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'DADDY, WHAT DID YOU DO IN THE GREAT WAR?'[1] DIRECT PARTICIPATION IN HOSTILITIES, A POSSIBLE SOLUTION TO A FRAUGHT LEGAL POSITION

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The issue of whether or not a civilian is culpable for having directly participated in hostilities, as per Article 51(3) of the First Additional Protocol to the Geneva Conventions is a complex and highly controversial issue. Further complexity is faced when considering the issue of targeting, and whether an individual may be legitimately targeted for his/her direct participation in hostilities. The aim of this paper is to examine the issue and to pose an alternative mechanism so as to provide a practical test to determine an individuals' status. It also calls upon International jurists to provide much needed guidance.

Key words: *direct participation, hostilities, Geneva Convention, alternative mechanism*

INTRODUCTION

The August conflict between the Russian Federation and Georgian Government in the disputed regions of Abkhazia and South Ossetia brought into sharp focus not only the actions of regular combatants, but also the behaviour and conduct of those civilians who engaged directly in the hostilities. Media reports concerning the activities of a variety of Abkhazi and South Ossetian militiamen, bandits and armed gangs appears to highlight, yet again, the *'democratisation of violence'*[2] that features so commonly in such inter-ethnic conflict.

Such alleged conduct does, however, give a practical example to illuminate the current circuitous debate at the International Committee of the Red Cross (ICRC) regarding the precise meaning of the phrase direct participation in hostilities.

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[1] The quote is taken from a First World War recruitment poster in which a young girl sits on her father's knee and asks him the question. Available from http://beck.library.emory.edu/greatwar/postcard-images/daddy.jpg

[2] A phrase I attribute to the United Kingdom's Chief Rabbi Sir Dr Jonathan Sachs.

The reality of civilians participating directly or otherwise in hostilities is of course nothing new; phrases such as *guerrilla*, *franc tireur, levee en masse* and unprivileged belligerent[3]/combatant[4] bear witness to the fact that civilian 'soldiers' have played a significant role in warfare throughout modern history. This reality is neatly encapsulated by McLaughlin[5] who appreciates and acknowledges that, *'…the armed conflict paradigm permits the use of lethal force against certain categories of people outside the situations of self-defence. It permits offensive operations (attack) where the use of lethal force is authorised against a person or a group who may permissibly be targeted within the bounds of IHL. Provided that the requisite assessments are made, considerations balanced and precautions observed, the 'enemy' – be they formed units, levee en masse, militias, dissident organised armed groups or civilians taking a direct part in hostilities – may be attacked and killed.'*

The *'democratisation of violence'*, however, which emerges in the Post-Cold War World increases the incidence and awareness of the phenomenon. The significance of this is epitomized by the concept of asymmetric conflict, arguably the very hallmark of the current 'war on terror', in which regular members of a state's armed forces engage and indeed are, in turn, engaged by, irregular, often non-state forces. These forces are loosely described as terrorists, militiamen or insurgents. Significantly such concerns should not be viewed exclusively through the paradigm of the 'war on terror'. Perhaps the most tragic example of a civilian who participates directly in hostilities is the child soldier, those youngsters deliberately recruited to undertake heinous acts with unflinching loyalty. Consequently the potential of a civilian engaging, for whatever reason, in direct combat was specifically recognised by Article 51 (3) of the First Additional Protocol, which provides that: *'Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.'* As Best[6] appreciates, *'Civilians are advised that they will retain their protected status "unless and for such time as they take a direct part in hostilities", i.e. in the event of their so taking part in guerrilla warfare and living to tell the tale, they can go back to being civilians afterwards.'*[7] The phrase direct participation in hostilities appears, of itself, a simple and sufficiently innocuous phrase, but what,

[3] See for example Major R. R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 1951 Brit. Y.B. Int'l. L. 323

[4] See for example Knut Dormann, *The Legal Situation of "Unlawful/unprivileged Combatants*", 849 Int. Rev. Red Cross 45 (2003) (Discussing the legal status of unlawful combatants)

[5] Rob Mc Laughlin, *The legal regime applicable to use of lethal force when operating under a United Nations Security Council Chapter VII mandate authorising "all necessary means"*, 12 J.C. & S. L. 389, 404 (2007) (Discussing the paradigm of warfare and legitimate military targeting)

[6] Geoffrey Best, War & Law Since 1945 255 Clarendon Press 1997.

