

‘Direct Participation in Hostilities’

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Abstract

This is the text of a lecture, presented by Professor Yoram Dinstein at Tilburg University, outlining some key aspects of international humanitarian law as regards the principle of distinction; the principle of proportionality; direct participation in hostilities; drones; human shields; and private military contractors.

Keywords

humanitarian law; direct participation; distinction; proportionality

1. The Principle of Distinction

I shall start with the basics. The principle of distinction constitutes the underpinning of international humanitarian law (IHL) in the sense that, if you were to remove it, the entire legal edifice might collapse.

The question is: distinction between whom or what? The answer is: the distinction is between civilians and combatants, as well as between civilian objects and military objectives. The fundamental idea is to keep civilians and civilian objects out of the crossfire of hostilities to the extent that this is feasible. Unfortunately, in recent times, war has been fought by some parties to armed conflicts in such a way that it has had the maximum possible effect on civilians. But war should have the minimum possible effect on civilians. Modern IHL is certainly dedicated to the proposition of sparing civilians from the calamities of war, as much as circumstances permit. The saving clause (as much as circumstances permit) is inescapable, since there is no way to sterilize civilians altogether from the devastation spread by war.

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It is true that sometimes warfare does not affect civilians at all. Thus, if one takes the 1805 Battle of Trafalgar, Lord Nelson beat the combined French and Spanish Navy some distance away from the coast of Spain without causing any injury to civilians. This could happen because no civilians live in the ocean. But even naval warfare – if waged close enough to the shoreline – can impact upon civilians through gunfire or missiles. In land warfare, civilians are almost always exposed to danger due to their omnipresence near the battlefield (unless hostilities are conducted in uninhabited areas like the Sahara desert or the Greenland icecap), and it is virtually impossible to ensure their safety from collateral damage. More on collateral damage in due course.

The essence of the principle of distinction is that civilians (or civilian objects) ought to be protected from attack. This protection has three dimensions. The first is barring direct attacks against civilians *qua* civilians. One may well ask: why attack civilians as such? The inducement to do that is the prospect of shattering their morale, through “shock and awe”, so that pressure will be brought to bear upon the Government to put an end to the war. The point has to be clarified. The tactics of “shock and awe” is not unlawful *per se*, as long as it is directed at combatants and military objectives. If civilians are shocked by the harsh hammering taken by lawful targets, and then pressure their Government to capitulate, this is in harmony with IHL. Thus, in the Kosovo Air Campaign of 1999, victory was achieved by NATO when Serbian civilian morale broke in light of the huge success of the air offensive against military objectives in and around Belgrade. What is unlawful is directing “shock and awe” attacks against civilians, in order to spread terror among them. Whether such attacks against the civilian population are necessarily effective (judging solely by the yardstick of results) is a different matter. The lesson learned from World War II, Vietnam and other international armed conflicts is, to say the least, far from conclusive. However, even if direct attacks against the civilian population are effective from a utilitarian standpoint, they are forbidden as a matter of law under IHL.

The second dimension of civilian protection granted by IHL is the prohibition of indiscriminate attacks. Indiscriminate attacks are conducted in such a manner that the attacking party does not particularly care whether the targets are military or civilian. A graphic example is what happened very frequently in the course of World War II. The US and British Air Forces would launch huge air flotillas (hundreds of aircraft and even a thousand in a single raid) to bomb selected objectives in Germany. *En route*

to the target, a certain percentage of the bombers were damaged either by ground fire or by Luftwaffe fighters, or had some technical malfunction. In consequence, they had no choice but to return to their home base without executing the mission. The problem was that they still carried the bomb load and it was impossible to land safely with the lethal cargo on board. Patently, the air crew had to toss the bombs prior to landing. That much was a given. But where was this to be done? Today the answer would be obvious: release the bombs over the North Sea, which stretches between England and Germany. Even above the open sea there is always some remote chance that the bombs might strike a fishing trawler, but by and large the airspace over a large body of water would be safe. Yet, that is not what the air crews usually did at the time. What they did was drop the bombs within German airspace. By chance, the bombs might hit some unidentified military objective. But, by the same token, they could kill civilians. As far as the air crews were concerned, they did not attempt to injure civilians: they were simply indifferent. No effort was made by them to draw a line between military objectives and civilians. This is the epitome of an indiscriminate attack, which is proscribed today.

