

## **The Effect of New Technology on the Concept of “Direct Participation in Hostilities” in International Humanitarian Law**

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### **ABSTRACT**

This Research is about participation in hostilities particular civilian participation in international and non-international armed conflict. According to the International Humanitarian Law when civilians directly participate in hostilities, they loss their protection right.

Over recent decades, because of the continued advancement of technology, the nature of warfare has changed significantly, the current war fronts are something different from the earlier battle field. Modernization of the world differentiates the strategies of wars, methods of wars and planning of achieving the military benefits. Therefore, the earlier laws do not fit with the current war front.

It is not true to say that only Direct Participation in Hostilities (DPH) can respond adequately to current forms of participation in conflicts because nowadays there are various types of participation in wars that may not fall within the concept of direct participation such as indirect participation in hostilities. Consequently, if applied the condition of direct participation to regard a person as combatant then what will be position of people who do not directly take part such as service men.

To answer the research questions this academic paper will explains the notion of DPH. Also, this research focuses on the elements of the DPH and then the effect of new technology on the concept of DPH in International Humanitarian Law will be argued.

**KEY WORDS:** Hostilities, Direct Participation, Additional Protocols, Combatants, Armed Conflict, New Technology.

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**1. Introduction**

International Humanitarian Law (IHL), sometimes known as the law of armed conflict, is a body of treaties that govern how states use force in armed conflicts. In those agreements there are a variety of concepts and conditions that appear simple on the page, but are unclear in the heat of war (Avril McDonald, 2004). Direct Participation in Hostilities (DPH) is one such concept. The importance of implementing the concept was stated in both of the Additional Protocols to the Geneva Conventions. (Nils Melzer, The ICRC’s clarification process on the notion of direct participation in hostilities, 2009, 299 - 307).

Moreover, differentiating between civilians and fighters is the idea behind the concept. Civilians are not supposed to participate in warfare; only combatants are allowed to do so under the concept of distinction. (Principle of distinction, 2022).

Throughout history, civilians have indirectly contributed to the overall war effort, for example by producing and providing weapons, materials, food, and shelter, or by providing political and financial support. These activities have typically been conducted away from the battlefield. Traditionally, very few civilians have been directly involved in actual combat (ICRC, 2009).

Furthermore, Information and communication technology are becoming an essential component of daily life and can benefit both individuals and societies in a different way. However, the context in which the idea is used has altered due to the exponential development in the technological complexity of warfare, such as the introduction of computer network attacks and new fighting models (Michael N. Schmitt, 2004, 505- 507).

**1.1 Aim of the research**

- Analyzing the contemporary developments in the battle field, how do they all affect the definition of civilian and whether the earlier laws are sufficient for protecting and safeguarding the civilians during hostilities.
- Highlighting the impact and great role of technology on armed conflict, especially direct participation in hostilities.
- Explain the legal framework for civilian's participation in armed conflict and the loss of the right to protection when they participate in war.

### **1.2 Importance of the Research**

- There is not much research on this topic so far because this concept of direct involvement in war is new and it has not been possible to fully determine which actions are direct involvement and which actions are indirect involvement in war.
- Through this research, civilians and combatants can become more familiar with the laws of armed conflict and avoid from the violations of International Humanitarian Law and its regulations.

### **1.3 Research Questions**

- What conducts amounts to direct participation in hostilities?
- Does the current concept of direct participation in hostilities respond adequately to current forms of participation in hostilities?
- What are the current challenges arising in relation to civilian participation in hostilities?

### **1.4 Research methodology**

Researchers have tried to use qualitative methods through a critical discussion, considering some important cases related to armed conflict and non-participation of civilians in war especially non-direct participation in combat.

### **1.5 Structure of the research**

This research will be divided in to three sections. The first section focuses on the notion of DPH. The second section examines the elements of DPH. The third section will address how the growth of technology presents many new challenges for DPH. In conclusion the researchers present some important consequences and recommendations.

## **2. The Notion of Direct Participation in Hostilities**

The International Humanitarian Law treaty does not define direct participation in hostilities and does not give a precise definition of the idea, which is derived from state practice or international jurisprudence.

Therefore, according to the International Humanitarian Law the concept of Direct Participation in Hostilities must be interpreted in a good faith (Vienna Convention on the Law of Treaties, 1969, Article 31, 1).

