, any single interpretation is likely to draw significant criticism.

Conclusion.

The inherent tension within the concept of direct participation in hostilities (DPH) makes any attempt at reinterpretation particularly challenging. A narrow interpretation would limit the number of civilians who may be targeted, yet it could also incentivize terrorists to conceal themselves among civilian populations. Conversely, a broader interpretation would expand the scope of lawful targeting but might encourage civilians to distance themselves from both hostilities and terrorist groups. This difficulty is further compounded by the risk that favoring one approach over the other could alienate influential States, potentially undermining the stability of the international legal system. In such circumstances, a reinterpretation of DPH might erode existing consensus, leading States to establish their own standards and justify them before courts and public scrutiny.

The challenge of reinterpreting DPH lies in the absence of clearly preferable options. This points toward the need for a more radical reconceptualization, comparable to Alexander's resolution of the Gordian Knot. A membership-oriented approach may offer one possible path. However, this would remove the temporal limitation inherent in DPH. While doing so would address the "revolving door" issue, it would also permit continuous targeting of individuals, effectively treating them as combatants and weakening the emphasis on direct participation. Moreover, determining membership would raise complex evidentiary questions. Experts would need to identify reliable indicators of intent, such as allegiance pledges, training activities, residence in safe houses, associations with known members, or even engagement with extremist content online. Developing such a framework would require clear and carefully articulated rules.

Indeed, the easier it becomes to establish membership, the more likely it is that civilian employees and contractors would also meet the threshold for direct participation in hostilities (DPH). This raises the possibility of distinguishing between two forms of membership, placing civilian personnel in one category and terrorists in another. Such an approach would significantly reshape the concept of DPH and could dispel concerns that certain States are applying it inconsistently. At the same time, it would create distinct classes of civilians, a development that experts have long been reluctant to accept. Reinterpreting DPH is therefore a complex and demanding task. Regardless of the outcome, the continuing evolution of warfare will likely ensure that these debates re-emerge in the future, prompting further reconsideration.

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