
**THE INTERNATIONAL HUMANITARIAN LAW NOTION OF DIRECT
PARTICIPATION IN HOSTILITIES – A REVIEW OF THE ICRC
INTERPRETIVE GUIDE AND SUBSEQUENT DEBATE**

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SUMMARY

The phrase "direct participation in hostilities" has a very specific meaning in international humanitarian law (IHL). Those individuals who are clothed with combatant status are authorised to participate directly in hostilities without fear of prosecution, while civilians lose their civilian immunity against direct targeting whilst they participate directly in hostilities. Any civilian activity which amounts to "direct participation in hostilities" temporarily suspends their presumptive civilian protection and exposes them to both direct targeting as a legitimate military target and prosecution for their unauthorised participation in hostilities. Since existing treaty sources of IHL do not provide a definition of what activities amount to "direct participation in hostilities", the ICRC in 2009 released an Interpretive Guide on the Notion of Direct Participation in Hostilities - in the hope of providing a neutral, impartial and balanced interpretation of the longstanding IHL principle of direct participation in hostilities. While not without criticism, the Interpretive Guide aims to respect the customary IHL distinction between "direct participation in hostilities" and mere involvement in the general war effort. The Guide proposes a three-pronged test which establishes a threshold of harm, and requires direct causation together with a belligerent nexus. Collectively, these criteria limit overly-broad targeting policies, while distinguishing occasions of legitimate military targeting from common, criminal activities. Together with these three criteria, the Guide introduces the notion of the revolving door of protection, together with the concept of a "continuous combat function". Both these new concepts have been the subject of criticism, as too the idea that a presumption of non-participation status should apply in cases of

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doubt. Nevertheless "nothing indicates that the ICRC's interpretive guidance is substantively inaccurate, unbalanced, or otherwise inappropriate, or that its recommendations cannot be realistically translated into operational practice"¹ in a way which will ensure that the fundamental principles of distinction and civilian immunity upon which all of IHL is built are observed.

KEYWORDS: direct participation in hostilities; international humanitarian law; revolving door of protection, continuous combative function

* ¹ Melzer 2010 *NYU J Int'l L & Pol* 915.