2. The Principle of Proportionality

I come now to the third dimension of the protection of civilians from attack. Empirically speaking, this is the most important extension or extrapolation of distinction, known as the principle of proportionality. The requirement of proportionality in IHL has nothing to do with enemy combatants or military objectives. It is circumscribed to the issue of collateral damage - viz. incidental loss - to civilians or civilian objects. The construct is as follows. Lawful targets, as I mentioned earlier, are not likely to be isolated from civilians. There will almost always be some civilians around; some civilians passing by; some civilians living or working next door or down the road from lawful targets. What the principle of proportionality disallows is to attack *lawful* targets – combatants or military objectives – if it is expected that the collateral damage to civilians or civilian objects will be excessive in comparison to the anticipated military advantage. Should the expectation be that excessive collateral damage to civilians would be triggered by an attack against a lawful target, the attack must be aborted. “Excessive” is the key phrase here.

The reason why I am saying that the principle of proportionality is the most important aspect of distinction is that our armed forces (at least in the West) are highly trained. As a result, they will generally not engage in direct attacks against civilians, and they will largely avoid indiscriminate attacks. However, when it comes to the subtle nuances of proportionality, the state of affairs is murkier. After all, assessment of proportionality is predicated on a balancing act, which is full of complexities. First off, how do you compare the incidental loss to civilians and the military advantage? To compare the two properly, they would have to share a common denominator. Yet, no common denominator exists. Besides, the two antagonists in an armed conflict will surely have disparate perspectives in such an evaluation. The party under attack will be inclined to cherish more the value of civilian lives, whereas its opponent - launching the attack - will lean in the direction of giving greater weight to the military advantage to be gained. This is only human nature. What can be done about this? Some NATO armed forces have access to computer software programmes that calculate the risks of collateral damage *vis-à-vis* the value of enemy military assets that are to be taken out, producing a green or a red light for the benefit of those planning or executing an attack. Nevertheless, there is no way to always quantify what lies on the scales.

Moreover, remember: this is all about foresight rather than hindsight. The decision to launch an attack hinges on expectations and anticipations - meaning that it is not about the actual result of the attack - and, given the "fog of war", expectations and anticipations are as valid as the military intelligence on which they rest. If the information available is faulty, the entire balancing act is liable to be thrown out of kilter. All that we can say, therefore, is that the decision must be based on reasonable grounds, so that a reasonable commander - if put in the shoes of the one actually planning or executing the attack - would not have an utterly different frame of mind.

3. Loss of Civilian Protection: Direct Participation in Hostilities

Protection of civilians, like every other protection in war, can be lost. When does that happen? The answer given in both the Geneva Conventions of 1949 and in the two Additional Protocols of 1977 is that protection is granted to civilians "unless and for such time as they take a direct part in hostilities". In 1949, the adjective in usage was "active"; today it is "direct".

But it is universally agreed that the meaning of both adjectives in this context is the same.

When do civilians take a “direct part in hostilities” (DPIH) and what is the meaning of the words “for such time”? The trouble is that the framers of the Geneva Conventions and the Additional Protocols did not bother to define or expound their terminology. Curiously enough, for many years the language used (which, at a cursory glance, seems innocuous) attracted little or no serious attention to details.

4. The Scope of DPIH: A Failed Attempt to Reach a Consensus

In 2003, an informal meeting of experts from approximately 25 countries was held at the invitation of the Swiss Ministry of Foreign Affairs, in order to consider current challenges to - and potential gaps in - present-day IHL. A number of such gaps were identified, including the absence of definition of DPIH. Since there was no enthusiasm (to put it mildly) for the crafting of any new formal treaty in the field, it was resolved to proceed with experts' work that might produce authoritative (albeit not binding) restatements of the law.

Accordingly, the ICRC organised - in 2004, at the Asser Institute in The Hague - a one-day workshop of IHL experts, to examine the notion of DPIH. The meeting started very slowly, and during the coffee break people were wondering what will be there to debate the whole day. Yet, as the group reconvened, almost by chance, a disagreement developed between General Rogers of the UK and myself. The discord related to what has become known as the case of “Bob the driver”, to which I shall come back later. Everybody joined the fray, and it turned out that the issue could not be settled by the end of the day. The ICRC then offered to prepare some in-depth papers and questionnaires, and the group of experts met again. One thing led to another, and the project went on for more than five years. We arrived at a consensus on the fate of “Bob the driver”, but by then many other questions had flared up. Opinions were often sharply divided, but it appeared that a common-ground text was within reach. Unfortunately, a tentative compromise was not approved by higher echelons in the ICRC. The result was that the ICRC published in 2009 a so-called Interpretive Guidance (representing the views of the ICRC), from which most of the Western experts dissociated themselves. In my opinion, the failure to arrive at a consensual outcome is highly regrettable.

