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THE ICRC'S FORMULATION OF THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: A CRITICAL LEGAL ANALYSIS

Uluslararası Kızılhaç Komitesi'nin Çatışmalara Doğrudan Katılım Kavramına İlişkin Ortaya Koyduğu Çerçeve: Eleştirel Bir Hukuki İnceleme

Res. Asst. Lokman Burak ÇETİNKAYA*

ABSTRACT

The International Committee of the Red Cross (ICRC) invited a group of experts to The Hague to clarify the meaning and scope of the notion of “direct participation in hostilities” (DPH) in 2003.¹ This attempt took more time than expected and produced the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (the Interpretative Guidance) in May 2009.² However, the outcome of this entire process lacks consensus among the experts who participated in the working group meetings³ as a significant number of them are of the opinion that the Interpretative Guidance does not correctly maintain the balance between military necessity and humanitarian concerns.⁴ Because the ICRC's formulation of DPH is not in accordance with this generally accepted balance, which reflects the spirit of all international humanitarian law (IHL) norms, the Interpretative Guidance has been widely criticized by legal experts and scholars as will be discussed in this essay.

Keywords: the International Committee of the Red Cross, Direct Participation in Hostilities, International Armed Conflicts, Non-international Armed Conflicts.

ÖZET

Uluslararası Kızılhaç Komitesi, “çatışmalara doğrudan katılım” kavramının anlam ve kapsamını netleştirmek için 2003 yılında, uzmanlardan oluşan bir grubu Lahey'e davet etti. Bu teşebbüs, beklenenden uzun bir zaman aldı ve 2009 yılının Mayıs ayında

* Research Assistant at Fatih Sultan Mehmet Vakıf University, Faculty of Law, lbcetinkaya@fsm.edu.tr.

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¹ ICRC, Overview of the ICRC's Expert Process (2003-2008), at 3, available at <https://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf> (last visited 30 December 2015).

² ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Nils Melzer ed., 2009), available at <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (last visited 30 December 2015).

³ ICRC, *Overview*, *supra* note 1, at 4.

⁴ Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, 1 *Harv. Nat'l Sec. J.* (2010) 5, at 6.

Uluslararası Kızılhaç Komitesi, "Uluslararası İnsancıl Hukuk'ta Çatışmalara Doğrudan Katılım Kavramına İlişkin Yorumlayıcı Kılavuz"u yayınladı. Ancak çalışma toplantılarına katılan uzmanların büyük bir bölümünün, Yorumlayıcı Kılavuz'un askeri gereksinim ve insani kaygı arasındaki dengeyi doğru şekilde kuramadığı düşüncesinde oldukları ve bütün bu süreç boyunca uzmanlar arasında fikir birliği sağlanamadığı görüldü. Uluslararası Kızılhaç Komitesi'nin çatışmalara doğrudan katılıma ilişkin ortaya koyduğu çerçevenin Uluslararası İnsancıl Hukuk kurallarının ruhunu yansıtan bu genel kabul görmüş dengeye uygun olmaması, Yorumlayıcı Kılavuz'un, bu makalede ele alındığı üzere, hukukçular ve akademisyenler tarafından ciddi bir biçimde eleştirilmesine neden oldu.

Anahtar Kelimeler: Uluslararası Kızılhaç Komitesi, Çatışmalara Doğrudan Katılım, Uluslararası Silahlı Çatışmalar, Uluslararası Olmayan Silahlı Çatışmalar.

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I. Concept of "civilian" in the context of direct participation in hostilities: membership approach vs. functional criteria

The principle of distinction is enshrined in Articles 48, 51(2) and 52(2) of Additional Protocol I (AP I)⁵ and requires parties to a conflict to distinguish peaceful civilians from members of organized armed groups and those taking a direct part in hostilities. Although Additional Protocol II (AP II)⁶ includes a prohibition on making civilians the object of attack in Article 13(2), it does not directly refer to the principle of distinction. However, the jurisprudence of the International Court of Justice, of the Inter-American Commission on Human Rights, and of the International Criminal Tribunal for the former Yugoslavia clearly reveals that the principle of distinction is of customary character in both international and non-international armed conflicts and is one of the cardinal principles of IHL.⁷

Determining who qualifies as a civilian is not only important in terms of the principle of distinction, but also necessary for DPH as this only applies to civilians. This will be explained separately in relation to international armed conflicts and non-international armed conflicts.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977, 1125 UNTS 3.

⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977, 1125 UNTS 609.

⁷ International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, paras. 78-79; Inter-American Commission on Human Rights, Case 11.137 (Argentina), Report, 18 November, 1997, para. 177; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000, para. 180.

A. International armed conflicts

According to Article 50 (2) AP I, civilians are defined negatively under the membership approach as those who are not members of regular armed forces of State or irregular armed forces such as militia, voluntary corps, and paramilitary armed forces integrated into State armed forces, or *levée en masse* (resistance movements) belonging to a party to the conflict. According to this approach, civilians can be determined by simply distinguishing them negatively from members of listed groups. However, as required in non-international armed conflicts, the Interpretative Guidance proposes the same functional criteria used to determine the members of irregular armed forces (discussed below) also be applied to international armed conflicts.

B. Non-international armed conflicts

Civilians in non-international armed conflicts can also simply be defined as all those who are not members of organized armed groups whether State or non-State in character. Although the ICRC accepted this approach at the first meeting in 2003 and in its Customary International Law Study,⁸ it then came to a different conclusion in its Interpretative Guidance. The Interpretative Guidance provides a distinction between State armed forces and non-State organized armed groups when establishing membership. According to this, as domestic laws generally do not regulate the membership to non-State organized armed groups and such membership occasionally hinges on an act of official integration or identification, only those individuals performing a “continuous combat function” should be considered as members of non-State organized armed groups.⁹ Therefore individuals who do not continuously participate in hostilities and individuals who exercise non-combat function such as political and administrative personnel, recruiters, trainers, financiers, propagandists, weapon suppliers, manufacturers, smugglers, and intelligence collectors are not qualified as members of non-State organized armed groups and remain civilians.¹⁰

First of all, since the above listed persons who performed the same function would still be targetable as members of State armed forces, States will never accept such a higher threshold that benefits non-State organized armed groups. It is also illogical to introduce such a double standard that asks what functions members of non-State organized armed groups are performing, but does not ask the same question for members of State armed forces. Why

⁸ ICRC, Customary International Humanitarian Law, Vol. 1 (Henckaerts & Doswald-Beck eds., 4th ed. 2005) at 19.

⁹ ICRC, *Interpretative Guidance*, *supra* note 2, at 34-35.

¹⁰ *Idem*, at 31, 36.

should the cook of a non-State organized armed group be treated differently from the cook of a State armed force based on the function criterion? It should always be kept in mind that IHL must be applicable to parties to a conflict equally; otherwise no commander will be able to convince his fighters to comply with the rules. Secondly, the function criterion does not satisfactorily define civilians. For instance, when you see someone preparing a meal, does it mean that this person is doing this 24/7? It is almost impossible to distinguish the respective function someone has in a group. Thirdly, the Interpretative Guidance has inaccurate qualification of *levée en masse* as neither civilians nor members of the armed forces that does not based on any treaty or customary rule.¹¹ In conclusion, the ICRC seems to be trying to establish a new rule by introducing the term “continuous combat function”, which is not even found in treaty law, rather than correctly reflecting customary law in the determination of who is a civilian. Therefore, the distinctive criterion in the definition of civilians should be non-membership of both organized armed groups whether State or non-State in character and *levée en masse* regardless of any functional criteria that is proposed by the ICRC for non-State organized armed groups.

II. Constitutive elements of direct participation in hostilities

It should be noted from the beginning that as long as there is no sufficient reliable information on whether a specific civilian's conduct qualifies as DPH, the conduct must be presumed as not amounting to DPH in accordance with the rule of doubt.¹² Therefore an individual enjoys protection as a civilian unless his conduct amounts to DPH without doubt.

