

## 5.8 CIVILIANS TAKING A DIRECT PART IN HOSTILITIES

Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.

5.8.1 Civilians Taking a Direct Part in Hostilities – Notes on Terminology. This manual uses the phrase “direct part in hostilities” to indicate what activities cause a civilian to forfeit his or her protection from being made the object of attack. This usage does not mean that the United States has adopted the direct participation in hostilities rule that is expressed in Article 51 of AP I.

5.8.1.1 “Active” Versus “Direct”. The phrases “active part in hostilities” and “direct part in hostilities” have been used to describe when civilians forfeit their protection from being made the object of attack. As noted above, this manual uses “direct” rather than “active” in this context, although as discussed below, this usage should not be regarded as indicating a substantive difference between “active” and “direct.”

Common Article 3 of the 1949 Geneva Conventions refers to “[p]ersons taking no active part in the hostilities.” AP I and AP II use the phrase “direct part in hostilities.”<sup>226</sup> In addition, AP I uses the phrase “direct part in hostilities” to address other situations apart from the protection of civilians.<sup>227</sup>

Although the words *active* and *direct* can mean different things in the English language, the terms have sometimes been treated as the same for the purpose of applying the direct participation in hostilities rule.<sup>228</sup> One of the reasons for treating the terms the same is that although the English language version of the 1949 Geneva Conventions uses “active,” and the English language versions of AP I and AP II use “direct,” the French language versions of these treaties use the same word, “*directement*.”<sup>229</sup> Because the English and French language versions

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<sup>226</sup> AP I art. 51(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”); AP II art. 13(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”).

<sup>227</sup> See, e.g., AP I art. 43(2) (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities”); AP I art. 47(2) (“A mercenary is any person who ... [inter alia] (b) Does, in fact, take a direct part in the hostilities ...”).

<sup>228</sup> See, e.g., Prosecutor v. Tadić, ICTY Trial Chamber, IT-94-1-T, *Judgment*, ¶¶614-15 (May 7, 1997) (“The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which: ... (iii) are committed against persons taking no active part in hostilities ... the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.”); Prosecutor v. Akayesu, ICTR Trial Chamber, ICTR-96-4-T, *Judgment*, ¶629 (Sept. 2, 1998) (“‘The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities’. This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of ‘persons taking no active part in the hostilities’ (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, ‘all persons who do not take a direct part or who have ceased to take part in hostilities.’ These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous.”).

<sup>229</sup> GC art. 3, 973 UNTS 289 (“*ne participant pas directement aux hostilités*”).

of the 1949 Geneva Conventions, AP I, and AP II are equally authentic, States negotiating these treaties may not have intended a difference between “active” and “direct.”<sup>230</sup>

Another reason for treating the terms “active” and “direct” the same in this context is that they are understood to be terms of art addressing a particular legal standard, and there are a range of views as to what that legal standard means. Thus, there may be different views about what the underlying standard means, even when there is agreement on the appropriate term to describe that standard. Accordingly, there seems to be little value in distinguishing between the two terms for the purposes of applying this legal rule.

#### 5.8.1.2 *AP I, Article 51(3) Provision on Direct Participation in Hostilities.*

Although, as drafted, Article 51(3) of AP I does not reflect customary international law, the United States supports the customary principle on which Article 51(3) is based.<sup>231</sup> Similarly, although parts of the ICRC’s interpretive guidance on the meaning of direct participation in hostilities are consistent with customary international law, the United States has not accepted significant parts of the ICRC’s interpretive guidance as accurately reflecting customary international law.<sup>232</sup> But some States that are Parties to AP I may interpret and apply Article 51(3) of AP I consistent with the customary international law standard.

