

THE ICRC INTERPRETIVE GUIDANCE ON THE
NOTION OF DIRECT PARTICIPATION IN
HOSTILITIES UNDER INTERNATIONAL
HUMANITARIAN LAW: AN
INTRODUCTION TO THE FORUM

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According to a fundamental principle of international humanitarian law (IHL), parties to an armed conflict who use military violence must distinguish between combatants and civilians. The former are legitimate military targets, while the latter are immune from attack. Civilians, however, lose their immunity if they directly participate in hostilities. Thus, a remarkably terse expression—“direct participation in hostilities” (DPH)—holds the key to the fundamental protection of innocent life and the organization of military planning around the world.

The concept of DPH has had to bear an especially heavy weight in contemporary armed conflicts. Technological developments have expanded the capacity of individuals to apply lethal force while remaining located thousands of miles away from their targets. States have increasingly relied on private contractors to maximize military power. And the most intractable conflicts now include non-state armed groups that wear no uniform and purposefully commingle their fighters with civilian populations. In light of these factors, a clarification of the concept of DPH and its careful application to present-day conflicts has assumed extraordinary importance.

In 2009, the International Committee of the Red Cross (ICRC) issued its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (“Interpretive Guidance”). This much-anticipated document resulted from a six-year study, which included five

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meetings of IHL and military experts convened in Geneva and The Hague between 2003 and 2008. The Interpretive Guidance addresses three broad questions: (1) what is the definition of a civilian?; (2) what actions constitute DPH according to which civilians become legitimate military targets?; and (3) what restraints (if any) apply to the use of force against legitimate military targets? And the Interpretive Guidance addresses vital sub-topics such as the temporal dimension of loss of immunity from attack, as well. The document is also limited in its scope. It concerns DPH with respect to targeting and military attacks exclusively. It does not consider detention or combatant immunity. And it concerns IHL exclusively. It does not refer to international human rights law, at least not expressly.

The Interpretive Guidance will generate discussions of great consequence for ongoing and future wars. This Forum, in our view, merits a place of privilege in these discussions. The Forum convenes leading IHL and military experts who were directly involved in the expert meetings over the past six years. The authors include senior-level legal advisors to the militaries of Canada, the United Kingdom, and the United States. Each expert provides a thorough description and critical analysis of a different component of the Interpretive Guidance. Dr. Nils Melzer, Legal Adviser at the ICRC and author of the Interpretive Guidance, provides a detailed response to these criticisms.

We should explain that these critiques reflect only one of several important critical perspectives on the concept of DPH. There are four partially-overlapping, partially-conflicting critical perspectives applied to any concrete interpretation of DPH—or any other central concept in IHL. In our view, no single critical perspective, if pushed to its logical extreme and considered in isolation, could produce an adequate interpretation of DPH. We discuss four perspectives in turn.

(1) *Interpretive Indeterminacy*. One critical perspective emphasizes the inherently abstract character of DPH. This perspective argues that no sufficiently concrete interpretation of DPH exhibits all of the essential attributes of a minimally satisfactory interpretation: coherence, legitimacy, political acceptability, and administrability. The emphasis here is on problems associated with both the broad interpretive license and complex law-making process in international law. On this view, the

Interpretive Guidance is, in the end, an unhelpful and perhaps counterproductive exercise. Although the challenges posed by this view are important and must be met, this critical perspective, if carried to its logical extreme, would render the principle of distinction, and arguably IHL itself, devoid of meaning.

(2) *Human Rights in Armed Conflict*. Another critical perspective emphasizes the threat posed by a broad interpretation of DPH for the right to life and other fundamental human rights. This perspective is often motivated by a worry that IHL authorizes—either as a *de jure* or *de facto* matter—the extrajudicial killing of civilians. The emphasis here is often on problems associated with the potential conflict of law between human rights and IHL as well as problems associated with conceptions of DPH that are insufficiently bounded by temporal and geographic limitations. On this view, the Interpretive Guidance is problematic because it fails to provide meaningful limits on when an “IHL framework,” rather than a “human rights framework,” is appropriate. Although the human rights perspective is clearly central to any adequate conception of DPH, this perspective, if considered in complete isolation, does not adequately account for the practical realities of contemporary military operations. This perspective pushes for a limited conception of DPH and, more fundamentally, a highly limited conception of when IHL should be considered the relevant legal paradigm.

(3) *Humanization of Warfare*. A related critical perspective emphasizes the role that DPH plays in the humanization of warfare. This perspective views the concretization of DPH as an important step in the “humanization” of IHL—the increasing commitment to humanitarian values in IHL even when these values might conflict with prevailing conceptions of military necessity. On this view, the Interpretive Guidance is flawed in that it defines DPH too broadly. Although the robust commitment to humanitarian values is an indispensable feature of any central concept in IHL, this critical perspective does not help provide meaningful guidance on exactly when, if ever, humanitarian concerns should yield to military necessity. This perspective pushes for a limited conception of DPH and a broad conception of the material field of application of IHL.

(4) *Military Practicality/Military Necessity*. A final critical perspective argues that DPH must accord with the pragmatic and tactical realities of military operations. An emphasis here is often on preserving discretion or freedom of action for military planners and for personnel that make targeting decisions on the battlefield. This perspective does not reject a robust commitment to humanitarian values out of hand. Rather, this approach suggests that the realities of warfare provide an important limit on the scope and content of IHL. On this view, the Interpretive Guidance unjustifiably restricts the scope of legitimate military activities. Although this perspective is fundamental to delineating the practical boundaries of DPH, if stretched too far, it would undermine core humanitarian principles and the protection of innocent civilians. This perspective tends to push for a broad conception of DPH and a highly limited conception of when international human rights law should be considered the relevant legal paradigm.

Each of these perspectives is both indispensable and inadequate. And, in our view, the best way forward in the debate over the proper interpretation of DPH is to foster dialogue across perspectives. Although the critiques in this Forum are primarily representative of perspective (4), the Forum provides an important contribution to the broader debate on DPH in at least three ways. First, the Forum provides a detailed, rigorous compendium of critical perspective (4). Indeed, many of the arguments pursued in the Forum demonstrate the value of perspective (4) when it is framed in principled and measured terms and takes into account competing humanitarian and military interests. Second, some contributors argue that the Interpretive Guidance reflects an excessive version of perspectives (2) or (3). An assessment of those criticisms helps to understand the content, virtues, and, to be sure, vices of those perspectives as well. Third, the ICRC response elicited by these critics suggests that other critical perspectives have and will continue to play a role in the debate. The ICRC response also suggests that the other perspectives might meaningfully inform the military practicality/military necessity perspective. In the final analysis, the combination of criticisms and responses point in the direction of a more integrated approach to interpreting and applying IHL in general, and the concept of DPH specifically, in contemporary armed conflicts.