The Interpretative Guidance requires the following three criteria to be met cumulatively in order for the conduct of an individual to qualify as DPH.

A. Threshold of harm

The threshold of harm required for conduct to qualify as DPH in hostilities would not only be reached by inflicting damage, destruction, killing, or injury, but also by adversely affecting the military operations or military capacity of a party to the conflict by, for example, depriving of the military use of certain objects, equipment or territory.¹³ However, merely inconveniencing the enemy does not meet the threshold. The likely consequence of an act must be of sufficiently severe in order to reach the required threshold. However, this

¹¹ *Idem*, at 25.

¹² *Idem*, at 75.

¹³ *Idem*, at 48.

ambiguous threshold is criticized by Bosch¹⁴ due to the fact that it is under-inclusive and unduly difficult to satisfy.

The Interpretative Guidance states that if a specific act is designed to, or capable of, inflicting harm that meets the threshold, then it is irrelevant whether the harm materializes or not.¹⁵ Therefore, the consideration of the first criterion should be the objective likelihood of the act to result in such harm.

B. Direct causation

It is correctly stated in the Interpretative Guidance that “there must be a direct causal link between the 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.”¹⁶ The term “likely” means that which can be reasonably expected to result from an act in the prevailing circumstances.¹⁷ Contrary to the position taken in the Interpretative Guidance, the term “direct” should be understood as a sufficiently close causal relation.¹⁸ However, the ICRC took this concept a step further and interpreted the direct causal link quite narrowly by introducing the concept of “one causal step”¹⁹ and by excluding all uninterrupted causal chains of events.²⁰ According to this, there is no direct causal link between the act of assembling improvised explosive devices (IEDs) and the harm likely to result from that act.²¹ It is clear that the ICRC in its Interpretative Guidance strived to limit the scope of DPH, but has not reflected reality. Although the ICRC’s notion of one causal step may make sense in theory, as has been indicated by Boothby,²² it is difficult to apply this notion in practice because attacks in modern conflicts are achieved through a multiplicity of integrated steps. The ICRC’s approach has also been rightly criticized by Watkin²³ as such a narrow interpretation of the rule creates a

¹⁴ Bosch, “The International Humanitarian Law Notion of Direct Participation in Hostilities - A Review of the ICRC Interpretive Guide and Subsequent Debate” 17 *Potchefstroom Elec. L.J.* (2014) 998, at 1011.

¹⁵ ICRC, *Interpretative Guidance*, *supra* note 2, at 47.

¹⁶ *Idem*, at 51.

¹⁷ *Idem*, at 47.

¹⁸ Van Der Toorn, “‘Direct Participation in Hostilities’: A Legal and Practical Road Test of the International Committee of the Red Cross’s Guidance through Afghanistan” 17 *Austl. Int’l L.J.* (2010) 7, at 24.

¹⁹ ICRC, *Interpretative Guidance*, *supra* note 2, at 53.

²⁰ *Idem*, at 54.

²¹ *Ibid.*

²² Boothby, “Direct Participation in Hostilities - A Discussion of the ICRC Interpretive Guidance” 1 *J. Int’l Human. Legal Stud.* (2010) 143, at 159.

²³ Watkin, “Opportunity Lost: Organized Armed Groups and The ICRC ‘Direct Participation in

major threat against both civilians and security forces. As has been stated by Dinstein,²⁴ equipping the enemy with specific means of harm, such as assembling IEDs or transporting certain equipment not too remotely from combat operations to persons who plan to attack somewhere, may also qualify as DPH. Therefore, direct causality should not be limited to the notion of “one causal step”. However, it does not mean that indirect causalities should be included. As has been rightly stated by Van Der Toorn,²⁵ the term “direct” should be understood as sufficiently close causal relations according to the facts on the ground.

