

# IHL and Civilian Participation in Hostilities in the OPT

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## Introduction

This policy brief reviews the legal questions associated with the participation of civilians in hostilities. This issue represents a critical challenge to the protection of civilians in current conflicts, particularly when hostilities are conducted in the midst of civilian populations and assets, and when non-state armed groups are engaged as central actors. This issue is also of particular relevance when the hostilities occur under occupation. While international law recognizes a basic right of self-determination for populations under occupation, it provides immunity against violence only to those *not* participating in hostilities. This apparent contradiction is at the core of the debate on the protection of civilians and raises a number of questions about the roles and rights of civilians in armed conflict, as well as the concept of participation in the war effort and the nature of hostilities. Is a member of a militant group necessarily a “combatant”? Can he or she be targeted according to the rules of international humanitarian law (IHL)? Is membership the key criterion, or are the actual acts of the individual the deciding factors of his or her status under the law? How can a civilian maintain or restore his or her protected status? Practitioners face these and related questions when developing policies for civilian protection in the occupied Palestinian territory (OPT).

As with all briefs in this series, this paper focuses on providing practitioners with a clear understanding of the legal framework available for protecting Palestinian civilians living in the OPT, as well as the legal regime applicable to both the Israeli military and Palestinian militants when they engage in military operations. This framework is based on IHL (and, in a broader sense, on international human rights law). This note explores the spectrum of opinion (amongst both scholars and practitioners) on the question of the legal implications of civilian participation in hostilities, in particular the legality of targeting civilians who engage in hostilities. It highlights debates ongoing in the field of IHL without attempting to present “correct” answers, with an eye to enhancing practitioners’ understanding of the types of legal rationale used both to limit and allow targeting of civilians who engage in hostilities. Ultimately, the aim of this brief is to strengthen the capacity of professionals to utilize and negotiate with the law while developing strategies to enhance the protection of civilians.

A number of prominent scholars and practitioners today argue that the relevance of IHL to the protection of civilians rests on its ability to provide a clear rationale justifying the distinction between individuals who engage in hostilities – and as such become legitimate targets – from those who do not. In the view of such scholars, a substantive protection regime for civilians requires that the concept of participation in hostilities must be brought in line with current realities in the battlefield. In their view, the classical notion of distinction between civilians and combatants, embodied in the conventional mobilization of combatants in large uniformed contingents and the obligation to conduct military operations away from civilian centers, does not provide sufficient guidance in contemporary conflicts. In this reading, the drafting of the current treaties of IHL took place at a time when the categories of “combatant” and “civilian” were more clearly delineated than

they are in today's conflicts. These scholars argue that state militaries now face a much more complex set of actors in the battlespace: individuals who appear to enjoy immunity from attack under IHL, but who in fact occupy a new category between “innocent” civilians and regular combatants. They observe that militants nowadays in fact depend on their protected status as civilians to plan, prepare, and engage in hostilities.

Others argue that the rules of IHL did indeed anticipate the types of conflicts and actors we see today, and that the very clear legal separation between combatants and civilians should not be muddied by references to “new facts” or “changed paradigms” of warfare. These scholars argue that the legal understanding of civilian participation in hostilities has achieved the status of customary international law, and that all states are bound to limit their targeting of civilians who participate in hostilities to the narrow confines of existing law. In addition, these scholars and jurists note that any suggestion of a third category of actor in the battlefield, one between civilian and combatant, poses serious risks to all civilians caught up in armed conflict and diminishes the power of IHL as a clear set of rules for commanders making difficult decisions in the course of warfare.