[7] Interestingly McLaughlin goes so far as to suggest that the *'1949 Geneva Conventions, Common Article 3, implicitly permits attack on civilians taking a direct or active part in hostilities by virtue of the fact that it precludes attack on "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms…',* see McLaughlin, note 5 at foot 57. Whilst such a position appears entirely logical it may come as a stark and unpleasant reminder of the perils of warfare to others.

if any, situation(s) does it envisage precisely? Is it equitable that certain behaviour conducted by civilians is regarded as constituting direct participation in hostilities, whilst other, apparently similar, behaviour is not? Consider the following scenario as an example:

Night has fallen; a chill wind blows and eerie animal calls resonate across the open prairie. The inhabitants of the cavalry outpost in the lonely timber fort suddenly realise that hostile forces, renegade Indian braves or desperate bandits (depending on the title of the movie) surround them. The soldiers and traders attend to the defence of the fort; the older women nurse the frightened children, whilst the plucky younger women however assist their men folk by loading and re-loading their rifles.

This of course is a scene so familiar to the Western film genre that it achieves cliché status, but whom, if anyone, in this scenario has taken a direct part in hostilities? In seeking this determination a series of questions are posed which require some considerable analysis. The first issue to address is whether such a conflict is subject to the provisions of the First Additional Protocol, only then can one contemplate whether a nexus has, or needs, to be established between the hostilities and a wider armed conflict. Eventually we begin to consider the actions, and perhaps even the intentions, of those involved and seek to evaluate whether or not a sufficient causal link has been established so as to determine if they have participated directly. In loading the weapons have the women 'directly participated'? In assisting the soldiers in the defence of the fort have the traders done so? In tending to the soldiers minor wounds, so that they can than return to their posts, have those providing medical aid also directly participated in the hostilities? These are all issues which have been debated at great length by the Experts convened by the International Committee of the Red Cross and have informed present thinking on the nature of direct participation.

THE CURRENT DEBATE CONCERNING PARTICIPATION

It appears that determining the scope and nature of the term direct participation in hostilities is as elusive as pinning down the description of baldness. As Lindley[8] acknowledges, *'[W]e know what perfect baldness would consist of. ...It would be idle to attempt a precise definition of how many hairs, or what proportion of hair, a person must have lost in order to be correctly described as bald.'* This, admittedly flippant, comparison seeks to highlight the fundamental problems for practical application, faced by both humanitarian and military lawyers and perhaps most significantly by commanders on the ground, posed by musing the phrase direct participation in hostilities.

Whilst the fundamental basis of international humanitarian law is the principle of distinction, between belligerents (combatants) and non-belligerents (civilians

[8] Richard Lindley, Autonomy (Issues in Political Theory) 69-70 Palgrave Macmillan 1986

and those rendered *hors de combat*), this distinction may become blurred in certain, albeit limited, circumstances. The aim of this paper is, therefore, to examine the current debate and to highlight the problematic and apparently insurmountable concerns and issues, which emerge from the debate concerning the term direct participation in hostilities. This author would seek to propose an alternative approach, which aims to bring a greater degree of clarity and certainty and also calls upon International Courts and Tribunals to provide much needed practical guidance in this area.

