

Direct Participation of Civilians in Hostilities as an Exception to Civilians Immunity in Armed Conflict: A Critical Review

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Abstract

Notion of direct participation in hostilities has been a complex and contentious phenomenon within the realm of armed conflict, especially where the armed conflict involves non state armed actors. The notion covers a situation where a person carries out specific acts which by their nature or purpose form part of the conduct of hostilities between parties to an armed conflict. In this circumstance, a person loses his immunity and becomes a legitimate target since he ceases to be harmless. Though it is usual that civilians and civilian objects enjoy immunity against direct attack, but where either of the belligerents is an armed group, there is problem of how to deal with members of such armed groups. This problem emanates from the fact that membership of the armed group is drawn from the civilian population while during armed conflict, the general population is made up of civilians and members of such group, and it creates a problem of identity. Likewise, the problem may also be attributed to lack of legal framework defining the status of members of armed groups and the notion of direct participation in hostilities. Therefore, the article analyses the notion of direct participation with a view to determining when civilian or a member of an armed group loses immunity against attack.

Key Words: Combatant, Civilian, Hostilities, legitimate Target, Armed Group

1. Introduction

The protection of civilians and civilian objects from the risk and dangers of hostilities during armed conflict has been a major concern of the international community. The immunity civilians enjoy is premised on their non-involvement in military operations. But civilian immunity lasts for as long as he does not involve in an act that qualifies as direct participation in hostilities. In cases of non-international armed conflict where both or either of the parties to the conflict is an armed group, there is confusion in identifying members of such group from the general population. As such, it is difficult to identify and ascertain members of armed group who are carrying out attacks on behalf of the group from the civilian population. This poses a serious threat to the belligerent in determining the issue of legitimate target especially where the members of such armed group carry out a guerrilla attack. This raises a question as to when do a person is said to have directly participated in hostilities and when does he cease to participate.

It is against this background that the article will look at the general concept of civilian as protected category. It will analyse the concept of armed group with a view to determining the status of its members for the purpose of attack at all times. The article equally considers the notion of direct participation in hostilities as an exception to civilian immunity. In doing so, it analyses the essential requirements for an act that constitute direct participation, and when does the act begin and end.

2. The Concept of Civilian and its Immunity

The definition of civilian given in Additional Protocol was not assertive i.e. civilian is negatively defined with respect to combatants and armed forces. Civilian is any person who is not a member of the armed forces of a party to a conflict (Art. 50(1) API, Henkaert et al. 2005). So in an elaborate language, a civilian is any person who is not a member of the belligerent armed forces whether or not the authority upon which such a force depends is recognised by the adverse party or of associated militia, incorporated paramilitary police or volunteer corps, including organised resistance units, or of a *levee en masse* acting in immediate resistance to invasion (McCobrey 1990, Art. 50(1) API). Meanwhile, the civilian population comprises of all persons who are civilians. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (Art. 50 (2)(3) AP I). As it is virtually inevitable that during armed conflict individual members of the armed forces will be intermingled with the civilian population, and their presence shall not therefore deprive the civilian population of its character as such or of the protection to which it is entitled. Hence the presence of members of armed forces on leave amidst a large number of civilians does not mean that the group of civilians may be attacked (Baxter 1988). In case of doubt whether a person is civilian or not, that person shall be considered and treated as a civilian (Ladan 1999). In practice, this means that a combatant may only open fire on persons of uncertain status or who find themselves in a location which puts their status in doubt such as a terrain where civilians are not expected if he is convinced that they are

enemy combatant, or civilian who loses protection as a result of direct participation in hostilities (Kalshoven 2001).

The reason underlying principle of distinction is the fact that civilians lack the right to directly participate in hostilities and civilians lose their entitlement to protection against direct attack for such time as they take a direct part in hostilities (Ibid). Under International Humanitarian Law, not only do civilians who directly participate in hostilities become legitimate target but they may also face prosecution under the national law of the state capturing them for simply taking up arms against legitimate constituted authority (Bellal 2009). Therefore, in the absence of rules protecting civilians, individuals who participated in hostilities in any way continued to do so at their own risk (Carmines 2008). Thus the safeguards that the law extends to civilians are premised upon their refraining from participation in belligerent activities and upon their identifiability as non-combatants (Baxter 1975).

On the contrary, there are contending views that civilians do not require certain extreme protection if the war is just. Where the war is just, collateral killing of civilians in connection with legitimate military operations is to be allowed (Maiese 2003). The other view is that the extent to which civilians are responsible for the actions of their government helps to determine what foreigners can do to the civilians, as in targeting or not targeting them during a war against aggression, and what foreigners can do on behalf of the civilians, as in a humanitarian intervention. The rationale behind this view is that people bear the responsibility of their governance and hence for their government's action, whether or not the state is a free state. In other words, the guilt of joining the aggression should not be limited to the decision makers in the government or political and military leaders who approved the war alone since the war is for the interest of the state (Cornwell 2008).