For both sides of this debate, the Israeli-Palestinian conflict presents a key example and case study of their arguments. For those who argue that contemporary warfare has fundamentally changed, groups like Islamic Jihad and the military wing of Hamas present model cases of organized entities intent on utilizing terror tactics while enjoying the protection of civilian status. Others posit that militants in the OPT can be seen in light of existing IHL, and that the military must abide by strict rules of distinction and proportionality in targeting those civilians who directly engage in hostilities. This debate remains wide open, and for many, the stakes of accepting either argument are higher than ever. In this context, the International Committee of the Red Cross (ICRC) is conducting significant research on the issue, engaging international experts in a multi-stage process of deliberation and debate. In case of the OPT specifically, the Israeli Supreme Court has also explored this issue in detail in its decision on targeted attacks.<sup>1</sup>

Part I of this Policy brief examines the international legal framework applicable to the targeting of civilians who take a direct part in hostilities, in particular with reference to the recent Israeli Supreme Court decision. Part II defines the main components of direct participation of civilians. Part III addresses current uncertainties in the context of international and domestic law by suggesting three key questions for scholars and practitioners to consider in determining the lawfulness of targeting any given individual who is alleged to be taking a direct part in hostilities. Part IV concludes with a review of the current debate.

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<sup>1</sup> For a detailed examination of the Israeli Supreme Court's judgment in the so-called “targeted killings” case, see the HPCR brief “On the Legal Aspects of “Targeted Killings” Review of the Judgment of the Israeli Supreme Court,” May 2007, available online at <http://www.ihlresearch.org/opt/pdfs/briefing3731.pdf>.

## Part I: The International Legal Framework

This legal debate takes place within a politically charged environment, and in the case of the OPT, an ongoing military conflict. For some, the political nature of the debate diminishes the value of legal discussion as a plausible means for finding a solution to this dilemma. Yet, the law appears to shape the principles under which political and security decisions are made. Military commanders are trained on the basis of clear rules of engagement. Their decisions are informed by legal advisers in real time and may eventually be subject to review by a judicial body. While it may be the case that nuances of legal debate matter little in the theater of operations where military considerations and politics dictate the course of action, the law sets the vocabulary and planning framework within which military operations are devised, negotiated, and implemented. This distinction is relevant for practitioners, because most protection activities do not take place on the battlefield. Rather, these efforts address the legal responsibility of the higher echelons state and military leadership in the proper planning of operations. Hence, third party interventions to ensure protection of civilians will often be most effective at the level of the Ministry of Defense or Foreign Affairs.

In the current case, the legal distinction between civilians and combatants is understood by all parties as a core principle of humanitarian protection. This principle is enshrined in both treaty and customary law, and it applies to both non-international<sup>2</sup> and international armed conflict.<sup>3</sup> As one scholar noted nearly a century ago, “The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of international law.”<sup>4</sup> This general principle appears in the earliest texts of the laws of war and is expanded upon in Additional Protocol I of 1977, which holds that “*the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations...the civilian population as such... shall not be the object of attack.*”<sup>5</sup> Despite the fact that a number of prominent states, including Israel, are not party to the Additional Protocol, this aspect of the principle of distinction is widely recognized as binding customary international law (meaning that even states that have not signed the treaty are bound by those aspects that are recognized as customary).<sup>6</sup>

While requiring that civilians are to be protected, the law also recognizes the military imperatives of conducting effective and victorious operations. This principle, known as “military necessity,” states that parties to the conflict can use all force necessary to achieve their military goals, *unless such acts are prohibited by the law*. In practice, this means that there is no obligation to arrest or to otherwise use lesser means to neutralize those who engage in hostilities. Combatants can be attacked at any time: they can be killed as they plan an attack, when they engage in hostilities in the battlefield, when they

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<sup>2</sup> Common Article 3 of the Geneva Conventions of August 12 1949; Additional Protocol II to the Geneva Conventions of August 12 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), Article 13 (2).

<sup>3</sup> *Supra*, note 1.

<sup>4</sup> Roy S. Schondorf, “Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?” *New York University Journal of Law and Politics*, Vol. 37, No. 1, Oct. 2005, p. 62., footnote 158.

<sup>5</sup> *Supra*, note 2, AP II, Article 51 (1)(2).

<sup>6</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, eds., *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), Rule 6.

leave the battlefield, or even while they are sleeping in their barracks.<sup>7</sup> Only when a combatant surrenders or is otherwise put “*hors de combat*,” do attacks against him or her become illegal.