5.8.2 Persons to Whom This Rule Applies. For the purpose of applying the rule discussed in this section, “civilians” are persons who do not fall within the categories of combatants listed in § 5.7.2 (Categories of Persons Who Are Combatants for the Purpose of Assessing Their Liability to Attack). Accordingly, for the purposes of this section, “civilians” include:

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<sup>230</sup> See, e.g., GC art. 150 (“The present Convention is established in English and in French. Both texts are equally authentic.”); AP I art. 102 (“The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.”); AP II art. 28 (same).

<sup>231</sup> See John B. Bellinger, III, Legal Adviser, Department of State, *Unlawful Enemy Combatants*, Jan. 17, 2007, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 915-16 (“While we agree that there is a general principle of international law that civilians lose their immunity from attack when they engage in hostilities, we disagree with the contention that the provision as drafted in AP I [Article 51(3)] is customary international law.”); Michael J. Matheson, Deputy Legal Adviser, Department of State, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law* (Jan. 22, 1987), 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419, 426 (1987) (“We also support the principle that the civilian population not be used to shield military objectives or operations from attack, and that immunity not be extended to civilians who are taking part in hostilities. This corresponds to provisions in articles 51 and 52[ of AP I].”).

<sup>232</sup> See, e.g., Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 186 (2012) (“From the operational perspective, the feedback [on the ICRC’s interpretive guidance] was that the report was too rigid and complex, and did not give an accurate picture of State practice or (in some respects) of a practice to which States could realistically aspire.”); *Al-Bihani v. Obama*, 590 F.3d 866, 885 (D.C. Cir. 2010) (Williams, J., concurring) (“The work itself explicitly disclaims that it should be read to have the force of law. . . . Even to the extent that Al Bihani’s reading of the Guidance is correct, then, the best he can do is suggest that we should follow it on the basis of its persuasive force. As against the binding language of the AUMF and its necessary implications, however, that force is insubstantial.”).

- members of the civilian population;<sup>233</sup>
- persons authorized to accompany the armed forces;<sup>234</sup> and
- members of the merchant marine and civil aircraft of parties to a conflict.<sup>235</sup>

5.8.2.1 *Persons Belonging to Hostile, Non-State Armed Groups*. Some States may choose to characterize persons who belong to hostile, non-State armed groups that do not qualify for status as lawful combatants as “civilians” who may not be attacked unless they are taking a direct part in hostilities. However, these States may also characterize the act of joining and remaining a member of an armed group that is engaged in hostilities as a form of taking a direct part in hostilities that continuously deprives these individuals of their protection from being made the object of attack.<sup>236</sup>

The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as “civilians” to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.<sup>237</sup> Either approach may yield the same result: members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*. However, practitioners, especially when working with coalition partners, should understand that different legal reasoning is sometimes applied in reaching that result.

5.8.3 “Taking a Direct Part in in Hostilities”. Unlike the treaty definition of “military objective” for objects,<sup>238</sup> the United States is not a Party to a treaty with a comparable provision defining taking a direct part in hostilities for the purpose of assessing what conduct renders civilians liable to being made the object of attack.

At a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy.<sup>239</sup> Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to

<sup>233</sup> Refer to § 4.8.1.5 (General Usage of “Civilian” in This Manual).

<sup>234</sup> Refer to § 4.15 (Persons Authorized to Accompany the Armed Forces).

<sup>235</sup> Refer to § 4.16 (Crews of Merchant Marine Vessels or Civil Aircraft).

<sup>236</sup> Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 193 endnote 22 (2012) (“As discussed below, there is a range of views on whether individuals who pass the membership threshold lose their civilian status (and are therefore unprivileged belligerents) or remain civilians but are deemed to be continuously taking a direct part in hostilities and accordingly continuously lose their protections from being made the object of attack.”).

<sup>237</sup> Refer to § 5.7.3 (Persons Belonging to Non-State Armed Groups).

<sup>238</sup> Refer to § 5.6.3 (Objects That Are Military Objectives).