It has been asserted that in recent times, there is increasing involvement of civilian objects in military operations. Hence, there is need in conduct of hostilities not to only protect the lives and well-being of individual civilians and of the civilian population, but also to protect those objects that are civilian in nature (Baxter 1988). Civilian objects are defined as those objects which are not military objectives (Art. 52 API). It is also clear that in case of doubt whether an object is civilian object or military objective, the object shall be considered a civilian object. Additional Protocol I provides that in cases of doubt whether an object which is normally dedicated to civilian purposes, such as place of worship, a house or other dwelling or a school is being used to make an effective contribution to military action, it shall be presumed not to be so used (Art. 52 (3) API). However, where an object is actually used in such a way as military quarters, command post or munitions depot it contributes effectively to military action. It may then be regarded as a military objective, provided always that the condition requiring that its destruction offers a definite military advantage in the circumstances ruling at the time is also met (Kalshoven 2001).

3. The Status of Members of Organised Armed Group

The membership of organised armed groups in the context of non-international armed conflict includes both dissident armed forces and other organised armed groups. Dissident armed forces essentially constitute part of states armed forces that have turned against the government (Melzer 2009). Their membership is determined by continue stay under the structures of the state armed forces to which they formerly belonged. Meanwhile, membership of organised armed groups for the purpose of principle of distinction cannot depend on abstract affiliation, family ties or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual correspond to that collectively exercised by the group as a whole, such as the conduct of hostilities on behalf of a non-state party to the conflict. Their membership is primarily drawn from the civilian population, but develops a sufficient degree of military organisation to conduct hostilities on behalf of a party to the conflict (Ibid).

In practice, it is ambiguous whether members of armed opposition group are considered members of armed forces (combatants) or civilians (Sassoli 2008). Though, persons taking direct part in hostilities in non-international armed conflict are sometimes labeled as combatants (UN General Assembly Res.2676 (xxv), sec. 68-9 Cairo Declaration). However, the designation combatants is only used in its generic meaning and indicates that these persons are legitimate target and do not enjoy the protection against direct attack accorded to civilians, but does not imply a right to combatant status or prisoner of war status as applicable in international armed conflict (Henkaerts et al. 2005). States do not wish to confer the right to participate in hostilities and its corresponding combatant immunity on anyone in non-international armed conflict. Thus, it is obvious that there is no combatant status in non-international armed conflict and this automatically lead to the conclusion that, apart from the states armed forces, there are only civilians in non-international armed conflict. In other words,

members of organised armed groups could only be attacked when they are actually conducting hostilities but not at any other time (Droege 2008).

Furthermore, to consider members of opposition armed group as civilians would certainly appear to create an imbalance between members of such groups and governmental armed forces. Application of this standard would imply that an attack on members of armed group is only lawful for such time as they take a direct part in hostilities while members of governmental armed forces remain legitimate target at any time (Henkaerts J., et al. 2005). It was suggested that there could be different ways of approaching the lawfulness of targeting members of armed group in non-international armed conflict. The first approach is to treat any member of an armed group who has a continuous combat function although he remains a civilian, but the mere fact of having continuous combat function amounts to direct participation in hostilities and that person can therefore be attacked at all times (Droege 2008). Thus an individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he first carries out a hostile act (Melzer 2009).

However, it not necessary that membership of an armed group must depend on the continuous active and hostile involvement in the conflict nor is it logically necessary that the continuous combat function of the individual be or consist of the active conduct of hostilities on behalf of the non-state party (Boothy 2010). To assert that the individual who is a member of the organised armed group must additionally assume continuous combat function before he can become continuously targetable narrows the notion of membership to a degree that lack sufficient justification and practical intuition (Ibid). The problem with the continuous combat function is that in the confusion and urgency of combat, where split-second decisions must be made on the basis of inadequate information (Baxter 1975), how can the commander or decision maker be expected to distinguish which persons are participating sporadically as against those with a continuous combat function?(Boothy 2010). Obviously, realities of war would not permit a commander to distinguish between members of armed groups on basis of continuous combat function at the battle field and sometimes the terrain may not give opportunity for careful and effective identification. Perhaps, continuous combat function approach may not really address the problem of members of organised armed group status as it appears to be impracticable taking cognizance of realities and terrain of war.

The second approach is to define members of opposition armed groups which have a continuous combat function as combatants for the purpose of the conduct of hostilities so that they can be legitimate target at any time, but without conferring on them a combatant status and combatant immunity as in international armed conflict (Droege 2008). This is a membership approach though it still attributed continuous combat function to a member before he can continuously be targeted. The approach is nevertheless linked to continuous combat function approach which leaves some questions unanswered.

