

**WHEN CIVILIANS “CROSS THE LINE”: THE INTERNATIONAL AND ISLAMIC LAW PERSPECTIVES**

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**Abstract**

*The protection of civilians is one of the most integral aspects of international humanitarian law. Civilians are defined in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War to include persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those considered hors de combat by virtue of sickness, wounds, detention, or any other cause. According to international law, civilians shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. It is however a growing concern in international humanitarian law as military forces claim that certain attacks on civilians are justified, be it due to ‘military advantage’, or that the civilians themselves have in one way or another, participated in the warfare. In such situations, both the armed forces and the law would have to determine whether the “civilians” are still civilians at the point of attack, or “civilians” who have lost their characteristics as civilians. This paper will discuss on the demarcation between the legal status of a civilian and the justifications of the claim to lift civilian characteristics from civilians in different situations, as well as issues of ‘active’, ‘direct’ and ‘sympathetic’ involvement of civilians in hostilities. In doing so, both the international law and Islamic law point of view will comparatively be examined.*

**Key Words:** *International humanitarian law, civilian, protection, unlawful combatant, Islamic law, military, treatment.*

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## **1. Introduction**

The heart of international humanitarian law lies in the protection of civilians, provision of treatment to the sick and wounded and reduction of unnecessary suffering in warfare<sup>1</sup> (Bugnion, 2004, p. 191). Civilians often face horrific consequences of war such as erroneous targeting of military operations and displacement of civilians. International humanitarian law, recognising customary practices of war therefore provides a strict ruling where civilians are immune from military targets and should be protected at all times. Article 51 (1) of Additional Protocol I provides that civilians shall enjoy general protection against dangers arising from military operations. It was based on this interest, that the word ‘civilians’ matters most to be defined, in order to differentiate from those who are permitted to be attacked in battlefield i.e. combatants. Common Article 3 provides civilians as ‘persons taking no active part in the hostilities’. As there can only be two categories of individuals in international humanitarian law – combatant or civilian, a negative inference on who is a civilian can also be drawn from those who are entitled to prisoner of war status. Article 4 of the Third Geneva Convention sets out those who are categorically recognized as prisoners of war:

- “1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly; and
  - (d) that of conducting their operations in accordance with the laws and customs of war.”

Those who do not fall within the purview of Article 4 would therefore be considered as civilians, thus entitling them the protection under Common Article 3 of the Geneva Conventions (“Common Article 3”). Common Article 3 provides:

“ In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘ hors de combat ’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

## **2. Losing the Characteristics of Civilians**

Losing the characteristics of a civilian means losing the protection from attacks, as conferred by Common Article 3. The contents of Common Article 3 indicate that international humanitarian law has in fact anticipated the possibility that there may be civilians taking part in hostilities. Another confirmation of the intention of international humanitarian law in the matter is the insertion of Article 51 (3) of Additional Protocol I, which provides to the effect that civilians shall enjoy the protection accorded by the provision, unless and for such time as they take a ‘direct part’ in hostilities.

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<sup>1</sup> International humanitarian law originated from the observation of unnecessary war suffering by Henry Dunant in his publication, *Un Souvenir de Solferino* (A Memory of Solferino) which led to the conclusion of the Geneva Conventions, the principle documents of international humanitarian law.