Civilians, on the other hand, benefit from immunity from attack. Inherent to this immunity and to the principle of military necessity is the prohibition on civilian engagement in hostilities. The language of Article 51(3) of the Additional Protocol is clear: “*Civilians shall enjoy the protection afforded by this Section unless and for such time as they take a direct part in hostilities.*”<sup>8</sup> In this context, the immunity of civilians hinges on the circumstances of their participation and the way in which it is perceived and addressed. As such, the debate over civilian immunity is waged over the wording of this one sentence, in particular, the interpretation of “for such time as” and “direct part in hostilities”. It also raises questions regarding the military responses to such participation, in terms of legitimate *means* of responding to an attack from a civilian, and legitimate *time frames* in which this response may take place. Can the military target these civilians at any time? Are they obliged to use lesser means to neutralize civilians participating in hostilities? Should they arrest these civilians whenever possible?<sup>9</sup>

To answer these legal questions, one must look to various sources of international law, including treaty law, case law, and the opinions of legal experts. Given that the central treaty-based rule on civilian participation in hostilities is promulgated in an international treaty that has not been ratified by Israel, this section considers what law applies to this question in the present conflict. In the next section, the brief will look into the details of the legal debate over the participation of civilians.

Since Additional Protocol I has not been ratified by Israel, Article 51(3) is formally not applicable to the conduct of hostilities in the OPT. In such a situation, one must look to international customary law as a possible source of an equivalent rule demonstrated by the general practice of states and their opinions about applicable laws. Lawyers also look to the interpretations of international courts to find evidence of customary law. For example, in the *Nuclear Weapons* Advisory Opinion of 1996, the International Court of Justice (ICJ) recognized that the principle of distinction had reached the status of customary international law.<sup>10</sup>

While Israel is not a state party to Additional Protocol I to the Geneva Conventions (AP I) it is nonetheless bound by the general principle of distinction in customary international law.<sup>11</sup> The ICRC Study on Customary IHL found that Israel, Egypt, Iraq and Syria had all responded favorably in 1973 to the ICRC’s appeal that the parties to the conflict in the Middle East respect the distinction

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<sup>7</sup> W. Hayes Parks, “Air War and the Law of War,” 32 A.F. L. Rev. 1, (1990), p. 143.

<sup>8</sup> Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 51, available at: <http://www.icrc.org/ihl.nsf/FULL/470?OpenDocument>. (Emphasis added.)

<sup>9</sup> For an in-depth analysis of the international law relevant to civilians who take a direct part in hostilities, but without specific reference to the OPT, see Jean-Francois Queguiner, *Direct Participation in Hostilities Under International Humanitarian Law*, HPCR Working Paper, November 2003, available at <http://www.ihlresearch.org/ihl/feature.php?a=42>

<sup>10</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 [1996] ICJ Rep 226, at para 434.

<sup>11</sup> The ICRC Study on Customary IHL, *supra*, Rule 1, page 3

between combatants and civilians.<sup>12</sup> The ICRC Study on Customary IHL also reports as evidence of state practice the 1969 decision of Israel's Military Court at Ramallah in the *Kassem Case*, which recognized the principle of distinction as one of the basic rules of IHL.<sup>13</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY),<sup>14</sup> and the Rome Statute of the International Criminal Court (ICC)<sup>15</sup> have reiterated the binding nature of the principle of distinction between combatants and civilians.

While the general principle of distinction is widely recognized as customary, the *specific* reference to civilian participation in Article 51(3) may be more controversial in terms of interpretation and application. Both treaty and customary IHL reflect that civilians enjoy immunity from attack “unless and for such time as they take a direct part in hostilities” (Article 51(3) Additional Protocol I, Rule 6 of the ICRC Study on Customary IHL). This exception to the general prohibition on attacking civilians also applies in non-international armed conflicts.<sup>16</sup> Though Israel remains bound by the customary IHL rule, the actual meaning of “direct participation” and its temporal scope remains debated by scholars and jurists in Israel and beyond.

## **Part II: The meaning of “unless and for such time as they take a direct part in hostilities”**

However strong the position in treaty and customary IHL that civilians can only be targeted if they take a direct part in hostilities, the exact scope of the notions of “hostilities,” “direct part[icipation]” and “for such time as” remains open to debate. The following analysis will consider each of these three elements in turn.