However, Melzer points out that the concept of Direct Participation in Hostilities refers to behavior that, if committed by non-combatants, suspends their protection from risks associated with military operations. (Nils Melzer, *The ICRC's clarification process on the notion of direct participation in hostilities*, 2009, 299 – 307).

Since 1977, one of the factors taken into account by IHL is direct involvement in hostilities. Legal professionals from throughout the world have attempted to reach consensus on a classification of what actions qualify as DPH and the parameters of its application. The International Committee of the Red Cross (ICRC) consequently released its Interpretive Guidance on the DPH in 2009. The ICRC gave a definition of DPH there (ÅT Nøstbakken, 2011).

Nevertheless, this definition, which only represents the ICRC's interpretation of DPH, was not the result of widespread consensus or agreement among states. Prior to this, the notion of DPH originates from Article 51(3) of Additional Protocol (I) to the Geneva

Conventions. According to this provision, people will benefit from the protection provided by this section unless they actively engage in hostilities (William J. Fenrick, 2007, 332 -338). In addition to this article, articles 43(2) and 67(1) (e) Additional Protocol I; and article 13(3) Additional Protocols II to the Geneva Conventions, mention the notion of DPH.

According to Gallahue, the idea of DPH thus refers to the total of all hostile acts fulfilled by individuals who are directly engaged in hostilities, regardless of whether the individuals are civilians or members of the armed forces (Patrick Gallahue, 2010).

It is important to remember, that the notion of DPH basically includes two components. First, "hostile act" refers to a specific act qualifying as DPH. Also, Verri dictionary of the International Armed Conflict expresses hostilities as "acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience" (Pietro Verri, 1992, 57); whereas the second is "direct participation" which is defined by the Interpretive Guidance as acts carried out by individuals during the armed conflict. Such persons are suspended from the protection that civilians get (Avril McDonald, 2004).

There is no doubt that the primary goal of IHL is to protect civilians during armed conflict; nevertheless, if they take direct involvement in hostilities, they will no longer be protected by IHL. (Rob McLaughlin, 2013, 213). Therefore, it is essential to define what constitutes direct participation, who constitutes a civilian, and for how long civilians are entitled to protection. The distinction is necessary because only members of the armed forces have the authority to engage in direct hostilities. (Additional Protocol (I) to the Geneva Conventions, 1977, Article 43, 2), while civilians as long as they refrain from doing so, are protected from attack (Customary IHL, Rule 1).

The principle of distinguishing between civilians and combatants was first set out in the St. Petersburg

Declaration, which states that the only legitimate aim that states should attempt to achieve during war is to weaken the military forces of the enemy (Customary IHL, Rule 1 Customary IHL, Rule 1 Customary IHL, Rule 1).

The Hague Regulations, in contrast, do not explicitly state that a distinction between civilians and combatants must be made, but Article 25, which prohibits the attack by whatever means, of towns, villages, buildings or dwellings, which are undefended", is based on this principle (Heather A. Harrison Dinniss, 2012, 17), because there is a lot of complicity in this field, especially in the age of technological advancement and the changing nature of military activities.

The concept of direct participation in war does not refer to behavior that occurs outside of armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature (Additional Protocol (II) to the Geneva Conventions, 1977, Article 1(2)). Moreover, even during armed conflict, not all behavior is considered part of the hostilities.

It could be said that due to the advancement of military technology and changing methods of participation in war, the concept of direct participation in war is not easy to analyse and has not yet been defined in an agreement or a consensus, but it is clear that the main purpose of the principle of DPH during armed conflict is to protect civilians and separate them from combatants.

### **3. Conduct Amounting to Direct Participation in Hostilities**

In times of armed conflict, everyone who qualifies as a civilian is entitled to protection from direct attack, unless they actively take part in hostilities. Three fundamental criteria for DPH have been provided by the ICRC's Interpretive Guidance, and they are: "threshold of harm, direct causation and belligerent

nexus" (Nils Melzer, *The ICRC's clarification process on the notion of direct participation in hostilities*, 2009, 46).

These elements are closely interconnected, and will be examined in more depth in this section.

### **3.1 Threshold of Harm**

A specific conduct must be likely to have a negative impact on the military operations or military capability of the opposing party in a war in order to meet the required threshold of harm in DPH. Using massive weapons, for instance, which devastate the enemy military force and cause death and injuries (Kenneth Watkin, 2009).