<sup>239</sup> ICRC AP COMMENTARY 619 (“Thus ‘direct’ participation means 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.”).

conduct or sustain combat operations.<sup>240</sup> However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort, such as by buying war bonds.<sup>241</sup>

Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context, such as the weapon systems or methods of warfare employed by the civilian's side in the conflict.<sup>242</sup> For example, in some contexts, training and logistical support may be viewed as taking a direct part in hostilities, while in other contexts it might not.<sup>243</sup> The following considerations may be relevant:<sup>244</sup>

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<sup>240</sup> See GUENTER LEWY, *AMERICA IN VIETNAM* 232 (1978) ("We know that on occasion in Vietnam women and children placed mines and booby traps, and that villagers of all ages and sexes, willingly or under duress, served as porters, built fortifications, or engaged in other acts helping the communist forces. It is well established that once civilians act as support personnel they cease to be noncombatants and are subject to attack.").

<sup>241</sup> Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 (2012) ("With respect to determining what it means to take 'direct part in hostilities,' as a threshold matter there seems to be a common view that direct participation in hostilities stands in contrast to support by a general population to a nation's war effort. Civilians who are contributing to a nation's war effort accordingly do not by dint of this alone lose their protection.").

<sup>242</sup> See Nils Melzer, *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report*, 35 (2005) ("Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.").

<sup>243</sup> For example, Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 680-81 (2010) ("For example in Iraq, it has been noted, 'IED and suicide-bomber cells are essentially combatant units themselves,' where the most technically skilled bomb builder 'also doubles as a training instructor.' Further, 'bombers do not 'just turn up to their target'. They need a logistical infrastructure, which consists of individuals ... who provide everything from reconnaissance of the potential target ... to the provision of a safe house and food, and the explosives-laden vehicle or suicide belt.' ... To limit direct participation to persons who place or detonate explosives is an artificial division of what is fundamentally a group activity. ... The person who is key in planning and facilitating such deadly attacks must be a valid target as a direct participant in hostilities ...") (first and second ellipses in original).

<sup>244</sup> Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 ("Any determination that a civilian is taking part in hostilities (and thus loses immunity from being made the object of attack) will be highly situational and needs to be made by a decisionmaker taking the following considerations into account: • Nature of the harm: Is the individual's activity directed at (i) adversely affecting one party's military capacity or operations or enhancing the capacity/operations of the other, or (ii) killing, injuring or damaging civilian objects or persons? • Causation/integration between action and harm: Is there a sufficiently direct causal link between the individual's relevant act and the relevant harm, or does the act otherwise form an integral part of coordinated action resulting in that harm? (Although it is not enough that the act merely occurs during hostilities, there is no requirement that the act be only a single causal step removed from the harm.) • Nexus to hostilities: Is the individual's activity linked to an ongoing armed conflict and is it intended either to disadvantage one party, or advance the interests of an opposing party, in that conflict? ... There is also a range of views about whether each of the foregoing three factors must be present in order to make a determination that an individual is directly participating in hostilities (or whether a 'totality of the circumstances' approach should govern), ... . Moreover, there is a range of views concerning the

- the degree to which the act causes harm to the opposing party's persons or objects, such as
  - whether the act is the proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or
  - the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party;
- the degree to which the act is connected to the hostilities, such as
  - the degree to which the act is temporally or geographically near the fighting; or
  - the degree to which the act is connected to military operations;
- the specific purpose underlying the act, such as
  - whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party;
- the military significance of the activity to the party's war effort, such as
  - the degree to which the act contributes to a party's military action against the opposing party;
  - whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded as taking a direct part in hostilities;<sup>245</sup>
  - whether the act poses a significant threat to the opposing party;
- the degree to which the activity is viewed inherently or traditionally as a military one, such as
  - whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and

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relevance of geographic and temporal proximity of an individual's actions to particular hostile acts in ongoing hostilities.”).

<sup>245</sup> W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, *Executive Order 12333 and Assassination*, Nov. 2, 1989, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3411, 3416 (“Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation’s national security or war aims. Thus, more than 900 of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.”).

combat service support functions);<sup>246</sup> or

- whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.