### ***What defines “hostilities”***

While it is clear that a civilian actively engaging in an armed attack would be targetable while in the heat of battle, the legal definition of what constitutes “hostilities” is not explicit. According to the Commentary on Article 51(3) of Additional Protocol I, “hostilities” include situations when a civilian undertakes hostile acts with or without the use of a weapon.<sup>17</sup> Hostile acts are “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of

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<sup>12</sup> The ICRC Study on Customary IHL, *supra*, page 5

<sup>13</sup> The ICRC Study on Customary IHL, *supra*, page 4

<sup>14</sup> *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, Judgment, Dec. 5, 2003, paragraph 62, *available at* <http://www.un.org/icty/galic/trial/judgement/index.htm>. [hereafter: *Galic*], noting that an attack against a civilian, “constituted of acts of violence willfully directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population,” falls under the rules of customary international law.

<sup>15</sup> Rome Statute of the International Criminal Court 1998, Article 8 (2) (e) (i), *available at* <http://www.un.org/law/icc/statute/romefra.htm>.

<sup>16</sup> Additional Protocol II to the Geneva Conventions of August 12 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), Article 13 (3), The ICRC Study on Customary IHL, *supra*, Rule 6; see also, Inter-American Commission on Human Rights, *Case 11.137 (Argentina)*, paragraph 810, ruling that civilians who took a direct part in the hostilities at La Tablada were legitimate military targets only while their direct participation continued.

<sup>17</sup> Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1943, *available at* <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument> [hereafter API Commentary].

the armed forces.”<sup>18</sup> Similarly, the ICRC Model Manual specifies that, “[t]aking part in hostilities means engaging in hostile action against enemy armed forces but not [just] assisting in the general war effort.”<sup>19</sup> Many experts have added that the definition of “hostilities” must also include activities aimed at the enemy in general, so as to include activities intended to harm civilians.<sup>20</sup> In the “targeted killings” case decided in December 2006, the Israeli Supreme Court considered “hostilities” to be “acts which by nature and objective are intended to cause damage to the army”.<sup>21</sup>

### ***Defining “direct participation”***

While the law was intended to establish a requirement for a direct link between the contribution of a civilian and the conduct of a military operation, the ICRC Study on Customary International Humanitarian Law has concluded that there is no clear and uniform definition of “direct” participation in hostilities in state practice.<sup>22</sup>

Both the ICRC Commentaries and the ICTY have defined “direct” participation in hostilities as “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>23</sup> They further note that determining what is “direct” participation requires a margin of judgment because direct participation includes more than just combat and active military operations but at the same time must not be so broadly defined as to include the entire war effort.<sup>24</sup> At the ICRC Third Expert Meeting on the Notion of Direct Participation in Hostilities, some participants argued for a narrow definition of “hostilities” (i.e., violent acts) in order to maximize the number of civilians protected by the principle of distinction, while others argued that a broad interpretation of “hostilities” (i.e., acts that go beyond the use of violence) might strengthen the actual protection of civilians by offering clear incentives for non-combatants to stay away from the battlefield or any hostile activity.<sup>25</sup> There were disagreements at

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<sup>18</sup> API Commentary, *supra*, at 1942. Similarly, the ICRC Study on Customary IHL reports the Inter-American Commission on Human Rights as having stated that direct participation in hostilities is generally understood to mean “acts, which by their nature or purpose, are intended to cause actual harm to enemy personnel and *matériel*.” (Inter-American Commission on Human Rights, Third Report on human rights in Colombia, cited in The ICRC Study on Customary IHL, at page 22)

<sup>19</sup> Cassese, *Expert Opinion*, *supra*, paragraph 12 (quoting ICRC Model Manual, at paragraph 601).

<sup>20</sup> “Targeted Killings,” Judgment, paragraph 33; ICRC, Third Expert Meeting, *supra*, at 22-24; David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT’L L. 171, (2005), at page 192, available at: <http://www.ejil.org/journal/Vol16/No2/art1.pdf>

<sup>21</sup> “Targeted Killings” case, Judgment, paragraph 33.

<sup>22</sup> The ICRC Study on Customary IHL, *supra*, at 23.