The defining line in determining the extent of direct participation before a civilian loses protection is however not established in international law. Question arises as to what constitutes “taking active part” as stated in Common Article 3 or “taking direct part in hostilities” as provided in Article 51 (3) of Additional Protocol I. In commenting on the degree of the shift between the two categories, Schmitt (2005) in citing W. Hays Parks (1994) suggested that there appears to be an indication for a fairly high threshold of participation to exist, before a civilian would be deemed to lose his right to protection under international law. The International Committee of the Red Cross (“ICRC”) have suggested that the terms ‘direct’ and ‘active’ should refer to the same quality and degree of individual participation in hostilities (*Interpretive Guidance*, 2009, p. 43). The complexity in determining ‘direct participation’ at the spur of the moment of an attack has led to erroneous targeting, thus causing failure to the full implementation of the well-founded “principle of distinction” in international law. The principle of distinction upholds that attacks must only be directed against military objectives which correspond to the most basic principle codified in the law of war, i.e the prohibition of targeting on civilians (Article 48, *Additional Protocol I*, 1977; see also Dorman, 2005, p. 83-98; Henderson, 2009, p. 45). Among the concerns are the conduct of hostilities in civilian population centres, the outsourcing of traditional military functions to civilian personnel (private contractors / civilian government employees) and the failure of persons directly participating to adequately distinguish themselves from the civilian population or otherwise.

Jensen (2007) suggested that one of the difficulties is attributed to the mingling of combatants with civilians on the battlefield. Insisting those involved in the battlefield to distinguish themselves from others is a mechanism to identify combatants and civilians. This explains the purport behind the insertion of the phrase ‘having a fixed distinctive sign recognizable at a distance’ into Article 4 of the Geneva Conventions, which is intended to be a characteristic of a combatant entitled for prisoner of war status. Bialke (2004), in this matter, noted the reason a combatant must abide with the duty to appear visually distinct from non-combatant civilians in the law of armed conflicts, emphasising that if an opposing side is unable to differentiate between combatants who may legally engage in combat and protected non-combatant civilians who may not lawfully engage in combat, the opposing side may be tempted to then wrongfully and indiscriminately target everyone within an operational field.

While combatants with uniforms can be easily and legitimately targeted, civilians without wearing any distinctive sign can only remain as suspects and can only be targeted if they start to take ‘direct part’ in the war. Both customary law and international humanitarian law treaties are clear on those authorized to be targeted for the use of lethal force. Article 43 (2) of the *Additional Protocol I* (1977) provides that members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, having the right to participate directly in hostilities. Civilians, on the other hand, have no right to take part in hostilities and they cannot be lawfully targeted unless and for such time as they take a direct part in hostilities (Art. 51(3), *Additional Protocol I*, 1977). In such circumstances, the civilians are regarded as ‘fighting civilians’ (Alam, 2005), as under international humanitarian law, there should be no intermediary status other than combatants and civilians. Fighting civilians are also referred to in different circumstances as guerrilla, *franc tireur*, *levee en masse* and unprivileged belligerents (William, 2009; see also Baxter, 1951).

Losing the characteristic of civilians is temporary and tagged to the time the civilian is of military threat to the opponent. Civilian protection will be restored when the civilian ceases attack. This differs with civilians who are members of ‘dissident armed forces’ or ‘organised groups’ which are parties to the conflicts in non-international armed conflict as they lose civilian characteristics as long as they remain members of the group. In such cases they are considered to have *de facto* continuous combat function in the conflict. Due to the absence of interpretation of what constitutes ‘direct participation’, the ICRC attempted to set the demarcation by determining three major aspects: who could be considered a civilian for the purpose of principle of distinction; whether the conduct amounts to direct participation in hostilities; and the modalities govern the loss of protection against direct attack. A thorough interpretation was recently issued by the ICRC on the constitutive elements of direct participation in hostilities. The criteria mentioned are, that the act must be likely to affect the military operations or military capacity of the other party adversely; there must be a direct causal link between the act and the harm likely to result (direct causation); and that the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another belligerent (nexus). All three requirements must exist cumulatively in each alleged direct participation of civilians. Should there be any situation of doubt, all measures of feasible precaution must be undertaken and the person must be presumed to be protected against direct attack (*Interpretive Guidance*, 2009).

### **3. Civilian Employees and Private Contractors**

The position of civilian employees and private contractors who directly partake in hostilities must necessarily rest on whether they can be considered as lawful combatants at the time of such participation. In this respect, reference must be made to Article 4 of the Third Geneva Convention which excludes certain persons from civilian status.