5.8.3.1 *Examples of Taking a Direct Part in Hostilities.* The following acts are generally considered taking a direct part in hostilities that would deprive civilians who perform them of protection from being made the object of attack. These examples are illustrative and not exhaustive:

- taking up or bearing arms against the opposing party, or otherwise personally trying to kill, injure, or capture personnel or damage material belonging to the opposing party,<sup>247</sup> such as
  - defending military objectives against enemy attack (*e.g.*, manning an antiaircraft gun, acting as a bodyguard for an enemy combatant);<sup>248</sup>
  - acting as a member of a weapons crew;
  - engaging in an act of sabotage; or
  - emplacing mines or improvised explosive devices;
- preparing for combat and returning from combat;
- planning, authorizing, or implementing a combat operation against the opposing party, even if that person does not personally use weapons or otherwise employ destructive force in connection with the operation;<sup>249</sup>

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<sup>246</sup> Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AJIL 1, 17 (2004) (“The argument that civilians are protected unless engaged in overtly aggressive acts like carrying weapons may be particularly difficult to maintain where armed groups are technically accorded civilian status by virtue of not being considered lawful combatants. To the extent that civilians fulfill the same function as combatants, either in the armed forces or as part of the organization of an ‘illegitimate’ nonstate actor, they are logically subject to targeting under the same provisions of international humanitarian law.”).

<sup>247</sup> 2006 AUSTRALIAN MANUAL ¶5.36 (“Civilians are only protected as long as they refrain from taking a direct part in hostilities. ... Civilians bearing arms and taking part in military operations are clearly taking part in hostilities;”); ICRC AP COMMENTARY 618-19 (¶1943) (“It seems that the word ‘hostilities’ covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon.”).

<sup>248</sup> 2004 UK MANUAL ¶5.3.3 (“Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so.”).

<sup>249</sup> See Public Committee against Torture in Israel, *et al. v. Government of Israel, et al.*, HCJ 769/02, Israel Supreme Court Sitting as the High Court of Justice, ¶37 (Dec. 11, 2005) (“We have seen that a civilian causing harm to the army is taking ‘a direct part’ in hostilities. What says the law about those who enlist him to take a direct part in the hostilities, and those who send him to commit hostilities? Is there a difference between his direct commanders and those responsible for them? Is the ‘direct’ part taken only by the last terrorist in the chain of command, or by the entire chain? In our opinion, the ‘direct’ character of the part taken should not be narrowed merely to the person committing the physical act of attack. Those who have sent him, as well, take ‘a direct part’. The same goes for the

- providing or relaying information of immediate use in combat operations, such as
  - acting as an artillery spotter or member of a ground observer corps or otherwise relaying information to be used to direct an airstrike, mortar attack, or ambush;<sup>250</sup> and
  - acting as a guide or lookout for combatants conducting military operations;<sup>251</sup>
- supplying weapons and ammunition, whether to conventional armed forces or non-state armed groups, or assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use,<sup>252</sup> such as
  - delivering ammunition to the front lines; or
  - outfitting and preparing a suicide bomber to conduct an attack.

5.8.3.2 *Examples of Acts Not Considered Taking a Direct Part in Hostilities.* The following acts are generally not considered taking a direct part in hostilities that would deprive civilians who perform them of protection from being made the object of attack. These examples are illustrative and not exhaustive:

- mere sympathy or moral support for a party's cause;
- general contributions made by citizens to their State's war effort (*e.g.*, buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces);
- police services (*e.g.*, police officers who maintain public order against common criminals

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person who decided upon the act, and the person who planned it. It is not to be said about them that they are taking an indirect part in the hostilities. Their contribution is direct (and active) (*see* Schmitt, at p. 529).”).