The ICRC developed three constitutive elements for DPIH: (i) threshold of harm; (ii) direct causation; and (iii) belligerent nexus. These three

criteria appear to be self-evident, but they are not. The main problem relates to organized armed groups. Such groups play a dominant role in non-international armed conflicts – fighting against the central government or among themselves – but they are also operating (independently of governmental armed forces) in quite a few international armed conflicts. An organized armed group consists not only of persons fulfilling a combat function (which, as the ICRC concedes, come within the framework of DPIH), but also of cooks, secretaries, computer technicians, etc. I shall return to this issue shortly.

5. What Is Clearly DPIH

Naturally, not every aspect of DPIH is controversial. Nobody has ever contested that a civilian who takes part in actual fighting against the enemy - inflicting death or destruction - comes under the rubric of DPIH. However, thanks to half a decade of deliberations, a number of other modes of activities (which, at some point, were the subject of doubt and even friction) have been accepted as DPIH. Let me mention some of them.

First, it is clear that civilians who are engaged in the planning of - or the preparation for - a combat mission count as DPIH, no less than those who execute the mission.

Secondly, operating a sophisticated weapons system – such as a drone – brands the person in charge (who is often a civilian) as DPIH. This is an important matter, and I shall address it separately.

Thirdly, gathering military information about the enemy qualifies as DPIH.

Fourthly, I return to “Bob the Driver”. The argument has been resolved, yet it is necessary to understand what it was all about and what the repercussions are. The scenario is as follows. We are talking about a professional driver, who is not a member of the armed forces but is hired by them as a civilian for a space of time, on the basis of “outsourcing”. The vehicle assigned to Bob is a munitions truck, which he is driving on the road from point A to point B. Bob reaches a rest area, where he gets off the truck and takes a stroll. Can the enemy attack? There was never any doubt about the munitions truck as such: it is palpably a military objective. Had Bob been killed during an attack on the munitions truck, this would have been regarded as lawful collateral damage. Still, here is the rub. Suppose that the enemy attacks not the munitions truck (which may well be guarded) but Bob personally while on his stroll (thus depriving the services of a skilled

driver in the continuation of the journey). Will such an attack, directed against a civilian employee, be lawful? This is where General Rogers and I initially disagreed: I said yes, and he said no. After much soul-searching (a process that took a couple of years), we came to an agreement shared by the entire group of experts. It all depends on geography, *i.e.* where the driving by Bob is done. If the fighting is taking place in Afghanistan, and Bob is driving the munitions truck from Idaho to Minnesota, we are now all agreed that he does not qualify as DPIH since the activity in which he is engaged is too remote from combat operations (although the munitions truck as such remains a military objective wherever it is located). Conversely, if Bob is driving the munitions truck from Kabul to Kandahar, he counts as DPIH. The test, as we see it, is whether the driving is connected to actual hostilities.

If one moves from land warfare to air warfare, the same principle applies, subject to changing circumstances. Given the possibility of air refuelling, the geography must be stretched while retaining the connection to the combat operations. Loading or servicing a military aircraft on its way to be engaged in hostilities even across the world - if carried out by a civilian employee - amounts to DPIH. On the other hand, if the military aircraft is loaded or serviced by a civilian on a routine flight away from the contact zone (say, from Norfolk, Virginia, to San Diego), it does not. Dissecting the case of “Bob the driver” has facilitated the parsing of more than a handful of tasks performed by civilians in diverse circumstances.

6. Drones

I have mentioned drones already, but since this has recently become an exceedingly popular topic in The Netherlands (and not only in The Netherlands), let me expand a little.

A drone - namely, an Unmanned Aerial Vehicle (UAV) - is a platform in the air. For the most part it is used purely for surveillance, but sometimes a missile can be launched from the drone. In any event, there is a “man in the loop” (who may be a woman). That is to say, somebody sits next to a computer console, getting an informational input from the drone and issuing feedback. The drone may loiter in the air above the target for many hours, during which time it can be patiently guided to change altitudes and angles, so that the information gained is optimal. Finally, the “man in the loop” - if satisfied - may push the button releasing a missile (if the drone is armed) or instructing another platform in the air (or even ground forces within range) to strike the target.