The third approach is to consider any person who is not formally a combatant i.e. not a member of the governmental armed forces as a civilian and can only be attacked during the actual times when he is directly participating in hostilities (Ibid). If everyone is a civilian, the fundamental principle of distinction becomes meaningless and impossible to apply. On a more practical note, to prohibit attacks by government armed forces on clearly identified fighters unless engaged by those fighters is militarily unrealistic, as it would obliged the government forces to act purely reaction to an attack while facilitating hit and run operations by the armed group (Sasoli 2008).

Finally, how practicable it is for the government forces to determine membership of an armed group so long as the individual in question commits no hostile act and how can membership of the armed group be distinguished from simple affiliation with a party to the conflict for which the group is fighting i.e. membership in the political, educational or humanitarian wing of a rebel movement? (Ibid). Therefore, members of organised armed group are civilians who directly participate in hostilities and attributing continuous combat function may negate realities of war where decisions are taken in tension and within a split-second. It is impossible to identify a person as a member of an armed group and at the same time analyse his role by attributing continuous combat function before taking decision whether to shoot or not. But attribution of continues combat function is possible when the parties are not in the actual heat of the war. Though, it was observed that this position may create imbalance since it creates a conflict with one side having civilians as its members. That notwithstanding, since in non-international armed conflict it is the states armed forces fighting dissident armed forces or armed group, and it is the states that did not want to confer belligerent status to the armed group, it is logical to hold the view of the states and treat members of armed group as civilians simplisiter. In other words, they are to be treated as

civilians who directly participate in hostilities and consequently loses protection and immunity accorded to civilians.

4. Notion of Direct Participation in Hostilities

In recent past, technological revolution in warfare has resulted in joining of segment of civilian population with each nation's conduct of military operations and vital support activities (McDonald 2004). Thus, civilian employees far from the actual battle field began to perform an increasingly direct and mission critical support function in many military high-tech engagements. Civilian personnel who administer any battle command system, communications systems and high-tech weapon have become a highly specialized component of modern armed forces (Wenger 2008). Today, when wars are fought for principles and ideologies, civilians have increasingly taken an active part in the support of hostilities or in the hostilities themselves (*Prosecutor Vs Jean Paul Akayesu*, Baxter 1975). In modern warfare, all the nation's activities contribute in some way or other to the pursuit of hostilities and even the people morale plays its part in this context (Carmines 2008). Even women are not left behind their participation in hostilities is also not a new phenomenon, for many of them have taken a more or less active part in war throughout the centuries (Krill 1985). Therefore, it is obvious that civilians supplement military capabilities in areas of active military operations and are meanwhile an indispensable part of modern warfare (Wenger 2008).

Notwithstanding, civilians are accorded protection against attack unless and for such time as they take direct part in hostilities. Although when a civilian uses weapon or other means to commit acts of violence against human or material enemy forces, loss of protection against attack is clear and uncontested (Henkaerts 2005). There is neither international humanitarian law treaty that defined the concept of direct participation in hostilities nor does a clear interpretation of the concept establishes from state practice or international jurisprudence (Melzer 2009). In other words, a precise definition of the term direct participation in hostilities does not exist and has not yet been clarified. And one of the areas of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term direct participation (Henkaerts 2005). Therefore, problem of determining what amount to direct participation exists in relation to all civilians including private military companies (Gillard 2006).

In line with this fact, many scholars have contributed toward elucidating the concept of direct participation in hostilities as to what conduct amounts to direct participation and when does direct participation begin and end? International Committee of the Red Cross (ICRC) has contributed immensely in this respect with the interpretive guidance on the notion of direct participation in hostilities. According to ICRC interpretive guidance, the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict (Melzer 2009). In the words of Kalshoven, to take a direct part in hostilities must be interpreted to mean that the person in question perform hostile acts which by their nature or purpose are designed to strike enemy combatants or material (Kalshoven 2005, Carmines 2008). Direct participation in hostilities also implies a direct causal relation between the activity engaged in and harm done to the enemy at the time and place where the activity occurs. In other words, to take a direct part in hostilities is usually taken to mean to engage in a specific attack(s) on an enemy combatant or object during a situation of armed conflict (McDonald 2004). Therefore, the notion of direct participation in hostilities does not refer to a person status, function or affiliation, but to his engagement in specific acts that meet the requirements of direct participation in hostilities (Melzer 2009).

It is generally observed that in recent time, the increase involvement of civilian in contemporary phases of warfare has resulted from the technological advancement and the emergence of complex and sophisticated weapons that require joint and/or coordinated efforts of two or more persons with high-tech computer knowledge for the purpose of identifying and designing the target location before an attack is launched. Consequently, civilians are often used in such high-tech operations during conduct of hostilities and it increases their risk of involvement in acts likely to qualify them as directly participating in hostilities. Therefore, it increases civilian casualty and exposure to risk and dangers of hostilities.

