

**ICTY, Prosecutor v. Pavle Strugar, Appeals Chamber, Judgment of 17 July 2008**  
**(Active Participation in Hostilities)**

164. The Trial Chamber found that [Mr.] Valjalo was injured while on his way to work and that there was nothing in the evidence to suggest that, in his capacity as a driver for the Dubrovnik Municipal Crisis Staff, he was taking an active part in the hostilities. It therefore held that Valjalo was the victim of cruel treatment as a violation of the laws or customs of war under [Common] Article 3 of the [Geneva Conventions].

(a) Arguments of the Parties

165. Strugar submits that Valjalo was a driver assigned to work for the Dubrovnik Municipal Crisis Staff since 15 September 1991 and that during the attack of 6 December 1991 he was transporting members of the Crisis Staff, municipality officials and officials of the Republic of Croatia to perform war tasks. As such, it is argued that he was taking an active part in hostilities. In this regard, Strugar refers [*inter alia*] to the Law on the Defence of the Republic of Croatia, which provides that members of the municipal crisis staff perform military tasks in times of war. [...]

168. The Prosecution argues that Valjalo was not a member of the armed forces, but was a civilian working as a driver for the Dubrovnik Crisis Staff and that, in his auxiliary position as a driver, he did not meet the test of taking a direct part in the hostilities. [...]

170. [T]he Prosecution acknowledges that should Valjalo have been the member of an organised armed group or of the armed forces conducting the hostilities or should he have been a civilian who was directly participating in the hostilities, then he could be legitimately targeted under international humanitarian law.

(b) Discussion

[...]

172. In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond a reasonable doubt that the victim of the alleged offence was a person taking no active part in the hostilities.

173. In *Kordić and Čerkez*, the Appeals Chamber defined the notion of direct participation in hostilities set out in Article 51(3) of Additional Protocol I as encompassing acts of war which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy's armed forces. The Appeals Chamber considers the concepts of "active participation" under Common Article 3 and "direct participation" under Additional Protocol I to be synonymous for the present purposes. [...]

174. The notion of participation in hostilities is of fundamental importance to international humanitarian law and is closely related to the principle of distinction between combatants and civilians. Pursuant to Additional Protocol I, combatants have the right to participate directly in hostilities and civilians enjoy general protection against dangers arising from military

operations unless and for such time as they take a direct part in hostilities. As a result, a number of provisions of international humanitarian law conventions refer to the concept of participation in hostilities.

175. While neither treaty law, nor customary law expressly define the notion of active or direct participation in hostilities beyond what has been stated above, references to this notion in international humanitarian law conventions do provide guidance as to its meaning. Common Article 3 itself provides examples of persons other than civilians taking no active part in the hostilities, namely “members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”. Article 41(2) of Additional Protocol I states that a person will be *hors de combat* if he “is in the power of an adverse Party”, “clearly expresses an intention to surrender” or “has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself” provided that “he abstains from any hostile act and does not attempt to escape”. *A contrario*, the notion of active participation in hostilities encompasses armed participation in combat activities.

176. Conduct amounting to direct or active participation in hostilities is not, however, limited to combat activities as such. Indeed, Article 67(1)(e) of Additional Protocol I draws a distinction between direct participation in hostilities and the commission of “acts harmful to the adverse party” while Article 3(1) of the Mercenaries Convention distinguishes between direct participation in hostilities and participation “in a concerted act of violence”. The notion of direct participation in hostilities must therefore refer to something different than involvement in violent or harmful acts against the adverse party. At the same time, direct participation in hostilities cannot be held to embrace all activities in support of one party’s military operations or war effort. This is made clear by Article 15 of Geneva Convention IV, which draws a distinction between taking part in hostilities and performing “work of a military character”. Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless.

177. The Appeals Chamber also takes note of examples of direct and indirect forms of participation in hostilities included in military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols. Examples of active or direct participation in hostilities include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces. Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.

178. On the basis of the foregoing, the Appeals Chamber holds that in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber

must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party.<sup>1</sup> If a reasonable doubt subsists as to the existence of such a nexus, then a Trial Chamber cannot convict an accused for an offence committed against such a victim under Article 3 of the Statute.