<sup>250</sup> 2013 GERMAN MANUAL ¶518 (“Accordingly, civilians who perform concrete actions that constitute direct participation in hostilities (*e.g.* conducting military operations, transporting weapons and ammunition to combat units, operating weapon systems, transmitting target data that leads immediately to the engagement of a military objective, etc.) can be engaged as military objectives while performing such actions.”).

<sup>251</sup> *For example*, 101st Airborne ROE Card, Iraq (2003), *reprinted in* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, I LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 - 1 MAY 2003) 315, 316 (2004) (“**7. Facts:** Your unit comes under fire, you notice a young civilian woman who appears to be pointing to the location where friendly troops are concealed, based on her actions, those locations are then targeted. **Response:** Shoot to eliminate the threat ...”).

<sup>252</sup> *See, e.g.*, United States v. Hamdan 6 (Dec. 19, 2007), *reversed on different grounds*, 696 F.3d 1238 (D.C. Cir. 2012) (“The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations [in the nearby town of Takta Pol and the more distant Kandahar]. ... Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of ‘direct participation.’”).

during armed conflict);<sup>253</sup>

- independent journalism or public advocacy (e.g., opinion journalists who write columns supporting or criticizing a State's war effort);<sup>254</sup>
- working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State;<sup>255</sup> or
- providing medical care or impartial humanitarian assistance.<sup>256</sup>

Although performing these activities does not make a person liable to being made the object of attack, performing these activities also does not immunize a person from attack if that person takes a direct part in hostilities or is otherwise lawfully made the object of attack.

5.8.3.3 *Taking a Direct Part in Hostilities and Standards for the Use of Force in Self-Defense.* In the practice of the United States, the U.S. armed forces have been authorized to use necessary and proportional force in self-defense in response to hostile acts or demonstrated hostile intent.<sup>257</sup>

In some cases, hostile acts or demonstrated hostile intent may also constitute taking a

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<sup>253</sup> Refer to § 4.23.1 (Police as Civilians).

<sup>254</sup> Refer to § 4.24.1 (Status of Journalists – Generally Civilian). Cf. ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶47 (Jun. 13, 2000) (“Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.”).

<sup>255</sup> BOTHE, PARTSCH, & SOLF, NEW RULES 303 (AP I art. 51, ¶2.4.2.2) (noting that during international armed conflict, “workers in defense plants or those engaged in distribution or storage of military supplies in rear areas, do not pose an immediate threat to the adversary and therefore would not be subject to deliberate individual attack”). However, these individuals assume the risk of incidental injury as a result of attacks against those factories. Refer to § 5.12.3.3 (Civilian Workers Who Support Military Operations In or On Military Objectives).

<sup>256</sup> Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict, ¶I, attachment to Ash Carter, Secretary of Defense, *Memorandum re: Principles Related to the Protection of Medical Care Provided by Impartial Humanitarian Organizations During Armed Conflict*, Oct. 3, 2016 (“Medical care during armed conflict is an activity that is fundamentally of a neutral, humanitarian, and non-combatant character.”).

<sup>257</sup> For example, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, ¶6b(1) (June 13, 2005), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 95 (2007) (“Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.”); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, *Standing Rules of Engagement for US Forces*, Enclosure A, A-1 (Jan. 15, 2000), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA, OPERATIONAL LAW HANDBOOK 102 (2006) (“US forces always retain the right to use necessary and proportional force for unit and individual self-defense in response to a hostile act or demonstrated hostile intent.”).



direct part in hostilities. However, hostile acts and demonstrated hostile intent in some respects may be narrower than the concept of taking a direct part in hostilities. For example, although supplying weapons and ammunition in close geographic or temporal proximity to their use is a common example of taking a direct part in hostilities, it would not necessarily constitute a hostile act or demonstrated hostile intent.