As Rogers[9]acknowledges the question of who constitutes a member of the enemy's armed forces is increasingly complex, *'[I]n a conventional conflict between states such as the Falklands War of 1982, this is not difficult. It is difficult when guerrilla tactics are adopted or irregular militias, paramilitary groups or resistance movements are involved in the fighting.'*

The significance of this issue was recognised in the Summary Report of the Third Expert Meeting[10], which acknowledged that, *'... counter-insurgency operations targeted mainly persons not military objectives. Therefore the notion of DPH was of utmost importance in situations of non-international armed conflict. In practice most targeting decisions had to be taken in a 'split second' by an individual soldier, who had no time to seek additional guidance. However, correct targeting was not only in the interest of the civilian population but also of the armed forces, because the erroneous killing of a peaceful civilian wholly alienated the civilian population and created new enemies.'* Last summer's well documented attack by the United States Air Force on a suspected Taliban stronghold, which led to the deaths of ninety civilians, including sixty children highlights, yet again, the grave concerns raised when a targeting decision proves erroneous[11].

The technical complexities and legal challenges posed when making targeting decisions are regularly faced not only by coalition forces in Iraq and NATO-led forces in Afghanistan, but also by Russian Federation and Georgian forces in Abkhazia and South Ossetia in which the 'farmer by day, fighter by night' scenario is significantly more than an exercise in academic curiosity. Such apparent behaviour by civilians exposes and then seems to exploit the phrase *'for such time'* contained within Article 51(3). This 'revolving door'[12] phenomenon appears to present a considerable degree of frustration to the efforts of the experts assembled by the ICRC to deliberate on the meaning of the term direct participation in hostilities. Similar difficulties also arise from the activities of those 'civilians' employed by private military companies and engaged by state

[9] Anthony P. V Rogers, Law of the battlefield 31 Manchester University Press 2004

[10] Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities, Convened at Geneva, 23 – 25 October 2005, at page 42. Available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf

[11] See for example Jeremy Page, *'89 Afghan Civilians Die, in 'tragic' US air strike'*, The Times, 25 August 2008, at 1.

[12] A phrase I attribute to Hays Parks, *Air War and the Laws of War*, 1 A. F. L. Rev. 118 (1990) (Discussing the issue of direct participation)

governments, NGO's or multinational corporations in Iraq and elsewhere. Are such 'mercenaries', participating directly in hostilities by guarding installations, providing equipment and training others? Or, alternatively, are they engaged in everything but, their roles being merely auxiliary? (A position often advocated by those same companies and their clients.) It perhaps comes as no surprise that as a consequence of the ICRC convened meetings of experts the reams of materials which have been produced in recent years concerning these prescient questions, appears to grow exponentially. Apparently very little, however, in the way of a definitive consensus emerges.

What may, therefore, be beneficial is a definitive set of practical legal principles from which lawyers and commanders can determine definitively whether or not a civilian has, or is, participating directly in hostilities. Such an evaluation process could then form the basis of a targeting decision or determination of detainee status following arrest or capture. Issues which if determined incorrectly can have widespread and lasting detrimental consequences not only for the military commanders on the ground, but also upon policy makers at home.

The guidance currently available to both lawyers and military commanders is however far from being either adequate or satisfactory. As Kretzmer[13] acknowledges, *'[T]he ICRC Commentary on Additional Protocol I merely states that "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.'*

Elements within the Experts second meeting[14] believed that the consensus reached at the Diplomatic Conference was that direct participation in hostilities consisted of actual shooting and war fighting and that everything else did not constitute direct participation in hostilities. One could surmise however, from the Commentary, that a host of activities and individuals could be determined as participating directly in hostilities, if one was to read the phrase *'acts of war… likely to cause actual harm'* liberally. This conclusion is of course a result of not only a broad interpretation of the Commentary, but also an acknowledgement of the ever-changing nature of warfare and weapons systems. 'Total war' is just one example in which one could argue that a state's entire population is in essence participating directly in hostilities.

More practically, an increasing number of sophisticated weapons systems rely heavily on civilian contractors to not only maintain, but also to operate them. Orakhelashivili[15] cautions though that, *'…if anything or anybody that is*

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[13] David Kretzmer, *Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?* 16 EJIL 171, 192 (2005) (Discussing the Commentary relating to Article 51(3).)

