

# **Third Expert Meeting on the Notion of Direct Participation in Hostilities**

**Geneva, 23 – 25 October 2005**

## **Summary Report**

**Co-organized by  
the International Committee of the Red Cross  
and  
the TMC Asser Institute**

This report was drafted by Nils Melzer, Legal Adviser of the ICRC, in a personal capacity and does not express or intend to express the institutional position of either the International Committee of the Red Cross or of the TMC Asser Institute on any of the issues examined. Equally, all statements referred to in this report, whether nominally attributed or not, were made in the personal capacity of each expert and do not express or intend to express the position of any government, organization or other institution.



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## Preliminary Remarks

- **Introductory Remarks to the Working Sessions:** The organizers' "Introductory Remarks" summarized at the beginning of each section of this report were made by Nils Melzer (ICRC), for the Working Sessions covered by Sections II to V of the report, and by Avril McDonald (TMC Asser Institute), for the Working Sessions covered by Section VI of the report.
- **Expert Diagrams:** During the Expert Meeting, several experts handed in diagrams, which they had drawn for the purpose of illustrating their oral contributions. Copies of each diagram were subsequently distributed to the participants at the Expert Meeting. However, for technical reasons it was not possible to reproduce the diagrams in this report.

## Introduction

In the framework of its project on the "Reaffirmation and Development of International Humanitarian Law", the International Committee of the Red Cross (ICRC), in cooperation with the TMC Asser Institute, organized a Third Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law". This meeting, which took place from 23 to 25 October 2005 in Geneva, brought together around forty legal experts representing the military, government and academia, as well as international and non-governmental organizations.

The event was part of a process of clarification of the notion of "direct participation in hostilities", which was initiated in 2003 and is intended to conclude in 2006. The process aims to identify defining elements of "direct participation in hostilities" and to establish guidance for the interpretation of that notion in both international and non-international armed conflict.

In preparation for this Expert Meeting, a number of thematic background papers were submitted to the participants, outlining the topics to be discussed and the legal and practical consequences of the different possible approaches that could be taken in each case. The high level of expertise of the participants provided for constructive and fruitful discussions on some of the most complex legal questions related to the notion of direct participation in hostilities. Overall, the discussions lead to the clarification of a number of questions and thus further reduced the remaining controversy as to how the notion of "direct participation in hostilities" may be interpreted.

The aim of this report is to provide an overview of the discussions held during the Expert Meeting, as well as of the conclusions reached with regard to the further steps to be taken. For easier accessibility, the report summarizes the main interventions made by the experts during the different working sessions under topical headings which follow the thematic order of the meeting's agenda (see Annex).

## **I. Aim and Final Product of the Clarification Process**

After welcoming the participants, the organizers opened the 2005 Expert Meeting with a round table discussion on the possible outcome and final product of the process of clarifying the notion of "direct participation in hostilities" and on the concrete subsequent steps that should be taken. After giving a brief overview of the clarification process up to the present stage, the organizers outlined their preliminary views on how that process could best be brought to a conclusion and then invited the participants to express their views and opinions in that regard.

### **Organizers' Proposal**

It was recalled that, at the beginning of the Expert Meeting process, the organizers had envisaged an abstract definition of the notion of "direct participation in hostilities", perhaps illustrated by a list of examples of conduct that would or would not constitute direct participation in hostilities. However, the discussions during the subsequent meetings gave rise to serious doubts as to whether an abstract definition, with or without a list of examples, could actually cover the vast variety of conceivable situations and whether it could sufficiently reflect the complexity of the legal issues at stake.

The organizers therefore proposed the drafting of a more comprehensive document, the first part of which would identify the essential elements of the notion of direct participation in hostilities, while the second part would consist of a commentary explaining these elements and reflecting the various views that had been expressed by the experts participating in the clarification process. The text would have to be carefully drafted, so as not to diminish the protection of peaceful civilians, who were not engaged in direct participation in hostilities. Such a document, clearly more substantive than the summary reports produced so far, could perhaps be described as an "interpretive guidance" on the notion of direct participation in hostilities and would probably be more operationally relevant than just an abstract definition supplemented by some examples.

The organizers proposed that they draft such a document based on a thorough evaluation of the discussions held and the materials produced during the first three Expert Meetings and

that this document be submitted to the participants two months ahead of the Fourth (and last) Expert Meeting to be held by the end of 2006. The primary aim of this meeting would be to provide an opportunity for a review of the draft document, to address major points of disagreement that may still persist and to ensure that any divergences of views remaining after the end of that meeting would be properly reflected in the commentary of the final document.

## **Expert Opinions**

There was general agreement among the experts that the clarification process on the notion of “direct participation in hostilities” should result in the publication of a final document (“report”; “interpretive guidance”) and that the organizers should provide the participating experts with the draft of such a document as a basis for discussion ahead of the Fourth Expert Meeting on “Direct Participation in Hostilities” planned for late 2006.

It was however emphasized that, while the importance and persuasive influence of the opinions expressed by this informal group of experts should not be underestimated, the making of international law nevertheless remained a prerogative of states. Thus, the aim of the clarification process clearly could not be to “progressively develop” the law, but had to remain limited to interpreting the notion of “direct participation in hostilities” within the framework of the *lex lata*. This did not exclude that the final document could subsequently serve states as guidance with regard to the questions to be addressed and the problems to be resolved in developing conventional or customary IHL relevant to “direct participation in hostilities”. Several experts also recommended that the clarification process should focus on interpreting “direct participation in hostilities” primarily as a notion of the conduct of hostilities under IHL rather than from the perspective of international criminal law.

