

# Israel – Hamas 2023 Symposium – Participation in Hostilities during Belligerent Occupation

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The recent breakout of hostilities in Israel and the Gaza Strip once again highlights the need to effectively protect civilians on the battlefield. This post aims to shed light on the circumstances under which civilians in occupied territories lose protection from direct attack. In this post, I analyze the concept of direct participation in hostilities (DPH) before examining whether hostilities and occupation are notions that are mutually exclusive, in light of the recent hostilities in the Gaza Strip. I focus on the concept of DPH by civilians in the West Bank and whether their acts can amount to a direct participation in the ongoing hostilities in Gaza, allowing Israeli forces to resort to force against them. Particular attention is placed on the need for a clear connection between the alleged act of DPH and the ongoing hostilities in the Gaza Strip.

## Direct Participation in Hostilities

The existence of an armed conflict between Israel and Hamas is unquestionable. But the precise classification of the conflict is a controversial subject. That point, however, does not impact the analysis of civilian participation in hostilities because the concept of DPH and its

associated rules apply identically in both international and non-international armed conflicts.

Different approaches have been adopted regarding the definition of the term DPH. The International Committee of the Red Cross, in its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Guidance)*, identifies three cumulative criteria for determining whether an act qualifies as a DPH. They are elaborated in the *Guidance* but for now it is sufficient to note that they are: a threshold of harm; direct causation; and a belligerent nexus (ICRC, *Guidance*, p. 46-64).

## **Hostilities and Occupation**

Further controversy surrounds whether the Gaza Strip is in a state of belligerent occupation by Israel. For the purposes of this post, I will align with the view that considers Gaza as occupied territory ([Dinstein](#), p. 298-301; [UN Doc A/HRC/12/48](#), p. 73-74).

If that is the case, it is useful to address the coexistence of occupation and hostilities in the Gaza Strip. In simpler terms, can the Gaza Strip be both under the effective control and authority of Israel, signifying occupation, and also be a theatre of active and ongoing hostilities? Is it possible for hostilities and occupation to occur simultaneously, or are these terms mutually exclusive?

International practice indicates that hostilities, within the meaning of international humanitarian law (IHL), frequently erupt in territories under occupation. Among other examples, the three intense military operations by Israel in the Gaza Strip (2009, 2012, 2014) which involved heavy fire, ground operations, launches of rockets and mortars by Hamas and other heavy means and methods of warfare are clear indications that hostilities can arise in times of occupation. No supporter of the view that Gaza is occupied considered previous hostilities in Gaza as leading to the end of its occupation by Israel (see e.g., [Longobardo](#), p. 197-204). Thus, it is clear that the eruption of hostilities in occupied territories does not inevitably terminate occupation.

On the question of resort to hostilities, there are two frameworks that potentially apply in occupied territory. International law literature frames them as the “conduct of hostilities” paradigm (governed by IHL) and the “law enforcement” paradigm (governed by international human rights law) (see e.g., [Gaggioli](#), p. 6). When hostilities erupt in occupied territory, an occupying power will use force according to the conduct of hostilities paradigm rather than under the law enforcement regime (more on that later). Operation of the conduct of hostilities paradigm makes the concept of DPH also applicable.

Applying these findings to the current conflict between Israel and Hamas, the eruption of hostilities in the occupied Gaza Strip did not terminate the Israeli occupation. Rather, the conduct of hostilities paradigm regulates Israel’s resort to lethal force against hostile groups and persons taking direct part in hostilities in the Gaza Strip.

## DPH outside the Gaza Strip

Since October 7, hostilities have continued between Israel and Hamas, mostly in the Gaza Strip. However, some acts of violence have also occurred in the West Bank. Through October 15, 54 Palestinians have been recorded dead, while more than 1,100 have been reported as injured. Given the West Bank's status as occupied territory, these figures raise the question, which legal rules should govern Israel's actions in the West Bank? In other words, is Israel entitled to invoke the concept of DPH to justify its use of lethal force against Palestinians living in the West Bank, 93 kilometres from the theatre of active hostilities in Gaza?

It is universally accepted that an occupying power is entitled to use force in occupied territory. Within the framework of Article 43 of the 1907 Hague Regulations, Israel can employ armed force within occupied territory to maintain public order and safety. However, there are significant differences between the two force regulation paradigms identified above. The most important is that in the conduct of hostilities an occupying power can employ lethal force based on the status of the person, e.g., as a combatant, while in the law enforcement paradigm lawful resorts to lethal force depend on the actual conduct of the individual against whom force is used.