<sup>23</sup> ICRC Commentary on AP I, *supra*, at 1944. *Galic*, *supra*, at paragraph 48 (using almost identical language). Many experts have understood this as a requirement of causal proximity. See, e.g., Michael N. Schmitt, “Direct Participation in Hostilities’ and the 21<sup>st</sup> Century Armed Conflict,” in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, at page 509 (Berlin: BWV, Horst Fischer et al eds., 2004) available at: <http://www.michaelschmitt.org/images/Directparticipationpageproofs.pdf>.

<sup>24</sup> ICRC Commentary on AP I, *supra*, at 1679.

<sup>25</sup> ICRC, Third Expert Meeting, on the Notion of Direct Participation in Hostilities, Summary Report, October 23-25, 2005, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf) at page 19-24.



the ICRC Second Expert Meeting as to whether a civilian acting as a voluntary human shield, or gathering intelligence, would be considered to have taken a “direct part” in hostilities.<sup>26</sup>

The Inter-American Commission on Human Rights has distinguished between “direct” and “indirect” participation by stating that civilian activities which “merely support the adverse party’s war or military effort” are indirect participation in hostilities. Such indirect activities include “selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent and incursion by on of the armed parties.” In contrast, direct participation involves “acts of violence which pose and immediate threat of actual harm to the adverse party.”<sup>27</sup>

In the “targeted killings” case, the Israeli Supreme Court defined taking a “direct part” in hostilities broadly, to include not only the commission of attacks, but also direct support for the commission of such acts, including intelligence-gathering, the transportation of combatants, the operation, supervision, service to combatants or their weaponry,<sup>28</sup> enlisting or sending combatants to commit hostilities, and “deciding” and “planning” the attack. Those who enlist others, guide them and send them to commit terrorist acts are also seen as directly participating in hostilities.<sup>29</sup> “Targeted killings” of civilians who take such a “direct part” in hostilities may be lawful, subject to the Israeli Supreme Court’s procedural requirements.<sup>30</sup> However, the Court classified the following as examples of “indirect” participation in hostilities: general strategic analysis, general support such as monetary aid, the selling of food or medicines, acting as an involuntary human shield, and distributing propaganda.<sup>31</sup> Civilians taking such an “indirect” part in hostilities would not lose their immunity from attack, and could not legally be the subject of a “targeted killing.”

### ***Temporal Element: “for such time as”***

Beyond the qualitative contribution of a civilian to the hostilities, the concept of direct participation also has an important temporal element. This element is linked to the definition of “for such time as.” In other words, the material contributions of a civilian to the hostilities do not by themselves remove the immunity against attack forever, but only *for such time as* this contribution effectively supports the conduct of hostilities. Hence, a civilian that has ceased to *engage* in acts of violence is again immune from attacks. Equally, a civilian who no longer provides *direct support* to the commission of an attack can no longer be targeted.

In its ongoing expert meeting process, the ICRC takes note of a consensus amongst participants that civilians are directly participating in hostilities while they are both *preparing for* and *returning from*

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<sup>26</sup> ICRC, Second Expert Meeting: Direct Participation in Hostilities, Summary Report, at pages 5-7, October 25-26 2004, available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf).

<sup>27</sup> Inter-American Commission on Human Rights, Third Report on Human Rights in Columbia, at 811 (1999).

<sup>28</sup> “Targeted Killings” case, Judgment, paragraph 35; see also HPCR Policy Brief, *On the Legal Aspects of “Targeted Killings,” supra*, page 11-12.

<sup>29</sup> “Targeted Killings” case, Judgment, paragraph 37.

<sup>30</sup> HPCR Policy Brief, *On the Legal Aspects of “Targeted Killings,” supra*, pages 13-15.

<sup>31</sup> “Targeted Killings” case, Judgment paragraph 35.



combat activities.<sup>32</sup> In the “targeted killings” case, the Israeli High Court ruled that a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them, or is using arms, or is on his way back from such a place, is taking “direct” part in hostilities.<sup>33</sup>

The ICRC Third Expert Meeting discussed four main approaches to targeting civilians “for such time as” they directly participate in hostilities: the specific acts approach, the affirmative disengagement approach, the membership approach, and the limited membership approach.<sup>34</sup> Each of these have anticipated strengths and weaknesses in practice, as discussed below.