Sub-paragraph (1) of the aforementioned provision relates to those who are formally enlisted into the armed forces by a state. Recruitment into the army is more often than not subject to regulatory procedures, thus limiting its membership only to those who are found to be qualified. It has been suggested that a civilian who is separately employed in a government “civilian” post or works for a company which has a contractual relationship with the government would therefore, by definition, be inconsistent with the connotation of Article 4 (1) of the Third Geneva Convention (Schmitt, 2005). The fact that no formal recruitment has taken place is indicative of a state’s understanding that such civilians who participate directly in hostilities do not acquire combatant status under such provision.

The issue then shifts as to whether civilian employees and private contractors taking part directly in military combat would fall within the purview of Article 4 (2) of the Third Geneva Convention, where combatant status is derived from the nature and actions of militias and other volunteer corps, including organised resistance movements. It is to be noted that the conditions set out in sub-paragraphs (a), (b), (c) and (d) of the provision apply to groups, and not individuals. It is difficult to see how government servants may be included in such groups, except in the unusual circumstance that they become resistance fighters upon isolation from the government (Schmitt, 2005).

In the case of private contractors, they would need to fulfil the four criteria under Article 4 (2) of the Third Geneva Convention for them to qualify as combatants; the first being, they must belong to a group which is subject to the supervisory direction of a commander. According to Dinstein (2004), “lawful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field”.

Secondly, they must comply with sub-paragraphs (b) and (c), which address the mode of identification required to distinguish combatants from civilian population i.e. through clearly visible insignia and openly carrying of arms. The adherence to these requirements by private contractors is case-specific. However, the general observation made is that although private contractors may carry arms openly, they do not generally wear distinctive attire that distinguishes them from civilians such as aid and relief workers.

Lastly, in order to be recognised as combatants, the group of which the private contractors are members must conduct their operations “in accordance with the laws and customs of war”. Although the compliance to these criteria is subject to a case-by-case analysis, taken as a whole, it is submitted that it would seem unlikely that they would qualify for combatant status under Article 4 (2) of the Third Geneva Convention. It is to be noted that the provision was intended to address militia, volunteer corps and resistance movements which are independent of a state’s military forces. Private contractors on the other hand, usually prefer affiliation with proper armed forces, due to fiscal considerations (Schmitt, 2005).

The existence of a grey area in defining direct participation fuels further uncertainty as to the position of government employees and private contractors who directly participate in hostile acts. While it has been submitted that such persons cannot properly be considered to be combatants, the question still remains as to whether they have been stripped of their civilian status following their direct involvement in hostilities. As discussed in the preceding paragraphs, what constitutes direct participation may be premised on the three elements prescribed by the ICRC i.e. the direct participation must have caused adverse effect to the military operations of the opposing party; there exists direct causation between the act and its foreseeable consequences; and the nexus between the harm inflicted on one party and the detriment caused to the other.

However, several aspects of direct participation remain unaddressed. The phrase “unless and for such time” in Article 51 (3) casts ambiguity on when civilian status is restored. In the case of civilian employees and private contractors who directly participate in hostilities, do they regain civilian protection at the end of each duty day or upon resuming their civilian day jobs? It is imperative that this question be resolved to ensure that a clearer distinction is drawn between civilians and combatants, and for such distinction to be respected at all times, especially in armed conflict.

#### 4. Islamic Law's Stand on Civilian Participation in War

The Islamic law of war forms part of the Islamic jurisprudence (*Shariah*). The primary sources of law are the Quran (the divine Book of God) and the traditions of Prophet Muhammad (pbuh). Most of the laws concerning war are contained in the traditions, during the years the Prophet spent after the migration to Madinah, in more than 20 battles. The traditions, namely all the utterance, actions and approvals of the Prophet Muhammad (pbuh) form a comprehensive guidance of laws governing warfare in Islam.