On the other hand, hostile acts and demonstrated hostile intent in some respects may be broader than the concept of taking a direct part in hostilities. For example, the use of force in response to hostile acts and demonstrated hostile intent applies outside hostilities, but taking a direct part in hostilities is limited to acts that occur during hostilities. Thus, the concept of taking a direct part in hostilities must not be understood to limit the use of force in response to hostile acts or demonstrated hostile intent.

In the practice of the United States, offensive combat operations against people who are taking a direct part in hostilities have been authorized through specific rules of engagement.

5.8.4 Duration of Liability to Attack. There has been a range of views about the duration for which civilians who have taken a direct part in hostilities forfeit protection from being made the object of attack.<sup>258</sup>

In the U.S. approach, civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them. Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection. There may be difficult cases not clearly falling into either of these categories, and in such situations a case-by-case analysis of the specific facts would be needed.<sup>259</sup>

5.8.4.1 Permanently Ceased Participation in Hostilities. If a civilian has permanently ceased participation in hostilities, then that person must not be made the object of attack because there is no military necessity for doing so.<sup>260</sup> The assessment of whether a person

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<sup>258</sup> See, e.g., Nils Melzer, *Background Paper – Direct Participation on Hostilities under International Humanitarian Law – Expert Meeting of Oct. 25-26, 2004* 34 (“At one end of the spectrum were experts who preferred narrowly defining temporal scope and favoured strictly limiting loss of protection to the period where DPH is actually being carried out. At the other end were experts who said that, once a person had undertaken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack. However, opinions varied greatly and could not easily be divided into two groups supporting distinct positions.”).

<sup>259</sup> Public Committee against Torture in Israel, *et al. v. Government of Israel, et al.*, HCJ 769/02, Israel Supreme Court Sitting as the High Court of Justice, ¶40 (Dec. 11, 2005) (“These examples point out the dilemma which the ‘for such time’ requirement presents before us. On the one hand, a civilian who took a direct part in hostilities once, or sporadically, but detached himself from them (entirely, or for a long period) is not to be harmed. On the other hand, the ‘revolving door’ phenomenon, by which each terrorist has ‘horns of the altar’ (1 Kings 1:50) to grasp or a ‘city of refuge’ (Numbers 35:11) to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided (*see* Schmitt, at p. 536; Watkin, at p. 12; Kretzmer, at p. 193; DINSTEIN, at p. 29; *and* Parks, at p. 118). In the wide area between those two possibilities, one finds the ‘gray’ cases, about which customary international law has not yet crystallized. There is thus no escaping examination of each and every case.”).

<sup>260</sup> Refer to § 2.3 (Humanity).

has permanently ceased participation in hostilities must be based on a good faith assessment of the available information.<sup>261</sup>

For example, a civilian might have engaged in an isolated instance of taking a direct part in hostilities. This isolated instance is likely to have involved multiple acts, because taking a direct part in hostilities normally includes deploying or moving to a position of attack and exfiltrating from an attack.<sup>262</sup> However, if this participation was an isolated instance that will not be repeated, then no military necessity for attacking that person exists after he or she has ceased taking a direct part in hostilities. Accordingly, the civilian must not be made the object of attack after he or she has ceased taking a direct part in hostilities. However, there may be other legal consequences from this isolated instance of participation. For example, such civilians may, depending on the circumstances, be detained, interned, or prosecuted because of these actions.<sup>263</sup>

5.8.4.2 *No “Revolving Door” Protection.* The law of war, as applied by the United States, gives no “revolving door” protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time.<sup>264</sup> Thus, for example, persons who are assessed to be engaged in a pattern of taking a direct part in hostilities do not regain protection from being made the object of attack in the time period between instances of taking a direct part in hostilities.<sup>265</sup>

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<sup>261</sup> Refer to § 5.3 (Assessing Information Under the Law of War).

<sup>262</sup> Refer to § 5.8.3.1 (Examples of Taking a Direct Part in Hostilities).

<sup>263</sup> Refer to § 4.18 (Private Persons Who Engage in Hostilities).

