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Which types of activities do not constitute direct participation

While, as noted above, making an essential contribution to the war effort could involve a civilian in direct participation, a non-essential contribution to the general war efforts (e.g., by supplying foodstuffs to combatants) is not tantamount to active participation in hostilities. [54] Thus, working in a munitions factory, supplying food to combatants, transport of food or humanitarian supplies, etc. are not considered to constitute direct participation. According to A.P.V. Rogers:

‘Taking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort and it would not include taking part in arms production or military engineering works of military transport.’[55]

Combatants clearly rely on the munitions made in the factories where civilians work and are equally dependent on the food they are supplied with. But in this case, the causality is too remote, and there is also no objective intention on the part of these civilians to participate. The civilian does not intend to harm the enemy by his actions or to gain any military advantage.

Notwithstanding the importance of certain key scientists to a military effort, most civilian scientists working for the military could not be considered as directly participating in hostilities where they are merely participating in the war effort. However, where by their work civilians put their own lives in danger, they cannot claim the protection against attack. As Kalshoven points out: ‘civilians cannot enjoy protection from attack when they enter military objectives (e.g., by working in a military base or in a munitions factory) or accompanying military units. This protection is diminished even when civilians merely live near or pass by a military objective, by dint of the very tangible danger of a legitimate collateral damage in case of attack.’[56] Iso part of customary international law.

Which types of activities constitute direct participation

According to the ICRC Commentary on Additional Protocol I: ‘Direct participation in

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hostilities implies a direct casual relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity occurs.’[44] The Commentary on Additional Protocol II states in a similar vein that: ‘The notion of direct participation in hostilities implies that there is a sufficient casual relationship between the act of participation and its immediate consequences.’[45]

But, in fact, this view, like the term ‘direct participation in hostilities’ itself is somewhat misleading as it suggests that only direct participation in a literal sense in activities amounting to attacks or which enable the launching of attacks on an enemy are covered. On the contrary, it is generally and increasingly considered that there are many activities which involve a more indirect role for civilians, where the civilian is one or more steps (geographically or temporally) away from the actual application of violence (which may be virtual rather than physical) and may not even consider him or herself to be a direct participant in hostilities, and which do not actually involve attacks in the literal or kinetic sense, or where the causality relationship is more indirect, yet which are also considered as direct participation in hostilities.

One can observe that at both ends of a spectrum of activities lie acts about which there appears to be consensus or at least little controversy that they constitute direct participation in hostilities or that they do not. It is those that lie somewhere in between that give rise to uncertainty.

Before focusing on the difficult cases, it is useful to first identify what are generally considered as clear-cut cases of direct participation by civilians in hostilities. According to Kalshoven: ‘[T]o take a direct part in hostilities’ must be interpreted to mean that the person in question performs hostile acts, which, by their nature or purpose, are designed to strike enemy combatants or *materiel*; acts in other words, such as firing at enemy soldiers, throwing a Molotov-cocktail at an enemy tank, blowing up a bridge carrying enemy war *materiel*, and so on.’[46] The US Navy manual states:

‘Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location

and attire, and other information available at the time.’[47]

A person who delivers ammunition within combat zones is generally considered to be directly participating in hostilities [48]. Yet, in this case, these persons are not themselves directly participating in an actual attack, but engaging in an activity which makes possible the direct participation in an attack by another person. Still, they are considered by most authorities to be legitimate military targets for the duration of their participation.

Civilians do not have to be located in the zone of hostilities or bear arms themselves in order to be considered as direct participants in hostilities and as subject to attack themselves. Where civilians are involved in operating weapons systems during situations of hostilities, even where they are at a geographical remove from the zone of hostilities, they can be considered as directly participating. For example, civilians manning computers which remotely control drones flying over foreign territory, gathering intelligence, selecting targets, or engaging in attacks, could certainly be considered to be directly participating in hostilities. Civilians involved in computer network attacks against an enemy could also be said to be directly participating in attacks.

The essential contribution that certain civilians make to the war effort may render them targetable. For example, certain civilians participating in strategic weapons programs, and at a geographical remove from the hostilities, could be considered as directly participating in hostilities and liable to attack. In 1989, a US memorandum of law concerning the prohibition of assassination stated:

‘The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of segments of the civilian population with each nation’s conduct of military operations and vital support activities. 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.’[49]

The memorandum gives the example of civilian scientists occupying key positions in a weapons program that is regarded as vital to a state’s national security or war effort. It noted that the participation of civilians in the Manhattan Project (more than 90 percent of the staff were civilians) was of such importance that they could have been considered as liable to attack.