In principle, Islam does not encourage participation from non-military personnel, especially those belonging to vulnerable groups such as women, children and the elderly. The participation of civilians in war is allowed where there exists a compelling and crucial need for it, and in emergency situations. Islam identifies combatants as those who carry arms for fighting, and confers them with certain rights. In the Islamic rules of war, a combatant cannot at any time target those who have not taken up arms against him. The principle of distinction is clear in Islam based on the Prophet Muhammad's (pbuh) prohibition to harm civilians like women, children, elders, religious authorities, farmers and shopkeepers in various authorities. It is stated in the Quran (Al-Baihaqi, n.d.).

*"And fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah does not love those who exceed the limits."* (Al-Baqarah: 190)

It has also been stated in the command of Prophet Muhammad (pbuh) during war as narrated by Anas bin Malik (Al-Baihaqi, n.d.):

*"Advance in the name of Allah, with Allah, on the pattern of the Messenger of Allah. That means do not to kill the elderly, infants or children and women. Do not exceed the proper bounds. Gather your spoils and make peace, and do good. Lo! Allah loveth those who do good".*

The direction was then followed by Abu Bakar Al-Siddiq, the second Caliph of the Islamic empire, when sending Yazid bin Abu Suffian, Amru bin Al-As and Syarhabil bin Hasanah to a battle in Sham. He said: *"Do not kill children, women and elderly, and you will find someone locked themselves in their worshipping place then let them be. Moreover, they are not to give damage to Muslims, their status are the same as women and is not permissible to kill them like the original infidel"*.

The wars under Prophet Muhammad's (pbuh) leadership observed the importance of protecting the civilians by placing battlefields outside human dwellings as a strategy of war, for instance, the Battle of Uhud and the Battle of Khandaq. In the battle of Khandaq, a trench was built around the city of Madinah to protect the civilians. Such strategy was to ensure that civilians of both warring parties of Quraisy and Muslims were not exposed to the war. Where it involves entering a city, as in the opening of Makkah, the Prophet Muhammad (pbuh) attempted to distinguish civilians from combatants by declaring that those who sought shelter in the Kaabah, Abu Sufyan's house or in their respected dwellings will not be attacked. As a result, the opening of Makkah shed no blood. From the Islamic point of view, the above rule is only applicable when civilians do not participate in the battle. But once they carry weapons for fighting, or contribute intelligence, war strategies or suggestions to the army, their status changes from civilians to combatants and are thus entitled to all combatant rights. This opinion is unanimously supported by the majority of Islamic scholars. They agree that the reason for one to take up arms and attack is if he or she is being fought against (Madkhur, 1932). In the event there exist situations which necessitate the involvement of civilians in warfare, for example when the state is under heavy attack, it becomes incumbent upon such civilians to participate in defending the state. This is in tandem with the rights of society to protect its country in international armed conflicts. In Islam, participation in such situations is considered a duty obligatory upon every Muslim. This is stated in the following verse of the Qur'an:

*"Go ye forth, (whether equipped) lightly or heavily, and strive and struggle, with your goods and your persons, In the cause of Allah. that is best for you, if ye (but) knew."* (Al-Taubah: 41)

From the Islamic point of view, women who are capable of carrying arms are allowed to participate in war when the state is under attack. An example of this can be seen in the Battle of Uhud, where a woman named Nusaibah binti Ka'ab joined in the fighting and her courage was praised by the Prophet Muhammad (pbuh) (Ibnu Saad, n.d.). Another case is that of Safiah binti Abdul Mutalib, during an attack on city of Madinah. The Prophet Muhammad (pbuh) had ordered the women to be gathered at a safe place and put Hassan bin Thabit in charge of their security.