Drones are frequently controlled by civilians. This is particularly noteworthy in the US where, for whatever reason, drones are often operated by CIA agents. Even in other countries, where the supervision of drones is (as it should be) a matter for the armed forces, “outsourcing” is common and civilians are hired for the discharge of the delicate duties associated with the operation of this specific means of warfare. The technology is such that the civilian guiding the drone may be situated at a great distance from the target, working in an office, e.g., in Cincinnati, while the drone is hovering over a target in Afghanistan. But there is no escape from the conclusion that the civilian doing this may be characterized as DPIH, although he or she is merely pushing buttons thousands of miles away from the target.

The principal advantage of a drone is the ability to gather real-time information from an “unblinking eye” in the sky, and instigate military action accordingly. In the past, a military commander who wanted to know how an enemy target “on the other side of the hill” looked – and whether its attack would entail excessive collateral damage to civilians, in breach of the principle of proportionality - had to spend a lot of time and energy on collating every available piece of information, debriefing patrols or prisoners of war, evaluating aerial photographs, etc. On too many occasions, by the time that the commander reached a decision, the information garnered would be completely outdated. Nowadays, thanks to the drone, the process is neater, faster, and - above all - more credible, there being no time-lag between the intelligence-gathering phase and the military action. Mistakes still happen, but not in the same frequency as in the past.

7. What Is Clearly Not DPIH

It must be grasped that civilian employees in munitions factories, although they contribute substantially to the war effort, do not lose their civilian protection from attack merely on account of their vocation. This is a pivotal point, inasmuch as most employees in munitions factories during wartime are civilians, and in both World Wars they were often women (since the men were mobilized). Munitions factories constitute military objectives, and, when they are at work, the civilian employees are running a risk. Should a munitions factory be attacked, the civilian employees are looked at as collateral damage. If the factory is of prime military value – for instance, if it produces F15s or F16s – I cannot think of any number of casualties to the civilian employees that will be deemed excessive. Excessive does not mean extensive.

All the same, the civilian employees of a munitions factory (even one producing F15s or F16s) remain civilians. They do not become DPIH, inasmuch as their work relates to capacity-building rather than actual hostilities. Hence, they cannot be attacked when they are at home or when they are commuting to or from work (unless they are using main arteries of communication, which are also considered military objectives). The attack must be *in situ*, when the civilians are in or near the military objective, not otherwise.

The same applies to civilians who are employed by the armed forces in military bases and installations, discharging general duties as sanitation engineers, dry cleaners or janitors, etc. If caught in a military base while it is under attack, they become lawful collateral damage. Once out of the base, their civilian protection is intact. The enemy cannot follow them when they leave the base, because they are not DPIH.

8. What Is Controversial?

Between the white and the black, there are a lot of shades of gray. There is still no agreement about the DPIH standing of a string of activities. For instance, what about a civilian who does not work in a munitions factory but undertakes to prepare at home an IED (improvised explosive device)? The argument is that, unlike a munitions factory worker - who does not deal with the end use of the munitions when they leave the assembly line, and does not know where the bomb goes or against whom it is going to be targeted - the individual preparing an IED is usually much more closely linked to the actual delivery of the device to the objective.

There are other controversial issues. Thus, what about training and recruitment? The recruiters and the trainers may do an indispensable job in laying the ground for combat operations, but - assuming that they are civilians - do they lose protection from attack? And what about civilian computer technicians who encode or repair military hardware and software programs? For that matter, what about a civilian who volunteers to serve as a guide for a military unit, enabling it to find a track through difficult terrain? What about civilians who donate (not sell, but provide freely) essential supplies to combatants?

These (and others) are issues that continue to reverberate in discussions regarding DPIH. Had the ICRC project ended with consensus, one could conceivably apply agreed general principles to specific cases. But since many of the general principles are themselves in controversy, the gap

between the strict view (commonly followed by the military) and the more lenient approach (advocated by NGOs) seems to be widening rather than shrinking.