Mike Schmitt has proposed a ‘criticality’ test, specifically ‘the criticality of the act to the

direct application of violence against the enemy’.[50] He states that ‘an individual performing an indispensable function in making possible the application of force against the enemy is directly participating. In other words, the appropriate test is whether that individual is an integral facet of the uninterrupted process of defeating the enemy.’[51]

To what extent is the intention of the participant or the results achieved relevant

It was stated above that some persons who might be considered as direct participants in hostilities might not actually be aware of their participation, begging the question, to what extent is the civilian’s state of mind relevant. What type of mens rea must a civilian possess in order to be considered as a direct participant in hostilities. It seems that one necessary mental element is that the civilian participant must intend to gain a military advantage or cause harm to the enemy. Indeed military responses to unlawful civilian involvement in hostilities acknowledge that there must be a certain intention on the part of the civilian who participates. This is clear even from the Commentaries to the First Additional Protocol, which states that direct participation encompasses ‘act which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces’.[52]

Suppose that a civilian peace activist in a state under occupation decides to destroy the enemy’s fighter planes, not in a bid to further the war effort (i.e., consciously to attain a military advantage) but for the opposite reason: in order to make a political protest against war and occupation and prevent the use of those planes for attacks on civilians. Is such a person taking a direct part in hostilities or engaging in an act of civil disobedience (albeit one that is a crime) Most if not all military persons would argue and correctly, it is submitted that such an action constitutes direct participation in hostilities, as the destruction of the planes causes harm to the enemy and has a direct military consequence for the armed forces, as it lessens their ability to wage war.

In this respect, while ‘intention’ is important, it is the intention to participate (that is, to engage in the activities actually engaged in and to cause harm or gain a military advantage by doing so) that is important, not the political or other motivation underlying the participation. In the above example, the civilian protester clearly intends to engage in actions that produce the result (the destruction of the planes). Whether his motivations are ‘positive’ (he is really peace-loving) or negative, while not entirely irrelevant to the decision to target him, would not render

him immune from attack, and in any case, such 'subjective' intentions are in many cases impossible to discern: in this sense, objective intention, as in the intention to participate in hostilities, must be distinguished and separated from (possible political) subjective motivation.

Another question to consider is to what extent the impact of participation of a civilian in hostilities should be considered. That is, should a results-oriented approach be adopted or an objective intention-oriented approach (in the narrow sense used above) or both. This is particularly relevant with regard to the choice of weapon used.[53] Arguably, the results of the participation should not be determinative of a civilian's participation. When the question of whether or not an individual civilian is considered to be directly participating in hostilities is made contingent on the actual effects achieved, it leaves too much to chance. If a civilian lobbs a hand grenade at a soldier during an armed conflict, few would argue with the proposition that he intends to inflict serious injury or harm and is a direct participant in hostilities. His objective intention is discernable from the choice of weapon used. If the hand grenade misses its target and ends up in a river, is the civilian's act any less illegal, or is he any less of a (future) military threat

What if a child throws a stone at a soldier on patrol during a situation of occupation. In this case, the choice of weapon could indicate a certain intention (or lack of) on the part of the assailant. If he had wanted to participate in hostilities and thereby inflict actual harm, he might better have chosen a Molotov cocktail. The fact that he has chosen as his weapon a stone could mean that he merely intends to express his dissatisfaction with the occupation. Still, accidents can happen and it is possible that the stone could strike the soldier in the head, inflicting a mortal blow. Should his bad luck in killing the soldier (a results-oriented approach) magically transform him from a protester into a war criminal. A child who fires a Molotov cocktail at a soldier might reasonably expect to inflict serious harm on the recipient. Yet, fate might intervene, and the Molotov cocktail could miss its target.

These examples hopefully illustrate that there are difficulties with a results-oriented approach. For one thing, it leaves too much to chance: a civilian may intend to directly participate, with the goal of achieving a military advantage, but he may fail in his attempt, or even be less successful than he had hoped. But for all that, he is no less of a direct military threat, including an ongoing threat. Indeed, his initial failure may simply spur him on to try again.

Apropos the example of the child throwing a stone, one can argue that a child is not in a

position to form the necessary intention to directly participate in hostilities, and the presumption *vis-à-vis* every minor should be that they are not direct participants unless there is a preponderance of evidence to the contrary (which the use of weapon could signify). It should also be mentioned that any military response, even to a direct attack, must be proportionate. Even if the child is concerned to be a direct participant in hostilities, a proportionate response (one that is informed by the rules of international humanitarian law) would not involve the use of live fire or even plastic bullets.

While it can validly be argued that in the cut and thrust of a situation of armed conflict, there is simply no time to look at the intention motivating an act, the idea is not to try and read the minds of civilians engaged in hostilities but to discern their intention from the available evidence, on a case-by-case basis. This seems indeed to be consonant with the above-quoted US Navy Manual, which enjoins combatants in the field to judge each action on its own merits, and consider all the available information at the time before reacting. Clearly, wars can only be waged and responses calibrated based on visible and discernable action, not on the unknown (and possibly unknowable) intention of an assailant. Bearing in mind that where reactive force is used, it must be proportionate and militarily necessary, one could argue that where a civilian's clear (on its face) intention is not the gaining of a military advantage or the infliction of harm on the enemy, he is probably not directly participating in hostilities.