[14] Summary Report of the Second Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, Convened at The Hague, 25 – 26 October 2004, at page 42. Available at http://www.icrc.org/Web/eng/siteeng0.nsf/ htmlall/ participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf

[15] Alexander Orakhelashvili, *The interaction between rights and humanitarian law: fragmentation, conflict, parallelism, or convergence?* 19 EJIL 161, 167 (2008) (Discussing the definition of direct

potentially or prospectively viewed as a military target or unlawful combatant can be attacked, then any civilian target can be attacked because it can always potentially become or has in the past been part of combat action. This is not an outcome that humanitarian law can accept.' Whilst naturally one would agree with the author that such a sweeping, universal definition is to be avoided, Orakhelashivili fails to provide any actual guidance as to how such a distinction, between a military target and non-military facility, is to be made. So as to ensure that such an all-embracing conclusion of legitimate targeting is not reached Rogers[16] provides examples of the problem and lists the activities of civilians, which do constitute direct participation in hostilities. Whilst illustrative such examples do no provide a practical test, as the Experts[17] appreciated the assessment of, *'direct participation in hostilities had to be made from the perspective of the soldier confronted with the situation and had to be linked to that soldier's reasonable evaluation that the civilian in question, represented an actual threat to himself or his fellow soldiers.'* And that whilst such civilians should be accorded the benefit of the doubt, *'...in urban warfare, a soldier confronted with armed civilians could not be expected to draw the distinction between plunder, looting and robbery but must be allowed to directly attack any civilian carrying a weapon, even if that civilian was only trying to loot a supermarket.'* Similarly the Experts appeared cognisant of the fact that making such a distinction was increasingly difficult, *'... particularly in societies where inter-clan rivalries escalated to the level of non-international armed conflict. In such situations, all clan members of fighting age had the tendency to get involved in atrocities against fellow civilians including women and children, acts that could well be regarded as direct participation in the hostilities. The difficulty was exacerbated in situations of failed states, where it could be next to impossible to establish a specific act of inter-civilian violence was carried out on behalf of an identifiable party to the conflict.'* The activities of South Ossetian militiamen in seeking to 'ethnically cleanse' their villages of their Georgian neighbours is only one example of such a dilemma. The Experts[18] did however conclude that, *'[G]roups such as gangsters, pirates and mafia often operated in a grey zone where it was difficult to distinguish them from those involved in an armed conflict. Clearly, groups could engage in hostilities for political or even purely economic interests that were beyond mere "private gain". Such groups could not be regarded as ordinary mafia, but should be regarded as directly participating in hostilities.'* Whilst the tribal warlords in Afghanistan, North Western Pakistan and Darfur may provide examples of such groups, do the South American drug cartels, Somali pirates or the *Cosa Nostra?*

Perhaps the most regrettable feature of the debate was the position adopted by the International Criminal Tribunal for the Former Yugoslavia in its judgment in

participation)

[16] Rogers, note 9 at page 11.

[17] Third Summary Report, note 10 at pages 11-12.

[18] Third Summary Report, note 10 at page 37.

the case of *Blaškić*[19], whereby the Trial Chamber appeared to declare itself, *'... content to define a civilian as the opposite of a combatant.'* In invoking Article 51(3) of the First Additional Protocol, Delmas-Marty[20] noted that, *'...the Court derives the following definition: A civilian unlawful combatant is one who takes part in hostilities, directly, for such time as he or she does so.'* Whilst this remains consistent with the ICRC Commentary, one would suggest that this does not provide much in the way of any assistance to those concerned with the practicalities of applying Article 51(3). Furthermore one would also stress that this was very much a missed opportunity by such an eminent institution, which has in previous cases appeared to act teleologically, if not perhaps in a spirit of judicial activism, to bring about much clarity and guidance to the discipline. One would of course concede that such an opportunity might arise in future, in particular in relation to the case of Thomas Lubanga currently before the International Criminal Court. Without such guidance a potentially fatalistic approach of 'I know it when I see it', in relation to direct participation, may develop with potentially very grave consequences for all concerned.

INDIRECT PARTICIPATION

The debate concerning direct participation in hostilities thus far appears to achieve little but to further complicate and obfuscate already murky legal waters, whilst frustrating those whose who argue that their own lives and those of their subordinates are threatened by civilian fighters who appear inviolate.

