

EDITORIAL

The phenomenon of civilians taking part in hostilities occurs in all war situations. In the recent conflict in Gaza, controversy raged over whether Israel used indiscriminate force, as the majority of victims were said to be unarmed civilians. Israel defended its actions by claiming that most of the fatalities were Hamas fighters or civilians opposing Israeli forces. In the Iraq war, militias and other fighters not in uniform challenged the world's strongest military power. In Afghanistan the distinction between a peaceful Afghan and a Taliban fighter is difficult to make, often leading to civilian casualties. In Sri Lanka a quarter of a million people – fighters of the Liberation Tigers of Tamil Eelam (LTTE) crammed together with the civilian population – were trapped in an area of 250 square kilometres amid intense fighting. In every internal conflict there have been insurgents who were farmers by day and fighters by night. The fighting civilian, seeking protection through a 'revolving door' by again becoming a peaceful peasant, makes it harder for the opposing armed forces to respond effectively and may lead them to conduct erroneous or arbitrary attacks against civilians.

The general protection of the civilian population is therefore at stake. It is an undisputed fact that more civilians than soldiers are killed or injured in present-day wars. The shift of military operations away from a circumscribed battlefield to cover whole countries (including the urban environment), the developments in war-related technology and industry, the increase in the number of irregular forces participating in armed conflict and a more recent trend towards war activities normally performed by the armed forces being carried out by private companies have blurred the once clear distinction between combatants and civilians.

By adopting guerrilla tactics – even mobilizing their civilian population to fight as guerrillas by creating so-called 'self-defence' forces fighting without uniforms and insignia – and even by their recognition of belligerency vis-à-vis opposing organized entities, states themselves have contributed to diluting the concept of armed forces and introduced what could be described as 'civilian combatants'. Clandestine violence by individuals, however, remains the subject of ordinary and often summary justice, as does any form of civilian resistance to military occupation.

Insurrectionary violence by civilians – the 'people's war', as Clausewitz termed it – further blurs the divide. Not only do the non-state parties merge like fish in the civilian sea and hide among the people – the often asymmetric balance of power also tempts the militarily weaker party to use the civilian component by

feigning civilian status when attacking the adversary and/or by creating human shields as protection from attack. Partisans, guerrilla fighters, resistance fighters and terrorists supporting a party to a conflict certainly do not qualify as peaceful civilians.

Some 400 years ago, Grotius wrote in *De Jure Belli Ac Pacis* that ‘those who are truly subjects of the enemy’, whether women, children, captives or hostages, may under the law of nations be attacked in person and property, but ‘it is the bidding of mercy, if not of justice, that except for reasons that are mighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction’, especially women and children, members of religious orders, farmers, merchants and prisoners. While the entire population of the enemy was potentially subject to attack, a distinction was nevertheless drawn between combatants and non-combatants, between the armed forces and the ‘innocent’ civilian population, mostly not engaged in actual hostilities.

Modern international humanitarian law is largely built up on this fundamental distinction between combatants and civilians, which the International Court of Justice has called one of its ‘cardinal principles’ and one of the ‘intransgressible principles of international customary law’. More generally formulated, it is the question of the divide between those who fight in hostilities and those who do not.

Combatants in the strictly legal sense are members of the regular armed forces of states; they alone have the right to participate in hostilities and may not be punished for doing so as long as they do not commit war crimes. Even this status was – and still is – placed under considerable strain by the progress of modern military techniques. The armed forces’ assignments have come to include non-fighting functions, and entitlement to combatant status is extended under certain conditions to members of irregular armed forces. On the approach of the enemy, even inhabitants of a non-occupied territory who spontaneously take up arms to resist the invading forces may be entitled to combatant privileges.

However, civilians have also taken on an increasingly decisive role in determining the outcome of a war. More recently, parts of clearly military functions have been more and more commonly outsourced to private companies or contractors. Civilian industries, transport centres and even the adversary’s civilian population have been viewed as supporting the war effort and have become military targets, as states interpreted the concept of military necessity more broadly to the detriment of the requirements of humanity. Even though the Assembly of the League of Nations had already proclaimed in 1938 that ‘intentional bombings of the civilian population are illegal’, the painful experiences of the Second World War showed how the entire life of the enemy state came to be an object of attack. The intention was at least to weaken indirectly the military forces of the enemy by breaking the morale of the entire enemy population.

The increase in the number of non-international armed conflicts in the second half of the last century made it even more important to protect civilian populations, who were forced to take sides and suspected of helping one or other of the parties to a conflict.

Article 3 common to the four Geneva Conventions of 1949 adopted after the Second World War introduced the concept of ‘taking no active part in the hostilities’, thereby opening the door to the contemporary notion of ‘direct participation in hostilities’. Depending on the quality and degree of a person’s involvement in hostilities, his or her participation could be described as ‘direct’ or ‘indirect’. Both 1977 Protocols additional to the Geneva Conventions, and relating to international and non-international armed conflicts, strengthened the protection of the civilian population by reaffirming that civilians are protected against attack ‘unless and for such time as they take a direct part in hostilities’. ‘Indirect participation’, such as mere political support or sympathy towards a warring party, does not justify an attack as it does not pose an actual threat to or harm the adversary. Conversely, the said prohibition of attacks should not be used to shield a military objective from attack, and military objectives do not necessarily cease to be subject to legitimate attacks merely because of the presence of civilians. In order to spare the civilian population, precautionary measures must be taken by all parties to a conflict to minimize incidental loss of civilian life.

In situations of international armed conflict, individuals not belonging to a party to the conflict who act on a merely spontaneous, sporadic and unorganized basis – unlike organized resistance fighters who take up arms in a situation of occupation – lose their protection as civilians. Whereas in inter-state armed conflicts civilians are persons who are not or are no longer members of their respective armed forces, no definition of civilians exists in non-international armed conflicts. On the government side, a definition similar to that in international armed conflict could be inferred; armed opposition groups, however, mostly lack any formal membership and members avoid identification as part of the group. Hence application of that rule would imply that an attack on members of an armed opposition group is lawful only for ‘such time as they take part in direct hostilities’, while an attack on members of government forces would be lawful at any time. Such an imbalance and violation of the principle of equal application can only be avoided if members of armed opposition groups – just like members of state armed forces – are excluded from the category of civilians and lose their protection if they have a continuous combat function.

The lawfulness of an attack on civilians depends on their own conduct in hostilities. It must therefore be determined what constitutes ‘direct participation in hostilities’, and when this begins and ends. The *Interpretative Guidance of the International Committee of the Red Cross*, published in this edition of the *Review*, aims to clarify international humanitarian law relating to the notion of direct

participation in hostilities in both international and non-international armed conflict. First, it sheds light on who can be considered to be a civilian for the purposes of the principle of distinction. Second, it identifies the constitutive elements of civilian conduct which amount to 'direct participation in hostilities'. Finally, it spells out the terms and conditions governing the ensuing loss of protection against direct attack.

Further articles on related issues help to illustrate the meaning and implications of this important rule which determines, by negative distinction, those who enjoy immunity from attack and are to be protected in all circumstances. It corresponds to the actual etymological sense of the word 'innocent', derived from the general negating prefix *in-* and the Latin *nocere* (to harm).

Toni Pfanner
Editor-in-Chief