

# The Presumption of Civilian Status in Cases of Doubt: A Vital Rule in Increasingly Unsettled Times

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*Editors' note: This post is drawn from the authors' [article-length work](#), "Pro patria mori: When States Encourage Civilian Involvement in Armed Conflict" appearing in the International Review of the Red Cross.*

The price armed conflict demands is human life, and international humanitarian law (IHL) governs which lives are its currency. It privileges combatants by granting them the power to take life, in exchange for the possible cost of their own, but prohibits the deliberate targeting of civilians and persons *hors de combat*. In cases of doubt, the law demands that a person be considered a civilian. This approach is straightforward and protective; a binary distinction, with a presumption of protection in cases of doubt.

But modern armed conflicts, be they international or non-international, are not straightforward. They, and the operating environments in which they are fought, are extraordinarily complex. In a recent [article](#) we examined one element of this complexity: an increasing reliance on, and encouragement of, civilian engagement in armed conflict, both in

the sense of direct participation in hostilities (DPH), and in ways that fall short of the DPH standard. We examined both the consequences for the individual, and the consequences for a State, when such participation is encouraged.

In this post we consider the presumption in favour of civilian status, and the danger of its erosion. We first contextualise our discussion with reference to characteristics of modern conflicts. We then argue the presumption is, by its very nature, a delicate rule; when belligerents take steps which blur the boundaries between civilians and combatants, they risk collapsing it entirely. In turn, this places the basic principle of distinction in danger. We close by recalling the need for adherence to both the presumption and the principle, which operate to preserve our common humanity.

## **Context**

As we note in our article, the involvement of civilians in the war effort is not new. However, it has become a more pressing issue in recent decades. Armed conflicts have become increasingly urbanised, digitalised, and asymmetrical. Civilian engagement has increased alongside these trends. Modern military operations increasingly occur in dense urban environments, which civilians are not always willing or able to leave. In such contexts not only is damage to civilian objects inescapable, but the risk that civilians are targeted is markedly increased.

These conflicts are not only fought through kinetic means, but also in the digital space. Cyber activities are a fact of modern armed conflict, and are often characterised by uncertainty as to the identities and locations of those who conduct them. Conflicts are also asymmetric, often at a structural level. That is, international and non-international armed conflicts are often fought between unequal belligerents. While armed conflict has never been truly symmetrical, asymmetry has become more pronounced and the subject of increased legal study in the decades since the end of the Cold War.

These changes render conflict environments more inherently unpredictable. This unpredictability has been accompanied by an increase in civilian involvement. This takes many forms, for example: taking up arms in response to a call from a belligerent party; participating in cyber activities; or supplying intelligence to a belligerent. With cyber activities being a possible exception, these are relatively straightforward examples of DPH. However, civilian involvement can also fall short of DPH. It may occur through the liberalisation of firearms laws during armed conflicts, the formation (but not necessarily the operation) of "community defence groups," or, in some circumstances, the provision of logistical support. Some even argue that on-the-ground media coverage by civilian reporters is a form of civilian involvement which falls short of DPH.

Of course, the novelty of this engagement should not be overstated. Civilian involvement in armed conflict is as old as armed conflict itself. What is different today is that the environments within which armed conflicts take place, in themselves, incentivise civilian engagement. A city cannot realistically be fully evacuated in short order. Many States are supported, tacitly or actively, by civilian actors in the cyber domain and asymmetry arguably rewards the intermingling of civilians and military objectives. These factors challenge adherence to the principle of distinction and increase the risk of harm to civilians. They have been noticed by States, leading to a divergence in State practice regarding the presumption of civilian status and the determination of whether a civilian is directly participating in hostilities.

### **The Presumption of Civilian Status: A Delicate Rule**

The presumption of civilian status is a cornerstone rule of IHL. The rule, as formulated in Additional Protocol I (AP I), Article 50, provides that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” The choice of the word “considered” as opposed to “presumed” was intentional and is reflected in the French text. The presumption, we argue, is generally accepted to exist as a rule of customary international law, but its precise scope is unclear.

State practice and *opinio juris*, as expressed through military manuals and through declarations and reservations, is not wholly consistent. The majority of State practice identified by the International Committee of the Red Cross (ICRC) recognises the existence of the presumption. The softest phrasing used was that persons must be afforded “the benefit of the doubt.” Some States party to AP I adopt a permissive view. One party affirmed on ratification its view that the rule is applicable only when there still exists “substantial doubt” following an assessment of the facts reasonably available to a military decision-maker at the time. Another State, in its military manual, describes the rule as entitling a person “to civilian protection until [the armed forces] are sure that he or she is not.” However, the same provision references the Galić trial judgment of the International Criminal Tribunal for the former Yugoslavia, which tied the presumption to a “reasonableness” test (para. 55). Another State again considers that “If doubt remains after all feasible precautions have been taken to clarify whether an objective is lawful, the degree of doubt will have to be weighed up against the consequences of not attacking.”

The most recent military legal manual of the United States, a non-party to AP I, affirms that the starting point for a military commander should be a presumption of civilian status. This was a notable shift in approach from the previous edition of the manual, which rejected the existence of a customary rule. This shift was criticised on the basis that—in our understanding of the debate surrounding it—it goes beyond the customary rule and produces a rebuttable presumption which could severely constrain the armed forces.