What exactly constitutes direct participation? This central question remains unresolved. The Experts[21] appear to have acknowledged that, *'[w]hen interpreting the notion of "direct participation in hostilities" it was preferable to remain as close as possible to actual fighting, because the more difficult it was to identify the decisive criteria in practice, the wider the interpretation of the notion of "direct participation" would be.'* This author naturally agrees with such a general principle, but would propose that rather than attempting to establish a decisive criteria relating to direct participation in hostilities, an alternative is considered, namely indirect participation in hostilities. Such indirect participation is in practice far more frequent and could easily be argued to cover the activities of religious and medical personnel in addition to munitions workers, civilian defence company contractors, entertainers, (the USO Show celebrities for example), as well as the families of service personnel. It would also include those civilians whose real participation in the hostilities is at greatest only marginal and ancillary, such as

[19] ICTY Judgment in the case of *Blaškić,* (IT-95-14-T), Trial Chamber 3rd March 2000, § 180, cited in Mireille Delmas-Marty, *The paradigm of the war crime: Legitimating inhuman treatment?* 5 JICJ 584, 590 (2007) (Discussing the ICTY judgment in *Blaškić*)

[20] Delmas-Marty, note 19, at page 590

[21] Third Summary Report, note 10 at page 32.

caterers, cleaners and the like. Consequently those deemed to have participated only indirectly would avoid the perils of Article 51(3).

To determine such indirect participation one might suggest that the test may be gleaned from domestic criminal law, in particular the inchoate offences and specifically the law of attempt, whereby only those acts which are, *'more than merely preparatory'*[22] to the commission of the offence are proscribed.

An analogy may therefore be drawn in which an individual, or group of individuals, who are engaged in those acts which are merely preparatory are deemed to have participated only indirectly in hostilities and, are accordingly, to be treated as civilian non-combatants. Such a position would therefore allow civilians to undertake relatively ancillary, auxiliary tasks, with a degree of certainty that their activities cannot be regarded as being direct participation in hostilities. Such activity could include "Bob" the truck driver, so beloved of the Experts in the course of their deliberations, and so allow him to deliver his supplies to the front and return safely. In determining which acts are merely preparatory, and which are more akin to direct participation the Experts[23] themselves provide some guidance. They suggest in relation to the distinction between ordinary crime and direct participation in hostilities that, an evaluation and assessment, *'...should be made based on the objective intention behind the act which can be objectively deduced from the way a conflict is being waged.'* Equally such an equation could provide a practical test from which to determine whether an individual had participated directly or indirectly in hostilities.

This author would suggest that with some further development[24] the notion of indirect participation has the potential to provide a non-exhaustive list and practical test which would satisfy the Experts[25] who advocated that, *'[A]ny potential list should be used to identify criteria implementable on the battlefield and as an illustration of the general definition.'* One is of course conscious of the potential backlash that may be experienced if certain commanders conclude that military necessity and effectiveness is in any way hampered or impeded by an additional layer of '*lawfare*'[26].

The notion of indirect participation does not however alter the legitimacy of targeting installations of military significance. If read cynically, the targeting of

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[22] See for example UK Criminal Attempts Act, 1981 c1 § 1(1) (Eng & Wales)

[23] Second Summary Report, note 14 at page 4.

[24] Including perhaps the notion of "but for" causation advocated by Prof. Michael Schmitt, see Second Summary Report, note 14 at page 11) Such a concept may be most useful, *post facto,* in determining whether an individual had in fact participated directly in hostilities.