A man from the enemy side managed to encroach upon the area, upon which Safiah asked Hassan to take action against the intruder. Hassan replied that he was a poet and was not skilful with weapons. Safiah killed the enemy by using a piece of wood and a knife. When news of the incident reached the Prophet Muhammad (pbuh), he affirmed Safiah's act. These examples are evident of the recognition given to the involvement of women in such situations of war (Al-Sarakhsi, n.d.).

However, if the war calls upon the involvement of armed forces *per se*, Islam does not allow women and non-military personnel to participate (Al-Sarakhsi, n.d.). This position is to be distinguished from that of women who are trained in military combat, or who have obtained the permission from the commander of the army, as well as children who are part of the armed forces. In the latter two situations, their involvement is permissible and they are acknowledged as constituents of the military. For example, the Prophet Muhammad s.a.w had refused to bring the children who volunteered to join the army, which included Usamah ibn Zayd and Abdullah ibn Umar to the Battle of Uhud because they were still young, but allowed Samrah ibn Jundub and Raafi' ibn Khadeej to join because they were good archers (Abu Shahbah, 1998).

If an Islamic state launches an attack against the enemy, Muslim soldiers are prohibited from disturbing and inflicting harm on civilians who have not taken up arms, as well as their property. Muslim soldiers are forbidden from killing those who do not participate in the war, which is based on important Islamic rules of war i.e. the preservation of the sanctity of human life and the freedom of non-Muslims to practise their faith.

In the event that there are enemy civilians who participate in hostilities against the Islamic state (regardless of whether they don military uniform), such civilians will be attacked, and if captured the rights of prisoners of war will be afforded to them (Darraz, 1952). Those who directly participate in combat will be subject to attack, as the reason which protects them is removed by virtue of their direct involvement. In other words, the prohibition on attacking civilians according to customary rules, is based on their vulnerability and non-participation in active warfare; thus, when they are found to directly participate, such prohibition is lifted, as a *hukm* (ruling) follows the '*illah* (reasoning) (Zuhaili, 1963). An example of this can be seen in the war between Muslims and Bani Quraidhah, where the Prophet Muhammad (pbuh) killed a woman who used a weapon to murder Mahmud bin Maslamah (Ibnu Kathir, n.d.). On another occasion, in the Battle of Hunayn, the Prophet Muhammad (pbuh) sent a troop led by Abu A'Mir, and among those killed in the war was Durraid bin Al-Samt, an elder who had provided suggestions to the enemy on how to overwhelm the Muslim army (Bukhari, n.d.).

The same position can further be noted from a reminder given by Umar Al-Khattab to his soldiers: "*Fear Allah and do not hurt the farmers, unless they attack you*" (Al-Baihaqi, n.d.).

The majority of the learned Muslim scholars ('*ulama*) have also reached a consensus on the applicability of this principle as part of the *Shari'ah*. Imam Nawawi explained this: "*The 'ulama have reached a consensus (ijma') that it is forbidden to disturb women and children if they do not take up arms in war. But if they participate in war, then the majority of the 'ulama are of the opinion that they are to be considered as combatants*" (Nawawi, n.d.).

Islam thus lays emphasis on the carrying of arms and direct participation in determining whether a party should or should not be attacked. Those who are not involved in active warfare such as medical and religious personnel, as well as messengers/heralds, cannot be targeted as they do not hold the status of combatants (Zuhaili, 1963).

### **Conclusion**

Based on the observations made of both international law and Islamic law on civilian participation in hostilities, it can be concluded that both legal systems acknowledge the lifting of civilian protection upon direct participation of civilians in hostilities. The comparison of the extent of participation in both systems is however a subject that needs further deliberation. From the perspective of Islamic law, it is sufficient that the participation is one that brings real danger or real apprehension of harm towards the military. The consequences of civilian participation in warfare in Islamic law however, are not entirely similar to that under international law, as all captives in Islam, combatants or not, receive the same treatment under the law of captives (*asra*) as prescribed since the early advent of Islam. There is no such status as unlawful combatant or illegal belligerent which is currently the subject of much debate in international law.

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