**The specific acts approach** depends upon the scope of acts included in the concept of direct participation. It holds that when a civilian is participating in those acts, he or she can be targeted. Conversely, when he or she stops participating in those acts, he or she cannot be targeted, but must instead face standard law enforcement procedures, such as arrest or detention. Some participants at the ICRC Third Expert Meeting commended the parallel between this approach and the protection given to combatants if or when they alternate between active duty and civilian life.<sup>35</sup> The specific acts approach is alleged to mirror the intention of the drafters of AP I, yet it does not deal with the “revolving door” phenomenon. Supporters of expanding the scope of time for which a civilian may be targeted for taking a direct part in hostilities argue that a specific acts approach offers undue protection for a civilian who frequently takes a direct part in hostilities.

**The affirmative disengagement approach** permits the targeting of a civilian who takes a direct part in hostilities from the moment of his or her first specific act of direct participation until or unless he or she ceases such activity in a way which is *objectively recognizable* to opposing forces. This approach is alleged to deal with the problem of the “revolving door,” and yet it presents possibly insurmountable intelligence difficulties. Targeting forces would need to monitor militants constantly for any act which constitutes affirmative disengagement. Unless a targeting force had up-to-date and verifiable information on every militant’s every action, they would not know whether or not a given civilian had in fact disengaged from direct participation in hostilities. Therefore, in the absence of conclusive evidence, such a targeting force might well assume that any civilian who participates once in hostilities remains targetable for as long as the hostilities continue. Moreover, a civilian taking a direct part in hostilities may not know how to communicate his or her affirmative disengagement to the forces that might target him, nor to whom he should communicate it. There would be a strong

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<sup>32</sup> Direct Participation in Hostilities, Webpage, ICRC, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205?opendocument>. But Orna Ben-Naftali & Keren R. Michaeli (in “We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings”, in 36 Cornell International Law Journal (2003) 233 at 279) argue that “preparing to” and “returning from” should be only be included in direct participation in hostilities on a case-by-case determination of the military necessity and alternative means. See also Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195, 211-12 (2004): “[O]ne should not deduce from the fact that combatants may be attacked until they are hors de combat, that civilians who are suspected of planning to participate directly in hostilities, or who could resume a previous participation are legitimate targets”.

<sup>33</sup> “Targeted Killings” case, Judgment paragraph 34.

<sup>34</sup> ICRC, Third Expert Meeting, on the Notion of Direct Participation in Hostilities, Summary Report, October 23-25, 2005, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2005\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf).

<sup>35</sup> ICRC Third Expert Meeting, *supra*, at 60.

disincentive for such a civilian to communicate his or her disengagement from hostilities for fear of reprisals, whether they be targeting, arrest, or detention. Moreover, the notion of “objectively” recognizable disengagement is difficult to define, and as Schmitt points out, the language of the affirmative disengagement approach relates strongly to the intention of the civilian – a subjective criterion.<sup>36</sup> If a civilian states his or her intention to cease providing strategic advice to a terrorist group, how would the targeting force know whether this is an objective cessation of participation?

**The membership approach** allows for the targeting of civilians who join armed groups for the duration of their membership in that armed group, using the rationale that such members pose an ongoing threat. The end of membership must be objectively communicated, posing the same intelligence problems as the affirmative disengagement approach above, especially given that many groups may not have official rosters of membership, uniforms, or centralized housing. The membership approach also poses specific problems in the context of the OPT, given the links between the political and social components (schools, hospitals, etc.) of Hamas and its armed wing. If a civilian were to support the political party Hamas through membership or financial contribution, this would not constitute taking a direct part in hostilities. A participant at the ICRC Third Expert Meeting noted that members of *armed groups* would not be civilians properly so-called, and that they might be targeted on the same terms as members of state armed forces.<sup>37</sup> However, the ICTY has ruled that membership of an armed group is not sufficient indication that a civilian is directly participating in hostilities for the purposes of targeting them with lethal force.<sup>38</sup>