[25] Summary Report of the First Expert Meeting on Direct Participation in Hostilities under International Humanitarian Law, Convened at Geneva, 2nd June 2003, at page 2. Available at http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf

[26] I attribute the term 'lawfare' to Major General Charles J. Dunlop Jr., USAF see *Lawfare Today: A Perspective*, Yale J. Int'l Affs, (Winter 2008) at 146. This author however seeks to apply it in a potentially derogatory context.

a weapons factory or ammunition shipment would still be deemed a legitimate target, with the resulting civilian deaths being deemed mere collateral damage. However, by demonstrating the concept of merely preparatory acts, the notion of indirect participation emphasises the fact that direct participation in hostilities, with respect to the actions of individuals, is limited only to actual combat as opposed to the plethora of surrounding supporting roles and tasks. This may consequently possibly mitigate, as the Experts[27] recognised, the almost Orwellian idea of treating some civilians *'as more civilian than others'*, a concern which is perhaps more concerning in relation to the temporal issue contained within Article 51(3).

THE TEMPORAL SCOPE

The Experts[28], who questioned whether, *'...members of organised armed groups are "civilians" and thus subject to direct attack only for such time as they directly participate in the hostilities',* identified the nub of this concern. As Orakhelashvili[29] identifies, *'the temporal limitation included in Article 51(3) of Additional Protocol I is absolutely crucial to maintaining intact the entire system of the civilian/military targets distinction. In order to be workable, this distinction must draw straightforward distinction in terms which targets can be attacked and which cannot.'*

Yet again an apparently simple phrase, 'and for such time', leads to incredible feats of military legal contortions, as noted above, though the 'revolving door' argument leads to serious practical concerns for both lawyers and commanders on the ground. Faced with such questions the Supreme Court of Israel in the case of *The Public Committee Against Torture in Israel et al v. The Government of Israel*[30], examined the issue of whether suspected terrorists can be deemed to be legitimate targets according to Article 51(3). The Court held that, *'[R]egarding the scope of the wording "and for such time" there is no consensus in the international literature ... with no consensus regarding the interpretation of the wording "for such time", there is no choice but to proceed from case to case*[31]*.'* Ben-Naftazi[32] declares that, *'[T]he analysis of the third, temporal, element ('For such time') is the least satisfactory: The Court does not, in fact, offer a standard by which that time is measured. Instead, it stipulates guidelines carrying a deterrence effect on future operations.'*

[27] First Summary Report, note 25 at page 1.

[28] Third Summary Report, note 10, at page 41.

[29] Orakhelashvili, note 15, at page 167.

[30] HCJ 769/02 *The Public Committee Against Torture in Israel et al v. The Government of Israel* [2005] B.H.R.C. 7 31

[31] *Ibid,* at para. 39

[32] Orna Ben-Naftazi, *A judgment in the shadow of international criminal law* 5 JICJ 322, 329 (2007) (Discussing the *Public Committee* case.)

A debate therefore emerges as to whether the 'revolving door' even exists. Kretzmer[33] notes that, *'[P]rofessor Cassese is adamant* (in his opinion before the Israeli Supreme Court) *that this term must be given a narrow meaning.'* Consequently *'[I]t is only while the persons are actually engaged in carrying out their hostile acts that they may be targeted. As soon as they have completed the hostile act, they once again enjoy the same protection as every other civilian.'* Kretzmer also identifies the fact that such a position is supported by the Commentary.

Others seek to differ; significantly The Inter-American Commission on Human Rights expressed a contrasting opinion. As Kretzmer[34] acknowledges, *'[I]n discussing Art. 51(3) of API the Commission stated that non-combatants who take a direct part in hostilities temporarily forfeit their immunity from direct individualized attack during such time as they assume the role of combatant. The Commission added: "It is possible in this connection, however, that once a person qualifies as a combatant, whether regular or irregular, privileged or unprivileged, he or she cannot revert back to civilian status or otherwise alternate between combatant and civilian status."*[35]

It may, therefore, be preferable to address the notion of 'for such time', as the Israeli Court suggests, on a case-by-case basis, as opposed to adopting a universal, perhaps utilitarian approach, which favours one position above another. Equally, it may prove beneficial to view the temporal element purely from a *post facto* perspective when dealing with individuals who have directly participated in hostilities, so as to determine their detainee status after the event. Following on from this, this author would suggest that in relation to targeting decisions the temporal issue is wholly eliminated from the decision, therefore permitting the targeting of individuals only for so long as they are actually directly participating in hostilities. This does not, however, permit them the benefit of the revolving door, rather the contrary.