Furthermore, the threshold of harm test is met by death, inflicting injury or destruction on individuals or objects protected against direct attack (Michael N. Schmitt, *Deconstructing direct participation in hostilities*, 2010).

Nevertheless, attacks against civilians and civilian objects, in Melzer's opinion, are the most uncontroversial examples of conduct that can qualify as DPH even in the absence of military injury. So, the realization of the harm is based on an objective likelihood or a threshold of harm that may reasonably be predictable to consequence from an act in the prevailing circumstances. For instance, the Islamic State of Iraq and Syria (ISIS) carried out executions, killings, kidnappings, rapes, and other acts of sexual and gender-based violence against women and children during the armed war (Iraqi Al-Amal Association, 2020, 7).

For an act to count as direct contribution it does not require the realization of harm reaching the threshold but only the objective probability that the act will cause such harm. Therefore, the determination of the relevant threshold must be based on a "probable" harm, that is, a harm that might reasonably be expected to result from an act in prevailing circumstances (Background Doc. DPH 2004, 25).

It could be said that in order to be considered direct participation in hostilities, there must be damage, whether against a military force or objective, or against all persons and objects protected from direct attack under international humanitarian law, but this damage does not have to occur, can also be predictable.

### **3.2 Direct Causation**

The second constitutive element required for the DPH is a direct causal link between the act and the consequence.

The second essential component for the DPH is a direct causal link connecting the action and the result (Howard M. Hensel, 2007, 55). According to Khanal, there must necessarily be a close causal relationship between the act and the consequent harm for there to be a direct rather than indirect participation in hostilities. He also believes that due to the variation of the standards, such as indirect causation of harm or materially facilitating harm, would be bring the entire war effort within the concept of DPH and, consequently, would prevent large parts of the civilian population of their protection against direct attack (Prativa Khanal, 2011).

There is an essential point in respect to direct causation; the required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations (Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, 2004, 505- 507). For instance, someone with expertise in computers or radio machining might be included in unmanned aerial aircraft strikes. What would be the status of such persons? (Michael N. Schmitt, *Essays on Law and War at the Fault*, 2012, 726 - 732).

The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. Being more specific, the required threshold of harm when a specific act is

not possible by its own directly cause, the requirement of direct causation would be fulfilled when the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm (Nils Melzer, *Keeping the balance between military necessity and humanity*, 2010, 831).

Another point in this regard is the causal relationship between the employment of equipment like temporally remote weapons-systems, remote controlled and the resulting harm remains direct irrespective of its proximity of time and geographic. Therefore, any action made to stop a military operation can be considered direct participation (Prativa Khanal, 2011). For example, a person who transports and delivers ammunition to a combat site is generally considered to be directly involved in hostilities, and although these people themselves do not directly participate in an actual attack, they make direct involvement in another's attack more likely (Hilaire McCoubrey, 1998, 22).

### **3.3 Belligerent Nexus**

A necessary component of "direct participation" is "belligerent nexus", which indicates that the action must hurt the opponent to support the favored party. Melzer asserts that in order to meet the requirement of belligerent nexus, "an 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" (Nils Melzer, *The ICRC's clarification process on the notion of direct participation in hostilities*, 2009, 58).

This means that in order for an act to qualify as DPH, it must be specifically designed to benefit one party to an armed conflict at the expense of another party, in addition to being objectively likely to cause harm that meets the first two elements (Eric Christensen, 2010, 281). For instance, the Central Intelligence Agency of the United States organized a specific strategy to kill Osama Bin Laden in Pakistan. In May 2011, US

Special Forces carried out an attack on Bin Laden's home with the intention of killing him. So, it could be said that the elements of DPH were available in this case. However, International academics have pointed out that at that time, there was no active hostilities between the US and al Qaeda. Therefore, killing Bin Laden was not permissible under international humanitarian law, and his execution would have been legal only if he had been actively engaged in combat. (Kai Ambos and Josef Alkatout, 2012, 341-345).

Contrarily, there are several acts that directly harm military operations or military power of a party to an armed conflict or that directly result in death, injury, or destruction of people or property that is protected against direct attack, but those acts may not always constitute DPH (Nils Melzer, *The ICRC's clarification process on the notion of direct participation in hostilities*, 2009, 299 - 307) Armed violence, which is not designed to harm one party in an armed conflict, cannot extend to any involvement in fighting that takes place between these parties. Civil violence, for example, remains non-combatant in nature if it is used in violent demonstrations, riots or in uncontrolled looting due to a breakdown of law and order.