9. 'For Such Time'

The dissensions are not confined to the phrase "direct participation in hostilities", extending also to the three words "for such time". Of course, in certain contexts, the meaning of this locution is easy to understand. Take, for example, reservists in the Swiss model (copied by Israel and other countries). Every year, a reservist serves in the army for a few weeks, perhaps a month. So for 11 months one can be a bank manager in Zurich's Bahnhofstrasse or a yodeler in an Alps canton, surely a civilian. But for one month, the same person picks up a rifle (which is stored at home), puts on a uniform, takes a train to the assembly point, and becomes a combatant. What the words "for such time" denote is that during the one month of military service the reservist can be attacked wherever he is, but during the rest of the year the enemy cannot chase him to the Bahnhofstrasse or to the Alps region. The same principle applies, *mutatis mutandis*, in other settings.

The first question is: how far downstream and upstream can you go after the person who qualifies as DPIH? It is generally agreed that the times of engagement or deployment (on the way to battle) and disengagement (on the way back) are included. A person who explodes a bomb somewhere becomes DPIH even before he detonates the fuse, and he retains that standing after he has done that. Yet, establishing the exact moment when the DPIH status commences and when it ends gives rise to controversy. Some commentators tend to contract the time-span, and others (including myself) are disposed to stretch it out.

Then there is the question (already mentioned) of organized armed groups. Does membership in an organized armed group suffice, no matter what one's role is, or is there a condition – as the ICRC believes – of a continuous combat function? If a combat function is required, a cook will not be regarded as DPIH. However, why should a cook be absolved from the status of DPIH if he or she is a member of an organized armed group? After all, a cook serving in the armed forces of a State qualifies as a combatant, notwithstanding his or her non-combat function. Why should a cook serving in an organized armed group on the opposing side be differently treated? As far as I am concerned, by joining an organized armed group, a

person elects to be DPIH, no matter what he or she is assigned to do within the group. The DPIH status will be terminated only when the person chooses to quit the group. Of course, there is an evidentiary problem of establishing actual belonging to an armed group, which is not likely to issue membership cards. But assuming that proof of membership is available (through careful intelligence work), the words “for such time” ought to coincide with the entire time-frame of affiliation, irrespective of specific acts or functions.

The cardinal issue is linked to what is usually called the “revolving door” phenomenon. Another way to look at it is referring to a person who is trying to be a “farmer by day, fighter by night”. This person tills the land or harvests the crops during daylight. After dusk, he goes to the barn, digs under the hay and pulls out a Kalashnikov, proceeding to a nearby road where he hides in ambush until an enemy car turns up, at which point he opens fire and manages to kill or wound those riding in it. Then he goes home, puts the Kalashnikov back under the hay in the barn, and the next day he is a farmer again. The Interpretive Guidance’s position is that every single action must be considered in isolation, and that civilian immunity from attack is restored at the end of each military engagement. Interestingly, this is inconsistent even with the ICRC commentary on the Additional Protocols, which rejects the “farmer by day, fighter by night” syndrome.

What my colleagues and I are saying, and this was perhaps the main bone of contention, is that DPIH activities cannot be regarded in isolation if there is a clear-cut pattern of participation in hostilities. When a person behaves as a “farmer by day, fighter by night” several times in a row, he can be considered DPIH on a 24/7 basis. That is of tremendous practical import, since it may prove impossible to take the person out while he is lying in ambush. The whole point about an ambush is that the person is well hidden from sight. On the other hand, if (through meticulous intelligence-gathering) his home base is known, he can be attacked there. The ICRC does not approve, but State practice confirms that such an attack is fully in compliance with IHL.

10. “Human Shields”

Another point of disagreement relates to “human shields”. There are two relevant sub-paragraphs in Article 51 of Additional Protocol I. Sub-paragraph (7) enunciates a norm which is irrefutable: it is forbidden to use the presence or movement of civilians to screen one’s own military

objectives or to impede the enemy's military operations. Indeed, manipulating "human shields" is a war crime pursuant to the 1998 Rome Statute of the International Criminal Court. The problem starts when, in contravention to sub-paragraph (7), "human shields" are being used in actuality. Granted, those responsible for this method of warfare are war criminals. But what are the consequences for the "human shields" themselves? Sub-paragraph (8) insists that a violation of the injunction against the use of "human shields" does not release a Belligerent Party from its legal obligations towards civilians. In essence, this means that the principle of proportionality remains intact.

In any analysis of the topic, it is imperative to distinguish between voluntary and involuntary "human shields". It is true that it is not always easy to tell them apart, and the rule is that - when in doubt - "human shields" must be viewed as involuntary. That is to say, the onus of proof lies on those claiming that "human shields" are voluntary. If the factual background is not known for sure, then the persons concerned must be deemed to be involuntary "human shields".