Before passing on to the issue of human shields, one more controversial thing needs to be clarified about the assembly of IEDs. One may ask what distinguishes the person who assembles IEDs from the munitions factory worker. As has been indicated by Dinstein,²⁶ the worker does not specifically know when, where, and against whom the munitions will be used, but the person who assembles IEDs is much more closely linked to the actual delivery of the device to the objective.

The issue of human shields was another point that led to disagreement during the expert meetings.²⁷ In the context of human shields, the ICRC says that acting voluntarily and deliberately as a human shield in order to create a physical obstacle to military operations of the adversary can satisfy the direct causation criterion,²⁸ but, if the shield amounts only to a legal obstacle to military operations of the adversary, it is not causally direct.²⁹ However, there is no rule under IHL that requires such distinction. Schmitt criticizes³⁰ the ICRC's view and indicates that the legal obstacle is often even more effective than the physical one. He further states that this allowance of intentional misuse of the law's protective provisions creates a great risk that respect for IHL will

Hostilities' Interpretive Guidance” 42 *International Law and Politics* (2010) 641, at 680.

²⁴ Dinstein, “Direct Participation in Hostilities” 18 *Tilburg L. Rev.* (2013) 3, at 9, 11.

²⁵ Van Der Toorn, *supra* note 18, at 24.

²⁶ Dinstein, *supra* note 24, at 11.

²⁷ ICRC, Summary Report of the Second Expert Meeting on the Notion of Direct Participation in Hostilities (25 / 26 October 2004), at 6, available at <https://www.icrc.org/eng/assets/files/other/2004-07-report-dph-2004-icrc.pdf> (last visited 30 December 2015); ICRC, Summary Report of the Fourth Expert Meeting on the Notion of Direct Participation in Hostilities (27 / 28 November 2006), at 44, available at <https://www.icrc.org/eng/assets/files/other/2006-03-report-dph-2006-icrc.pdf> (last visited 30 December 2015); ICRC, Summary Report of the Fifth Expert Meeting on the Notion of Direct Participation in Hostilities (5 / 6 February 2008), at 70, available at <https://www.icrc.org/eng/assets/files/other/2008-05-report-dph-2008-icrc.pdf> (last visited 30 December 2015).

²⁸ ICRC, *Interpretative Guidance*, *supra* note 2, at 56.

²⁹ *Idem*, at 57.

³⁰ Schmitt, *supra* note 4, at 32.

be undermined.³¹ Therefore, if a party to the conflict can determine that persons are posing as human shields voluntarily, their act should be deemed qualifying as DPH regardless of the physical or legal character of the obstacle. Attention should be paid to whether there is a sufficient reasonable ground indicating the voluntariness of human shields. In cases of doubt, participants must be treated as involuntary human shields and remain protected civilians. Therefore, an attack on a military objective that is shielded involuntarily by civilians would only be possible if incidental loss (in other words collateral damage) would not exceed the anticipated military advantage. According to the author, the threshold of excessive collateral damage should be higher in this situation as involuntary human shields are resorted to in order to take military advantage via violating IHL.³² It should lastly be noted that the term 'excessive' implies a higher threshold than 'extensive' or 'disproportionate'.

C. Belligerent nexus

According to the Interpretative Guidance, the belligerent nexus requirement would be satisfied if an act, which meets the first two criteria, was "specifically designed in support of a party to an armed conflict and to the detriment of another".³³ First of all, as Schmitt indicates,³⁴ the term "and" used in the statement of the ICRC should be altered to the term "or" because it is possible to conduct an attack against one party without intending to assist its opponent. Secondly, although it is stated in the Interpretative Guidance that the determination of the belligerent nexus is related to the objective purpose of the act, it would still be not expectable from a reasonable commander in practice as has been indicated in the Interpretative Guidance.³⁵ The focus, therefore, should be on whether the conduct is objectively capable of inflicting harm either depriving a party to the conflict of certain advantages or promoting the military efforts of another. Consequently, the criterion should be interpreted widely and from the perspective of the person called on to make the determination of the belligerent nexus by considering information reasonably available to him.