It is necessary to look at the different sides of belligerent nexus; subjective intent and objective purpose. The first one relates to the mental condition of the individual, but the second one is expressed in the act's or operation's design and is independent of the mental state of each contributing (ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009). The belligerent connection is occasionally called into question, nevertheless, by the mental state of civilians. For instance, despite the military operation's hostile nature, if a driver was uninformed that he was hauling a remote-controlled

bomb; he or she should be protected from direct attack (ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, 2009).

Theft of military equipment for personal use, for example, may cause the necessary threshold of harm even though many acts committed during armed conflict lack a belligerent nexus despite causing a high amount of harm. However, they are not specifically designed to support a party to the conflict by harming another (Nils Melzer, The ICRC's clarification process on the notion of direct participation in hostilities, 2009, 300 - 304).

It could be argued that the act must be specifically purposed and designed to do so in support of a party to an armed conflict and to the detriment of another. It does not necessarily reflect the subjective intentions of every individual involved.

#### **4. Direct Participation in Hostilities in the New Era of Technology**

Modern warfare has evolved and the separation of combatants from non-combatants has not been fully resolved (Hersch Lauterpacht, 1944, 74 - 75). Computer Network Attacks may include new ways of fighting for example hacker activities, viruses, Trojan horses and worms. Attacks can be carried out remotely via radio waves or international communication networks without physical intrusion beyond the enemy's borders and without immediate physical harm (Knut Dormann, Paragraph 2).

In peace or conflict time information operations can occur at the strategic or tactical levels of armed conflict. Computer Network Attack raises number of questions regarding to the direct participation. Computer Network Attack raises number of questions regarding to the direct participation, would a Computer Network Attack counts as an armed conflict? If not, the direct participation standard as discussed beforehand would be irrelevant (Michael

N.Schmitt, Wired warfare: Computer Network Attack and jus in bello, 2002, 397).

Furthermore, if a Computer Network Attack is regarded as an armed conflict, that determination should be made in light of the attack's outcomes because many humanitarian law principles place more emphasis on the effects of an attack than on its tactics or techniques.

Additional proof of this According to Michael Schmitt, non-kinetic conflicts can result in horrific physical losses, often worse than those brought on by attacks made with conventional techniques and weapons (Michael N. Schmitt, Direct Participation in Hostilities and 21st Century Armed Conflict, 2004, 505- 506). For example, when a railway control system is attacked through new technology and the use of the Internet by changing switching instructions, or changing the direction of water in a large urban area through technology, or changing data such as blood type or allergies in a computerized medical records system (Harles J. Dunlap Jr, Major General, 2011). Since Computer Network Attacks can cause actual injury, death, damage or destruction of enemy forces, those who carry out this operation are undoubtedly considered as direct participants in war. No one would contest the fact that a non-kinetic biological or chemical attack against another state would result in an armed conflict on a global scale. Since Computer Network Attacks have the potential to cause actual harm, death, destruction, or damage to hostile forces, protected objects, or protected people, those who carry out actions having this effect are unquestionably Direct Participants in Hostilities. A computer network attack is considered a direct contribution to warfare if it is directed at the enemy's immediate combat capabilities. As directed at enemy command and control facilities or missile systems, direct involvement in hostilities is considered (Nalina

Sivachandran and Thushani Shayanthan, 2019, 1113 - 1115).

Dinstein contends that the most important factors in an international military conflict are the principles of distinction, proportionality and precaution. But given the intricacy of computer network technology, it seems that applying these ideas to cyber war is difficult (Yoram Dinstein, 2012, 261 - 277). Secondly, Turns (2012) gave his explanation on the notion of DPH to cyber war by referring to the criteria of DPH which developed by International Committee of Red Cross in its 2005 Interpretive Guidance; briefly they are threshold of harm, direct causation and belligerent nexus (David Turns, 2012, 279). The most problematic issue for Turns is direct causation in the context of cyber-attack.