Still, in situations of occupation, there is a presumption, based on Article 43 of the Hague Regulations, that the occupying power should generally avoid resorting to the conduct of hostilities paradigm. Generally speaking, persons and objects in occupied territory are by definition under the effective control of the occupying power and should be administered and regulated according to local law. The stricter and less permissive rules of the law enforcement paradigm are preferred, as they provide the necessary legal context for the occupying power's maintenance of public order and safety (Longobardo, p. 186-194).

However, as already discussed, hostilities may nonetheless erupt and therefore the concept of DPH can be relevant to occupied territory. In such cases, the conduct of hostilities paradigm governs the occupying power's resort to lethal force.

Returning to the Israel-Hamas conflict, this post proceeds on the assumption that until October 16, there were no hostilities, in the IHL use of the term, in the West Bank. Accordingly, if a Palestinian civilian, as distinct from a member of an organized armed group, living in the city of Hebron (West Bank) were to use violence against Israeli soldiers, and assuming that the threshold of violence and the direct causation requirements in the ICRC Guidance were fulfilled, could Israel regard that conduct as DPH and directly target that civilian with lethal force? Or must Israel conduct its response under the law enforcement paradigm?

In this inquiry, the belligerent nexus aspect of the DPH standard is particularly helpful. According to the ICRC *Guidance*, a belligerent nexus requires that the act in question is designed to either support one party or be detrimental to another party to the conflict (p. 59). The nexus distinguishes acts related to hostilities from those that are merely criminal and unrelated to the larger context of hostilities.

Nonetheless, strict adherence to the precise wording of the ICRC belligerent nexus requirement, which requires a connection to the “armed conflict,” produces an undesirable outcome. First and foremost, direct participation is no longer assessed according to the ongoing hostilities, but instead in relation to the armed conflict overall. The ICRC interpretation broadens the range of acts that can be considered as DPH by emphasizing a connection to armed conflict, extending beyond the concept of mere “hostilities.”

Second, strict adherence to the ICRC *Guidance* expands the circumstances under which lethal force may be used against civilians engaged in alleged DPH, effectively circumventing the law enforcement framework. This expanded interpretation allows the occupying power to respond to alleged acts of DPH with lethal fire, in accordance with the conduct of hostilities paradigm. Resort to this paradigm, instead of the preferential law enforcement framework, potentially results in greater harm to civilians. In situations where there is no discernible link to the ongoing hostilities, the absence of such a nexus would render any harm inflicted upon civilians as unjustified and unacceptable. It is possible that the scenario of an armed conflict without ongoing hostilities (e.g., in case of declaration of war and occupation) was not taken into account during the preparation of the *Guidance*.

For these reasons, the belligerent nexus prong of the DPH analysis must be understood to operate with respect to the ongoing hostilities rather than within the overall context of an armed conflict, at least for the purposes of the present analysis. This interpretative approach offers a satisfactory solution to the terminological problem, as it requires a close relationship between the civilian act and the active hostilities. Thus, the fact that a Palestinian in Hebron, in the previous example, throws a stone towards Israeli troops, merely because he wants to liberate Palestine or to protest against the Israeli bombing of Gaza, but does not have the objective purpose and ability to harm Israel in a way related with the active hostilities in Gaza, is not enough to qualify his act as a DPH. Therefore, the response to the stone throwing should be governed by the law enforcement paradigm, which prohibits the direct use of force against individuals, unless it is strictly unavoidable in order to protect life.

To use a slightly different scenario, the same Palestinian possesses intelligence that military equipment will be transferred from the West Bank to Gaza to be used in the ongoing hostilities, and he decides to set fire to the storage area where the equipment is kept. This time his conduct has the required belligerent nexus to the ongoing hostilities in Gaza. As a consequence, setting the storage area on fire amounts to DPH and the Israeli response would be assessed under the conduct of hostilities paradigm. As a result, directly targeting the individual who sets the military equipment on fire would not be contrary to IHL.

## Conclusion

There is no doubt that the conduct of hostilities paradigm applies currently in the Gaza Strip and that Israel can directly attack any civilian who takes a direct part in the hostilities (even if Gaza is still considered as an occupied territory). Although the applicable legal paradigm in the West Bank remains the law enforcement framework, the concept of DPH is not entirely rejected. However, particular emphasis should be given to the existence of a belligerent nexus between the conduct and the active hostilities. If such a nexus exists, then the alleged civilian act can amount to DPH, and the Israeli response will be governed under the conduct of hostilities paradigm.

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