III. Duration of direct participation in hostilities

According to the Interpretative Guidance, the duration of DPH covers

³¹ *Idem*, at 33.

³² For an in-depth analysis on voluntary human shields, see Lyall, "Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States", 9 *Melb. J. Int'l L.* (2008) 313.

³³ ICRC, *Interpretative Guidance*, *supra* note 2, at 58.

³⁴ Schmitt, *supra* note 4, at 34.

³⁵ ICRC, *Interpretative Guidance*, *supra* note 2, at 63.

the entire period of a specific act that is beyond the phase of its immediate execution. It starts with preparatory measures and lasts during the deployment to, and the return from, the location of its execution.³⁶ For instance, a farmer will be directly participating in hostilities while he is on his way to plant an IED and is returning from doing so.

According to Article 51 (3) AP I and Article 13 (3) AP II, civilians enjoy full immunity from direct attacks unless (material aspect) and for such time (temporal aspect) they directly participate in hostilities. However, the Interpretative Guidance was not content with this customary rule and introduced the new concept of the “revolving door”.³⁷ According to this, an individual will enjoy protection after each specific act even though he commits the same act on a regular basis.³⁸ For instance, if the farmer goes to plant IED every single night, the Interpretative Guidance says that he still enjoys protection after completing each specific act. However, the conduct should be considered as a whole, rather than specific acts. Otherwise, as Von Der Toorn rightly stated,³⁹ the farmer in our example would be in the privileged position of being able to continually change his status in a manner that is not in accordance with the spirit of IHL. Consequently, as has been indicated by Boothby,⁴⁰ an individual who commits specific attacks on a recurring basis loses protection not only during the entire period of the specific act, but also on a continuous basis unless there is an overt renunciation of participation in hostilities. The form of renunciation may vary depending on the circumstances and it may appear as unambiguous opting out, an affirmative act of withdrawal or extended nonparticipation. In conclusion, the revolving door approach that is introduced in the Interpretative Guidance is not in accordance with treaty law and customary IHL.

IV. Conclusion

The Interpretative Guidance itself provides that the notion of DPH must be understood in accordance with interpretation rule found in Article 31 (1) Vienna Convention on the Law of Treaties⁴¹, as the concept is not clearly defined in treaty law or clarified through state practice and international jurisprudence.⁴² Contrary to this, the ICRC seems to be endeavoring to create law in its Interpretative Guidance by introducing new concepts such

³⁶ *Idem*, at 65.

³⁷ *Idem*, at 70.

³⁸ *Idem*, at 71.

³⁹ Van Der Toorn, *supra* note 18, at 15.

⁴⁰ Boothby, *supra* note 22, at 162.

⁴¹ 1155 UNTS 331.

⁴² ICRC, *Interpretative Guidance*, *supra* note 2, at 27.

as “continuous combat function”, “one causal step”, and “revolving door” which do not exist in treaty law or customary IHL. In addition, its treatment of some specific issues such as voluntary human shields and the assembly of IEDs will most probably be rejected by States that engage in conflict on a frequent or intense scale. Therefore, the Interpretative Guidance interprets the notion of DPH in favor of non-State organized armed groups in a manner that States will never agree to. One may claim that the Interpretative Guidance strives to interpret the notion of DPH from the perspective of equity and therefore benefits non-State organized armed groups. However, as has been indicated by Pirim,⁴³ since the scope and consequences of equity is ambiguous, it cannot be seen as a source of international law. Furthermore, the Interpretative Guidance does not correctly maintain the balance between military necessity and humanitarian concerns. Therefore, as has been explained above in the light of scholarly critiques, it can be concluded that the Interpretative Guidance does not correctly reflect treaty law and customary IHL in the matter of DPH.

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⁴³ Pirim, “The Normative Character of Equity in International Law” 26 *Turkish Justice Academy Journal* (2016) 169, at 195.

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