This approach appreciates the guidance found in the Israeli Supreme Court's judgment, which introduces the possibility of exploring alternative means of eliminating the potential threat posed by individuals who do engage in hostilities. The Court suggests that prior to a lethal attack other non-lethal means are first exhausted, such as arrest, investigation and prosecution. Similarly military commanders and law enforcement officials are entitled to seek the arrest of individuals known to have committed, or to be suspected of having committed, acts of violence or perfidious conduct. Should it be necessary such law enforcement

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[33] Kretzmer, note 13, at page 108.

[34] Kretzmer, note 13, at footnote 101

[35] Inter-American Commission Report on Terrorism and Human Rights cited in Kretzmer, note 13 at footnote 101. A position which Parks also advocates, note 12. Parks claims that an individual once engaged directly in combat cannot revert to his/her previous civilian status. Surely this position is also subject to criticism of its temporal scope; in a protracted conflict of many years duration is it right that an individual whose participation was some considerable time in the past is sill subject to targeting based on his previous direct participation in hostilities?

and/or military elements may resort to lethal force in order to defend themselves whilst seeking to affect the arrest of such an individual(s). This approach may as a consequence reduce unnecessary civilian casualties and so reduce the potential for further hostility.

In disaggregating the two concepts the practical application of Article 51(3) may become possible.

A ROLE FOR INTERNATIONAL COURTS OR TRIBUNALS?

The lack of further guidance as to the precise meaning and nature of the term *'direct participation in hostilities'* allows an increasingly broad interpretation of the phrase, which may prove problematic in its potential to incorporate within its ambit, those activities which may be, in reality far, more marginal to military operations than they first appear.

Such a concern is seen in the response to the judgment in the case of *The Public Committee Against Torture.* Schondorf[36] suggests that in, *'[A]pplying the elements of Article 51(3), the Court adopted a relatively expansive interpretation of the term 'taking direct part in hostilities', including in its ambit "a person who collects intelligence for the army, whether on issues regarding the hostilities ... , or beyond those issues ... ; a person who transports unlawful combatants to or from the place where hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation or provides service to them be the distance from the battlefield as it may."*[37] Furthermore as Kretzmer[38] similarly notes, *'... in the commentary on the Joint Services Regulations of the Bundeswehr, the term* (direct participation in hostilities) *is widened to include "civilians who operate a weapons system, supervise such operation, or service such equipment", as well as "preparation for a military operation and intention to take part therein", provided they are directly related to hostilities and "represent a direct threat to the enemy"*

As one noted above, the increasing role played by civilian contractors in supporting modern weapons systems creates a significant grey area which appears, from the quotation above, to place even the humblest maintenance technician in harms way. Such an interpretation may appear expedient to some; the consequences of targeting such individuals may prove far more controversial.

Such positions, as those quoted above, appear to reflect the opinions of some of the Experts[39] who suggest that direct participation in hostilities does

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[36] Roy S. Schondorf, *The targeted killing judgment: a preliminary assessment* 5 JICJ 301, 307 (2007) (Discussing the *Public Committee* case.)

[37] *The Public Committee Against Torture*, note 30, at § 35

[38] See Dieter Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflict 232 Oxford University Press1996, cited in Kretzmer, note 13, at page 192 and footnote 98.

[39] Third Summary Report, note 10, at page 14

not necessarily have to cause death, injury or destruction, therefore the concept of direct participation in hostilities would not be limited to traditional war fighting scenarios. One would therefore repeat, what therefore does constitute direct participation in hostilities? This lack of clarity may ultimately prove to be wholly counterproductive, as military lawyers and commanders may fail to agree on a working definition or practical test. In such circumstances it could be that a small number of commanders simply ignore advice, or are unable to communicate it effectively to front line personnel. Consequently war crimes and other grave breaches, which may have otherwise have been avoided, may occur and so further incite an insurgency. This event could then have potentially devastating consequences to the prosecution of the conflict and wider implications for international opinion and relations.