**The limited membership approach** is narrower than the membership approach insofar as it does not permit the targeting of all members of armed groups at all times. It restricts the category of persons who can be targeted to the *fighting members* of the armed group. These individuals can be targeted even when they are not engaged in the specific acts of direct participation in hostilities: they are targeted on the basis of their membership and their active participation in combat operations. They only regain protection when they disengage in an objectively recognizable manner. Fighting members are defined functionally as those who can be identified with relative precision as regularly conducting hostilities, matching their function with those of traditional armed forces, i.e. command, war-fighting, logistics, and intelligence. Thus, under this approach, those members of organized armed groups that act as support personnel—cooks, secretaries, etc.—can not be continuously targeted on account of their membership. Like non-members, they are subject to a specific acts approach.<sup>39</sup> The limited membership approach therefore limits the capacity to target support personnel who are not taking a direct part in hostilities and narrows the substantive scope of targeting civilians who take a direct part in hostilities. The temporal scope is broader than that of the specific acts approach, but only for those civilians who take the most direct part in hostilities, that is, in organizing, planning, and conducting hostilities. The intelligence-based concerns remain for this approach, as for all four approaches, but the limited membership approach is preferable to the

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<sup>36</sup> Michael D. Schmitt, “Direct Participation in Hostilities and the 21<sup>st</sup> Century Armed Conflict,” *supra*, at 519-20

<sup>37</sup> ICRC Third Expert Meeting, *supra*, at 63.

<sup>38</sup> *Prosecutor v. Halilovic*, ICTY, Case No. IT-01-48-T, Judgment, Nov. 16, 2005, at paragraph 34, *available at* <http://www.un.org/icty/halilovic/trialc/judgement/index.htm>. It should be noted that these individuals could perhaps still be prosecuted under the reading of the ICTY for membership in an armed group, but they would not lose their immunity from attack as civilians as a result of this membership alone.

<sup>39</sup> ICRC, Third Expert Meeting, *supra*, at 64-65.

membership approach as it would avoid targeting the members or supporters of a political party such as Hamas who do not participate in armed groups.

With reference to non-international armed conflicts, the ICRC Commentary to Article 13(3) AP II notes that a civilian regains his immunity when he “no longer presents any danger for the adversary.”<sup>40</sup> This introduces “threat” as one element of the temporal question: “for such time as.” Ben-Naftali and Michaeli argue that “threat” is the rationale for the ability to target civilians and that when the threat is neither imminent nor severe, the civilian is not a legitimate target and alternative means should be used to prevent the threat from materializing.<sup>41</sup> This analysis does not use any of the four frameworks discussed above. An analysis based on a subjective criterion such as “threat” is yet more liable than the frameworks above to be expanded or contracted according to military discretion. However, if objective criteria were to be introduced for civilians’ direct participation in hostilities, then the concept of “threat” could be given a verifiable objective meaning. Ben-Naftali and Michaeli acknowledge that “threat” should be refined to mean “imminent” or “immediate” threat, which does reduce its scope.<sup>42</sup>

In the “targeted killings” case, the Israeli Supreme Court noted that there is no international consensus regarding the meanings of the durational components of “takes a direct part in hostilities” and “for such a time as,” and therefore such determinations need to be made on a case-by-case basis.<sup>43</sup> The court explained the two ends of the spectrum of possible situations when laying out its framework for assessing each potential target. On one end of the spectrum, a civilian who directly participates in hostilities once or even sporadically but later detaches himself from that activity, entirely or for a long period of time, regains protection. Such a civilian cannot be targeted for his or her past activities.<sup>44</sup> On the other end of the spectrum, when a civilian joins a terrorist organization (which becomes his “home”) and, as part of his role as a member of this organization, engages in a chain of hostile acts with only short periods in between, he or she may be targeted for the entire duration of time it takes to complete that *chain* of hostile acts. This is because the rest between acts functions as preparation for the next activity. A militant should not be able to use the “revolving door” to find refuge to rest and prepare for his next attack.<sup>45</sup> Between these extreme cases, the court recognized there is considerable gray area, and that as such, each case must be determined individually upon examining the circumstances.

### Part III: Analysis

Given that none of the key components of AP II Article 51(3) – “hostilities,” “direct part” and “for such a time as” – has a settled meaning in international law, further criteria are needed to analyze the legality of attacks against civilians alleged to have taken a direct part in hostilities.