Non-State views also vary on the precise scope of the rule. The ICRC's view is generally protective, but not absolute. The *ICRC Customary IHL Study* characterises the customary rule as an obligation to conduct "a careful assessment" in situations of doubt. The *Interpretive Guidance* on DPH ties doubt to "the level of certainty that can reasonably be achieved in the circumstances," and makes reference to both status and conduct as characteristics to which doubt may attach. By contrast, the International Group of Experts responsible for the *Tallinn Manual* were split on the matter, with some considering that the presumption applies to some forms of doubt but not necessarily to doubt concerning conduct.

Scholarship, too, is widely divergent. A previous [post](#) on *Articles of War* describes the obligation as triggered in cases where the attacker has doubt as to the nature of the target, and not as "a general obligation." [Another](#) contributor argues the obligation is a rule of customary law; it is simply that the type of doubt to which the rule attaches is disputed. Similarly, Professor [Schmitt](#) does not dispute the customary nature of the rule, but highlights his disagreement with what the consequences of this doubt are. In other words, whether doubt always precludes the lawfulness of the attack. In the context of the ICRC *Interpretive Guidance*, he [argues](#) the presumption would not confer protection to civilians who expose themselves to such doubt through their voluntary choice. He suggests the presumption should rather go in the opposite direction; in cases of doubt whether a civilian's conduct amounts to direct participation, the attacker could presume this is the case and proceed with targeting.

A similar but distinct proposition was proposed by Professor [Dinstein](#), who underlined that when a person bears arms in a conflict zone, "enemy combatants can hardly be blamed if they misconstrue what is going on and resort to counterfire." [Nils Melzer](#), in support of the ICRC perspective, points to the wide range of situations where soldiers would be faced with doubt as to a civilian's conduct, not even so much because of their conduct *per se*, but, for instance, based on their location, such as approaching a checkpoint.

So, State practice demonstrates an inconsistent understanding of the rule, and scholarship does not clarify its content. It is generally agreed there is a customary rule which fulfils the basic role of ensuring that combatants remember their obligation not to deliberately target or harm civilians, and that there is no need for "[absolute conviction](#)" in the targetability of a person. Beyond these points little is settled. Some consider that to achieve this object and purpose the presumption must be narrow, because this would [encourage](#) civilians to stay removed from hostilities. Such a view privileges military necessity. Others interpret it as a rule premised in human protection, which necessarily means that it privileges the principle of humanity and should be applied more broadly. What constitutes "doubt" for the purposes of the presumption is unclear. Taken together, this shows the rule is fragile. Its content, and its scope of application, are not universally agreed, and such ambiguity can lead to inconsistent practice.

## **Threats to the Rule**

At the best of times, then, the presumption is a difficult rule to apply. Modern conflict environments make its application more difficult again. When armed conflict takes place in a city, people cannot always leave. In many cases, even if they could leave there is nowhere safe for them to go. But they also cannot be expected to stay within their home for the duration of an armed conflict, never leaving its walls. Not everyone who uses a computer in or near a conflict zone can plausibly be categorised as a target because of the risk of cyber activities, and not everyone who carries a firearm, or runs upon seeing a combatant or materiel, can plausibly be described as acting in a way where there is no doubt as to their status. If the presumption of civilian status is eroded by applying it too narrowly, the civilian status of these people ceases to have any meaning.

Equally, however, belligerents must not take advantage of the presumption. If a conflict takes place in a city, the defender should take all the steps it can to ensure the evacuation of civilians, and should not take steps that place those who choose to stay, or could not leave, in additional danger. A State which calls for “patriotic” cyber activities should not assume that those who conduct these activities will be safe, nor should it lead them to believe they are protected. A State which chooses to loosen its firearms possession laws must not lead its people to believe there are no possible consequences from the purchase of a weapon, and it cannot expect them to rely on another belligerent’s (claimed) ability to distinguish between a civilian who happens to hold a rifle, and a possible ambush. If a belligerent takes such actions, it renders the principle of distinction moot and deprives IHL of its basic logic.

## **A Principled Call**

In our view, the presumption of civilian status exists in a state of both strength and fragility. Strength, because the customary rule is generally accepted; fragility, because its content is so contested and contemporary conflict dynamics threaten to strip it of any meaningful effect. The rule is nonetheless a fundamental one. It is an operationalisation of the principle of distinction. When followed, it ensures that our collective humanity is not lost; that uncertainty is not seen as permission to extract war’s dues from those who take no part.

But it must genuinely be followed, by all actors in an armed conflict. An attacker who disregards the presumption cannot meaningfully comply with the principle of distinction, and risks violating it at a systemic level. A defender who takes advantage of the presumption is not acting consistently with its international obligations and cannot seriously expect that its opposition will sacrifice all concept of force protection to apply the presumption.

In our view, this is neither an unrealistic nor an idealistic proposal. It is nothing more than an appeal to the basic principles of IHL, to which all States and all non-State actors are bound. It is a proposal for belligerents to exercise caution in the conduct of hostilities, to the extent that such caution is possible, based on a presumption that all parties involved will interpret

the rule in good faith. Doubt must not be rendered meaningless, whether by under- or over-interpretation: doing so would breach the principle of *effet utile* and render both the presumption as contained in AP I, and its customary parallel, without meaning.

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