<sup>264</sup> See also Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 689 (2010) (“Further, on one level the term ‘revolving door’ evokes the idea of a form of carnival shooting gallery, where soldiers must wait until an opponent pops out from behind a door to be shot at. At some point, the credibility of the law begins to be undermined by suggesting an opponent can repeatedly avail themselves of such protection.”).

<sup>265</sup> Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641, 692 (2010) (“However, given the lack of credibility associated with the term, there can be no ‘revolving door’ of protection. After the first involvement, any subsequent act demonstrating direct participation would start to provide the basis to believe that there is the beginning of a pattern of conduct that reflects an intention to regularly engage in the hostilities. Repetitious participation can be considered in determining if such persons are in reality continuously engaged in hostilities. When such participation occurs, affirmative disengagement would be required in order to establish that such persons are no longer direct participants in hostilities.”). Cf. Bill Boothby, “*And For Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 741, 765-66 (2010) (“In my view, an alternative interpretation of the treaty language is equally valid. According to this alternative view, the temporal element in the provision lies both in the phrase ‘unless and for such time’ and in the word ‘participates.’ ... If, however, a person engages in repeated acts of DPH, there is an evident artificiality in regarding that individual as having protected status during the intervals in between. Experience shows that during those periods a further act of direct participation by the persistent participator is likely to be in prospect, and the likelihood is that during those intervals he will be preparing himself for the next act, checking his equipment, obtaining any additional equipment or stores he may require, communicating with like-minded or otherwise involved individuals, refining his plan and so on. While some such activities may be DP in their own right, the more important point is that a person who is so engaged cannot be

A “revolving door” of protection would place these civilians who take a direct part in hostilities on a better footing than lawful combatants, who may be made the object of attack even when not taking a direct part in hostilities.<sup>266</sup> The United States has strongly disagreed with posited rules of international law that, if accepted, would operate to give the so-called “farmer by day, guerilla by night” greater protections than lawful combatants.<sup>267</sup> Adoption of such a rule would risk diminishing the protection of the civilian population.

5.8.5 Civilians Who Take a Direct Part in Hostilities and the Law of War. Although the concept of direct participation in hostilities may be discussed in contexts besides targeting, such as in the context of criminal liability or detention, there are often significant differences between “taking a direct part in hostilities” for targeting purposes and the standards used for assessing whether a civilian may be detained or prosecuted.

For example, whether someone may be made the object of attack for taking a direct part in hostilities is different from whether he or she may be prosecuted for his or her actions. In some cases, domestic criminal liability for support to enemy armed groups is much broader than what acts constitute “taking a direct part in hostilities.”

Similarly, the authority to detain enemy persons during wartime extends beyond detaining those who have taken a direct part in hostilities.<sup>268</sup>

## 5.9 PERSONS PLACED HORS DE COMBAT

Persons, including combatants, placed *hors de combat* may not be made the object of attack. Persons placed *hors de combat* include the following categories of persons, provided they abstain from any hostile act and do not attempt to escape:

- persons in the power of an adverse party;
- persons not yet in custody, who have surrendered;
- persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck; and
- persons parachuting from aircraft in distress.

5.9.1 Hors de Combat – Notes on Terminology. *Hors de combat* is a French phrase that means “out of the battle.” It is generally used as a term of art to mean persons who may not be made the object of attack because they are out of the fighting and who therefore must be treated humanely.

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equated with a civilian who remains uninvolved in the conflict. To do so is to place at risk the respect, based on law, to be accorded to the civilian population.”).

<sup>266</sup> Refer to § 5.7.1 (Armed Forces and Groups and Liability to Being Made the Object of Attack).

<sup>267</sup> Refer to § 4.18.3 (Private Persons Who Engage in Hostilities – Lack of the Privileges of Combatant Status).

<sup>268</sup> Refer to § 4.8.3 (Civilians – Detention); § 4.4.2 (Combatants – POW Status During Detention).