The use of smartphones, apps, social media and other forms of digital communication between people is constantly increasing. This practice has extended to armed conflict; it is obvious that parties to conflicts use such means for both internal and external communication. Does international humanitarian law apply to the use of these new technologies during armed conflict and if so, how? (Pontus Winther, 2017).

A civilian who provides tactical intelligence about one side of a conflict to the other side through the use of a variety of modern technology devices such as smartphones risks being considered a direct participant in the conflict.

Nowadays, technology plays a major role in international and non-international armed conflicts, the methods of warfare have changed, if war was old-fashioned, now there are new weapons that are directly connected to the Internet and directed away from the battlefield they are harming them. For example, one side of an armed conflict far from the battlefield targets the enemy through drones by control, causing heavy casualties. The Turkish State

carries out dozens of drone attacks against the Kurdistan Workers' Party (PKK) in Iraq every day, causing heavy casualties.

Users of such weapons can be combatants or civilians. The question is whether the use of such advanced weapons at such a distance fall within the scope of direct or indirect participation in hostilities?

The researchers believe that in times of war, if any attack is carried out by one side against another in the old way (face-to-face warfare) or in the new way through advanced weapons, drones, cyber-attacks and Internet Networks considered as a direct participation in hostilities. To be considered directly involved in armed conflict, there must have been a criminal act committed against the other side of the fighters and caused damage, such as killing and destruction, in a way that affected the balance of power and the fighters or the criminal act was committed against all persons and things protected from armed conflict such as civilians, and there is a direct connection between the criminal act and the damage caused. At the same time, this criminal act must be designed and intended against the other party. For instance, involvement in a computer network attack directed against enemy command and control facilities, surface to air missile systems and combat communications would constitute direct participation in hostilities.

Also, when civilians participate directly in hostilities in all the ways mentioned in favor of one side against the other, they loss their protection right according provided to them under international humanitarian law.

## **5. Conclusion**

It is clear that direct participation in hostilities, not defined in any treaty laws or customary law, but is defined by the International Committee of the Red Cross Interpretive Guidance and both Additional Protocols to the Geneva Conventions. they explained

the protection rights to civilians against direct attack. The question is which attack consider as a direct participation in hostilities? which are people civilians and how long civilians can enjoy the protection?

Separating civilians from combatants during times of armed conflict is the goal of the DPH concept, which aims to safeguard civilian populations from the repercussions of warfare. However, when civilians directly take part in combat, they lose their rights to protection. In addition, the three basic elements of DPH have argued which comprise of threshold of harm, direct causation and Belligerent Nexus.

Legal scholars are still debating the idea of DPH, and there is no agreed-upon understanding of this concept or its constituent parts. While the ICRC's Interpretive Guidance has provided answers to many inquiries regarding the difficulties that emerged in International Humanitarian Law following the attacks of September 11, its interpretation is still limited to certain parts of DPH. Especially in modern warfare, it is illogical to link participation in war directly to moving forces. Not only may non-kinetic force be more deadly, but activities away from the battlefield may be just as important, perhaps more so.

## 6. Results and Recommendations

After a critical discussion and reading of the research topic, the researchers reached the following consequences and recommendations:

### 6.1 Results

- The mere concept of “Direct Participation in Hostilities” does not adequately respond to current forms of participation in hostilities because currently there are different forms of participation in hostilities that may not fall within the concept of direct participation as indirect participation in armed conflict.
- New Technology has had a major impact on armed conflict and changing the balance of

power, making it easier for civilians and combatants to participate directly in war.

- Whenever civilians participate directly in armed conflict in the interests of one party against another, they lose their protection right that granted to them under International Humanitarian Law. When they captured by the enemy, they are treated as prisoners of war.

### 6.2 Recommendations

- The authors recommend that civilians refrain from all forms of participation in armed conflict, especially Direct Participation in Hostilities, in order to be protected under international humanitarian law.
- The authors recommend that states pay more attention to International Humanitarian Law and the rules of war by issuing laws and regulations within the state, so that civilians and combatants are more familiar with the rules of war. As a result, fewer civilians are victims of armed conflict.
- With the continued advancement of technology and its use in armed conflict, authors recommend that the international community, especially the Security Council, meet every few years to enact new laws and regulations to further protect civilians from war and determine what constitutes direct participation in hostilities.
- The authors of the paper proposes the appropriate definition of civilian based on the term active participation in combat and law reforms in this area to realize the contemporary development in the combat space.

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