5. Essential Requirements for Direct Participation in Hostilities

For a specific act to qualify as direct participation in hostilities, it must satisfy three cumulative essential requirements- threshold of harm, direct causation and belligerent nexus. To meet the threshold of harm, 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 (Ibid). The qualification of an act as direct participation does not require the materialization of harm reaching the threshold

but merely the objective likelihood that the act will result in such harm i.e. harm which may reasonably be expected to result from an act in the prevailing circumstances (Ibid). Furthermore, a conduct of a civilian cannot be interpreted as adversely affecting the military operation or military capacity of a party to the conflict simply because it fails to positively affect them (Ibid). However, Boothy added that an act of civilian may positively contribute to the fighting position of his own party to the conflict, while not necessarily translating into immediate loss to the opposing party and it will amount to direct participation in hostilities. It is not necessary that the act must adversely affect the military operations or military capacity of the party, it suffices where the act is likely to at least cause death, injury or destruction (Boothy 2010).

The requirement for direct causation requires that there must be a direct causal link between a specific 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 (Melzer 2009). To qualify a specific act as direct participation in hostilities, there must be a sufficiently close causal relation between the act and the resulting harm. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary or which otherwise indirectly causes harm is excluded from the concept of direct participation in hostilities, because the primary purpose of the word 'direct' was to ensure that general contribution to the war effort was excluded as a ground for the loss of civilian immunity (Carmines 2008). Worthy of note is the fact that where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be satisfied where the act constitutes an integral part of a concrete and coordinated tactical operation that directly in one causal step cause harm that reaches the required threshold. However, this standard negates the contemporary phases of warfare where attacks are achieved through a multiplicity of integrated steps, and the notion of causal step leading to the hostile act seems difficult to apply (Boothy).

Meanwhile, the requirement for belligerent nexus requires the act to 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 (Melzer 2009). In other words, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party cannot amount to participation in hostilities. Belligerent nexus relates to the objective purpose of the specific act and it is not influenced by mental ability or willingness of persons to assume responsibility for their conduct (McDonald 2004). Thus civilians forced to directly participate in hostilities or children below the lawful recruitment age may lose protection against direct attack (Melzer 2009). The position seems to be in consonance with battle field realities where it is impracticable for an army to sight a person shooting at him, and yet wait to ascertain the mental ability or willingness of the person in carrying the attack before he could react. Meanwhile, in cases of individual self-defence; defending others against violence prohibited under international humanitarian law; in case of exercising power or authority over person or territory and cases of inter civilian violence lacks belligerent nexus required for qualification as direct participation in hostilities (Ibid). To crown it all, a specific act must satisfy all the three criteria of threshold of harm, direct causation and belligerent nexus before it qualifies as direct participation in hostilities.

Having captured the picture of what constitute direct participation, the question that arises next is what is the time for direct participation in hostilities? When does it begin and end? There is no certain answer to these points, however, military logic suggest that the period encompasses both the time during which the civilian is obviously approaching the chosen target with a view to carry out his hostile act and the time he needs to withdraw from the scene after the act (Kalshoven 2001). So, where a specific act requires deployment, such deployment and return from the deployment constitute integral part of the act in question. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation. For instance, by laying down, storing or hiding the weapons or other equipment used and assuming activities distinct from that operation. However, there would still be a problem with how to categorize the period when the person cleans and prepares his weapon for future use, and equally significant, is how to classify the continuing activity of storing, retaining and/or concealing the weapon for future operation (Boothy 2010). Therefore, lack of legal framework defining direct participation in hostilities results in the ambiguity surrounding when direct participation begins and ends especially in cases of repeated attack- whether cleaning and storing ammunition for subsequent attack form part of direct participation.

6. Conclusion

The notion of direct participation in hostilities entails a situation where a person performs hostile acts which by their nature or purpose are designed to strike enemy combatants or material. The act most satisfies three cumulative requirements- threshold of harm, direct causation and belligerent nexus for it to qualify as direct

participation in hostilities. Where a civilian involves in an act that qualified as direct participation in hostilities he automatically loses immunity against attack. Likewise, members of armed group can be treated as civilians who take a direct part in hostilities and consequently they lose immunity against direct attack. For any member of organized armed group who have continuous combat function is a legitimate military target subject to attack at all times.

It is suggested that International Committee of the Red Cross in collaboration with member states to Geneva Conventions and the Additional Protocols should work out a legal framework that provides a definite status for members of organised armed group with unambiguous position. So that there would be a legal framework that define where and when a member of organised armed group becomes a continuous legitimate military target. It is further suggested that there should be a legal framework defining the notion of direct participation in hostilities with specific parameter for determining its beginning and end.

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