Voluntary "human shields" are usually activists who decide to go into harm's way, with a view to showing their support for the cause of one of the Belligerent Parties. A leading example is that of the European activists who, in 1991, declared that they would go to Iraq and stand on the roofs of buildings likely to be bombed by the American-led coalition, so as to screen the targets from attack. Fortunately, Saddam Hussein suspected them of being clandestine foreign agents and denied their entry into Iraq. But there have been many other instances of voluntary "human shields", in Gaza and elsewhere.

What is the rule about voluntary "human shields"? My position is straightforward: voluntary "human shields" turn themselves into a DPIH and do not benefit from civilian immunity from attack. I am not suggesting that voluntary "human shields" become lawful targets before arrival at, or after departure from, the military objective which they are attempting to screen. What I am saying is that, for such time as the voluntary "human shields" stay at or near the lawful target, they lose their civilian protection. Consequently, the attack against the military objective may proceed as if the voluntary "human shield" were not there. The thrust of the argument is that voluntary "human shields" cannot impede an attack against a military objective, because they do not count as protected civilians in the calculus of proportionality and do not come into the assessment of collateral damage. That is the position upheld by most Western experts, although the ICRC does not see eye to eye with us.

The core of the problem is not voluntary but involuntary “human shields”. Here there are three competing outlooks. One extreme view (endorsed by the ICRC) is that of simply applying the principle of proportionality, counting all “human shields” as ordinary civilians for purposes of proportionality. If an excessive number of them is expected to be killed or injured when screening a military objective, the attack must be abandoned (despite the fact that the use of the “human shields” is a serious breach of IHL and a war crime). The other extreme view ignores altogether Article 51(8) (which does not reflect customary international law), and regards the blood of the involuntary “human shields” as staining the hands of those who are responsible for adopting this unlawful method of warfare. Admittedly, a complete disregard of Article 51(8) is a posture that only non-Contracting Parties to Additional Protocol I (like the Americans) can assume. For my part, I take a middle position. In my opinion, the principle of proportionality does apply to involuntary “human shields” - who do not lose their civilian protection - but the determination of what counts as excessive collateral damage should be attenuated by the special circumstances. In other words, since “human shields” are illegally used to screen the target, the appraisal of proportionality need not be pursued as strictly as in ordinary circumstances: it is permissible to take into account the fact that the enemy has acted in breach of IHL. I am glad to say that this approach is confirmed by the 2004 UK Manual of the Law of Armed Conflict.

11. Private Military Contractors

Lately, a new concern has arisen with respect to Private Military Contractors (PMC). In Iraq, the Americans - at the peak time of their presence there - had 135,000 soldiers deployed, plus approximately 150,000 PMC. Thus, the employment of PMC has become a mass industry. PMC include weapons instructors, guards, technicians, drivers, pilots, logistical aides, and what not. The question is: what is their legal status in an armed conflict? An informal session devoted to the subject in Montreux in 2008 came up with the conclusion that, as a rule, PMC are civilians. There are two assumptions here. One is that they are not incorporated into the armed forces: if they are, they constitute ordinary combatants. Two, as civilians, PMC are entitled to the usual protection from attack. But, in order not to lose that protection, they must be careful not to cross over into the domain of DPIH.

Iraq, as long as the Americans were there, is a good illustration. There was a major problem of banditry and lawlessness in the country (epitomized by

the looting of the national museum in Baghdad). Convoys and warehouses, not to mention foreign dignitaries and relief workers, had to be constantly guarded. But guarded from whom? PMC can retain their civilian status while guarding convoys from marauders. However, if a convoy is attacked by enemy combatants (as distinct from ordinary criminals), any PMC taking part in the hostilities would qualify as DPIH. Given the conditions of anarchy in Iraq for several years, it was not always easy to tell who was who on the ground. Yet, from a legal perspective, drawing the line of division between combatants and sheer outlaws poses no great obstacle.

12. Conclusion

DPIH and “human shields” are themes that call for further exploration. The disputes that they generate cannot be underrated. Nevertheless, they should not be looked at through a distorting lens. All legal systems, including IHL, include norms that are shrouded by a mist of ambiguity. This must not create the false impression that the entire legal structure is characterized by equivocation. There can be no bickering over the fundamental principle of distinction. Scholars love to argue contentious issues, but not every issue in IHL is contentious.