It must be imperative upon the various International Courts and Tribunals to provide much needed guidance on this issue, guidance which avoids all possible allegations of overly complex notions of '*lawfare*' and that provides individual soldiers and commanders a basic, practical framework in which to conduct operations. The Experts[40] appeared to have reached a similar conclusion, when they acknowledged that, *'[A]fter all, the criteria for "direct participation in hostilities " not only had to be sufficiently precise to allow the prosecution of the civilians in question after capture, but also simple and clear enough to remain understandable for the persons actually confronted with an operational situation.'* As Best[41] appreciates, *'[W]hat is oversimplified may be a better humanitarian working-tool than what has become endlessly complicated.'* In embracing simplicity and avoiding complexity much may be achieved.

CONCLUSION

It remains a depressing reality that civilians form the greatest proportion of victims in any contemporary armed conflict. Best[42] acknowledges that, *' …"protection"* is in fact a term of legal art', and that *'…civilians at large, civilians in general: How far they can actually enjoy the protection it promises must largely depend, as it always has done, on circumstances, politics, personalities, accident, luck and so on; things which the soldier never forgets, but the civilian hardly ever remembers.'*

However, despite such pessimism, it must also be acknowledged that an increasing number of civilians are consciously choosing to participate directly in hostilities and that this phenomenon appears to be growing with every new conflict. Furthermore such individuals, who for any number of reasons avoid direct membership of, or integration into, regular armed forces, often conduct

[40] Third Summary Report, note 10, at page 30

[41] Best, note 3, at page 262.

[42] Best, note 3, at page 256.

hostilities in flagrant disregard to the laws and customs of war, as was witnessed, for example, in the case of *Tadic*[43]. As the Experts[44] noted, the *raison d'etre of* Article 51(3) was to recognise that, *'...maximum protection for civilians was an important, but by no means the only purpose of the rule on direct participation in hostilities. More particularly, the aim of the rule was also to strengthen the principle of distinction by keeping civilians away from the battlefield. This was achieved by depriving any civilian of his or her protection against direct attack if he or she got involved in activities intended to harm the adversary.'* Whilst admirable, this distinction becomes increasingly difficult, if not practically impossible, in an age where the changes to the nature of armed conflict occur at such a rapid rate. Changes not only to the equipment and personnel employed by the state, but also the impact of the *'democratisation of violence'* in which the civilian fighter is an increasingly common feature necessitate an urgent re-assessment of legal rules, which now appear as outdated as a Great War recruitment poster from which this author draws his title.

Therefore in response to his daughters question, *'Daddy, what did YOU do in the Great War?'* The father, if he himself questions whether he participated directly in the hostilities, may wish to first telephone his lawyer before providing her with an answer.

"TATA, ŠTO SI TI RADIO U VELIKOM RATU?" - IZRAVNO UČEŠĆE U NEPRIJATELJSTVIMA I MOGUĆE RJEŠENJE ZA SLOŽENU PRAVNU POZICIJU

Prema članku 51. (3) Prvog dodatka protokolu ženevskih konvencija pitanje kažnjivosti za civile koji izravno sudjeluje u neprijateljstvima je složeno i nadasve kontroverzno pitanje. Daljnju poteškoću izaziva otvaranje pitanja cilja napada, odnosno da li se pojedinca može legitimno napadati zbog njegovog izravnog učešća u neprijateljstvima. Cilj ovog teksta je istražiti pitanje i postaviti alternativni mehanizam kako bi se osigurao praktični test određivanja statusa pojedinca. Istodobno njime se pozivaju međunarodni pravnici kako bi osigurali toliko potrebno usmjerenje.

Ključne riječi: *izravno sudjelovanje, neprijateljstva, ženevska konvencija, alternativni mehanizmi*

[43] Despite his best efforts, to appear a 'big man', before the ICTY, Tadic, and his comrades, remained little more than a group of vicious thugs, who imagined themselves 'soldiers' but yet chose to operate outside the realms of the laws and customs of war.

[44] Third Summary Report, note 10, at page 20.