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<sup>40</sup> ICRC Commentary to Additional Protocol II, at 4789, available at <http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument>.

<sup>41</sup> Ben-Naftali & Michaeli, *supra*, 278-279.

<sup>42</sup> Ben-Naftali & Michaeli, *supra*, 278-279.

<sup>43</sup> ISC, *Targeted Killings, supra*, at paragraph 39.

<sup>44</sup> ISC, *Targeted Killings, supra*, 39-40.

<sup>45</sup> ISC, *Targeted Killings, supra*, 39-40.

Based upon the above discussion, this section presents a short series of questions practitioners may want to consider in assessing the legality of an attack against a civilian.

- ***Was this attack targeting a particular individual or was it an indiscriminate attack?*** Indiscriminate attacks do not distinguish between civilian and military objects and are prohibited by Article 51(4) of Additional Protocol I. An air strike on a market or a beach which kills or injures civilians would likely be prohibited, both as a failure to distinguish between civilians and military objects, and because the deaths or injuries to civilians are disproportionate in relation to the military advantage anticipated from the attack.
- ***Was the particular individual engaged in the use of force or otherwise providing a direct contribution to the use of force?*** For example, an individual wearing an explosives belt, gathering intelligence for a suicide bombing, or engaged in conscripting or enlisting individuals to carry out a terrorist attack would qualify as a civilian taking a direct part in hostilities under the judgment of the Israeli High Court in the “targeted killings” case.
- ***Was this direct participation or contribution taking place over time or was the participation only sporadic or unpredictable?*** A civilian who consistently provides intelligence for militant operations might be considered to be taking a direct part in hostilities, whereas a taxi driver who transports militants to one meeting on one occasion would not lose his or her immunity from attack.

In recognition of the gray areas between clearly direct participation in hostilities and so-called indirect participation, the Israeli High Court set several procedural prerequisites for “targeted killings.” First, proper information on the target is required; if there is any doubt as to whether the target in question is a civilian who is taking a direct part in hostilities, the operation must be abandoned. Second, using an analysis from international human rights law and Israeli domestic law rather than international humanitarian law, the High Court required that an attack should take place only if it was the least harmful means available to averting the threat posed by the target. Third, the targeted killings must not cause civilian deaths, injuries, or damage to civilian objects which are excessive to the military advantage anticipated from the attack. Fourth and finally, an investigation must be carried out following any targeted killing to review its legality or otherwise.<sup>46</sup>

#### **Part IV: Conclusion**

Recognizing that the law sets the vocabulary and framework within which military operations are devised, negotiated, and implemented, this policy brief analyzes the legal debates concerning the direct participation of civilians in hostilities. This is a significant issue relating to the protection of civilians in the OPT, where hostilities are often conducted in the midst of civilian populations, and non-state armed groups are central actors on the battlefield. There is a spectrum of opinion among scholars and practitioners concerning the lawfulness of targeting civilians who take a direct part in hostilities. Some argue that the classical IHL distinction between civilians who are immune from attack and must not participate in hostilities and combatants who both kill and can be killed is

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<sup>46</sup> *Supra*, note 1.

poorly adapted to the realities of modern warfare. In this view, state militaries increasingly face attack from a wide range of actors, including those who may appear to be civilians, and thus the existing rules must be modified or reinterpreted to meet a new context of warfare. Others argue that the clear separation of combatants and civilians must be maintained in order to maximize civilian protection and in order to maintain clarity of norms for militaries and civilians alike. These scholars and practitioners argue that there is no gray area or third category between combatants and civilians, and that the introduction of such a third category would undermine the very basis of civilian protection and IHL itself.

Although Israel has not ratified Additional Protocol I, it is bound by the principle of distinction as a matter of customary international law. However, the precise scope and application in customary international law of Article 51(3) AP I – which limits the principle of distinction by stating that civilians enjoy immunity from attack “*unless and for such time as they take a direct part in hostilities*” – remains a matter of debate among Israeli scholars and practitioners. This policy brief explores interpretations of “hostilities,” “direct part,” and “for such time as,” and then formulates a set of questions to assist practitioners in assessing the scope of civilian protection set by this controversial legal norm.



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