179. When dealing with crimes pursuant to Common Article 3, it may be necessary for a Trial Chamber to be satisfied beyond a reasonable doubt that the alleged offence committed against the victim was not otherwise lawful under international humanitarian law. [...] Indeed, if the victim of an offence was a combatant or if the injury or death of such a victim was the incidental result of an attack which was proportionate in relation to the anticipated concrete and direct military advantage, his injury or death would not amount to a violation of international humanitarian law even if he was not actively participating in hostilities at the time of the alleged offence.

**ICC, Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, Judgment of  
1 December 2014  
(using children under the age of fifteen years to participate actively in hostilities)**

323. At the outset, the Appeals Chamber considers that Mr Lubanga's argument is correct that, in the context of Common Article 3 of the Geneva Conventions, 'active' and 'direct' participation in hostilities are used interchangeably. [...] Common Article 3 of the Geneva Convention is relevant to the *distinction* between persons who are afforded certain protection under the Geneva Conventions, including civilians, and those who are excluded from that protection. The purpose of Common Article 3 of the Geneva Conventions is to afford protection to those persons who are "taking *no* active part in the hostilities".

324. Nevertheless, [...] the Appeals Chamber finds that the term 'participate actively in hostilities' in article 8 (2) (e) (vii) of the Statute does not have to be given the same interpretation as the terms active or direct participation in the context of the principle of distinction between combatants and civilians, as set out, in particular, in Common Article 3 of

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<sup>1</sup> Cf. *United States of America v. Salim Ahmed Hamdan*, U.S. Military Commission, 19 December 2007, p. 6: "The Commission also finds that the accused directly participated in those hostilities by driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations. [...] Although Kandahar was a short distance away, the accused's past history of delivering munitions to Taliban and al-Qaeda fighters, his possession of a vehicle containing surface to air missiles, and his capture while driving in the direction of a battle already underway, satisfies the requirement of 'direct participation'."

the Geneva Conventions. This is because, despite the use of similar terminology, the purpose of article 8 (2) (e) (vii) of the Statute is different from that of Common Article 3 of the Geneva Conventions. The latter provision establishes, inter alia, under which conditions an individual loses protection as a civilian because he or she takes direct part in hostilities. On the other hand, article 8 (2) (e) (vii) of the Statute seeks to protect individuals under the age of fifteen years from being used to ‘participate actively in armed hostilities’ and the concomitant risks to their lives and well-being. Therefore, the Appeals Chamber finds that the interpretation given to Common Article 3 of the Geneva Conventions in the context of the principle of distinction cannot be simply transposed to that of article 8 (2) (e) (vii) of the Statute. Rather, the term ‘participate actively in hostilities’ must be given an interpretation that bears in mind that provision’s purpose.

[...]

340. The Appeals Chamber considers that [...] the Trial Chamber did not err in finding that the expression ‘to participate actively in hostilities’, imports “a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities”. In assessing whether an activity or role falls within the scope of article 8 (2) (e) (vii) of the Statute, it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged. The Appeals Chamber is satisfied with the Trial Chamber’s findings that the deployment of children under the age of fifteen years as soldiers and their participation in combat, as well as their use as military guards and bodyguards, fulfil this requirement and thus constitute use to participate actively in hostilities within the meaning of article 8 (2) (e) (vii) of the Statute.

### **Otázky k rozsudku:**

1. (*k rozsudku ICTY*) Co znamená podmínka přímé účasti na nepřátelských akcích a jaké okolnosti jsou zásadní pro posouzení, zda byla splněna v konkrétním případě? Byla podle vás splněna v případě pana Valjalo, který byl vážně zraněn při ostřelování Dubrovniku jugoslávskou armádou? Proč ano/ne?

2. (*k rozsudku ICC*) Jakým způsobem interpretoval požadavek aktivní účasti na nepřátelských akcích ICC? V jakém ohledu a z jakých důvodů se jeho výklad liší od výkladu ICTY v případě *Strugar*?