While it was not excluded that the clarification process may lead to the identification of certain abstract elements of the notion of “direct participation in hostilities”, it was generally regarded as unrealistic to achieve a comprehensive definition – even if illustrated by a list of examples – which could reliably identify all conceivable cases of “direct participation in hostilities”. Therefore, the primary value of the final document would probably lie in a report identifying the legal and practical problems inherent in the currently vague notion of “direct participation in hostilities” and in providing an overview of the various opinions expressed on these points during the clarification process. It was stressed that remaining divergences of

opinion should be clearly reflected in the document. Several experts proposed that, beyond mere reporting, the final document should also outline the legal and practical consequences of the various approaches that could be taken with regard to some of the unresolved issues. In order to provide useful and concrete assistance to practitioners, it was further suggested that the final document should not be limited to compiling different opinions, but should provide certain informal and preliminary recommendations. Finally, it was recalled that any interpretation of the notion of “direct participation in hostilities” would have to remain consistent with legal logic and other rules of international law.

A final document achieving but not exceeding these parameters was generally deemed as sufficiently ambitious to make a real contribution to the clarification of legal questions raised by the notion of “direct participation in hostilities” and, at the same time, modest enough not to interfere with the legislative prerogative of states.

## **II. Residual Issues from the Questionnaire (2004)**

Working Session I provided the experts with the opportunity to address two residual issues, which had already been raised in the Questionnaire (2004) but had not been discussed in detail during the 2004 Expert Meeting: namely the question of the extent to which "inter-civilian atrocities"<sup>1</sup> and the "establishment and exercise of control over persons, objects and territory"<sup>2</sup> qualify as direct participation in hostilities.

### **1. Inter-Civilian Violence and "Direct Participation in Hostilities"**

#### **Introductory Remarks**

It was suggested that the issues to be clarified with respect to inter-civilian violence could be summarized in the following question: whether and, if so, in what circumstances violent acts carried out by civilians against other civilians in a context of armed conflict could be regarded as constituting part of the "hostilities".

This would hardly be the case, for example, where civilian prison guards violently abused civilian prisoners, where civilians participated in violent riots and demonstrations or where ordinary criminals simply took advantage of the chaos of armed conflict to loot or rape and murder other civilians. On the other hand, in certain cases of inter-civilian terrorist acts, of hostage-taking or of "ethnic cleansing" the answer would probably be less clear.

The practical significance of this question was that it aimed to determine whether civilians committing acts of violence against peaceful fellow civilians in situations of armed conflict could be directly attacked while so doing, or whether they had to be dealt with according to law enforcement principles.

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<sup>1</sup> Section I / 6 Questionnaire.

<sup>2</sup> Section I / 2 Questionnaire.

## Expert Opinions

It was generally agreed by the experts that not all forms of inter-civilian violence taking place in a situation of armed conflict could be regarded as direct participation in hostilities, but that certain additional criteria had to be met.

### a) Irrelevance of the Criterion of Legality or Illegality

Regarding the distinction of direct participation in hostilities from ordinary crimes, many experts emphasized that the illegality or legality of an act of civilian violence under domestic or international law is irrelevant for its qualification as direct participation in hostilities. It was also recalled that a civilian prosecuted for the mere fact of having directly participated in hostilities would have to be prosecuted for a violation of domestic law and not of IHL. Neither of these views was opposed by any participant.

However, violent transgressions against peaceful civilians always being contrary to IHL, the difficulty in the case of inter-civilian violence lay in distinguishing prohibited conduct that constituted direct participation in hostilities and entailed loss of protection against direct attack from prohibited conduct that did not have this consequence. In this respect, one expert suggested that a distinction should be made between the "private" and "public" acts of the civilians in question. For example, robbing a bank for purely personal gain was a private act, while robbing the same bank in order to raise money for the conduct of hostilities was a public act. In any case, however, the qualification of an act as direct participation in hostilities required a link to military activities.

### b) Irrelevance of Individual Motives

Many experts also emphasized that the subjective motives driving a civilian to carry out a violent act against peaceful civilians could not be a decisive criterion for the qualification of that act as direct participation in hostilities. For a soldier called to make a split second decision it would be impossible to determine *ex ante* whether the subjective intent of the civilian in question was the furtherance of the political or military goals of a party to the conflict. Instead, civilian conduct had to be evaluated based on objective criteria from the perspective of a reasonable soldier. One expert suggested, however, that subjective intent to

support the military action of a party to the conflict could remain a decisive criterion as long as it was objectively determined, namely based on what the perception of a reasonable soldier would have been in the prevailing circumstances.

### c) **The Criteria of Military Advantage and of Nexus to the Hostilities**

**Military Advantage:** A few experts suggested that acts of inter-civilian violence should be regarded as part of the hostilities if they provided a military advantage to a party to the conflict. This was said to imply that the act could not be of an individual nature but had to be part of a plan, a policy or a large scale operation. Other experts opposed this view and asserted that the question of whether or not civilian conduct actually created a military advantage could not be relevant for its qualification as direct participation in hostilities. Otherwise, malevolent parties to the conflict could claim that a "military advantage" was created for the opposing party whenever civilian conduct represented a certain burden for its troops and occupied military resources that otherwise could have been used for the conduct of hostilities.

**Nexus to the Hostilities:** Conversely, a criterion that found wide, practically unanimous, support by the experts was the nexus requirement. Accordingly, in order to qualify as direct participation in hostilities, inter-civilian violence must have a sufficient nexus to military operations or hostilities occurring in relation to a situation of armed conflict. In the words of individual experts, inter-civilian violence had to be "specifically related" or "linked" to military operations, "connected to violence used by combatants", have a "nexus to the hostilities", occur "in furtherance of specific hostilities", be "linked" or "related to" or "part of" already existing hostilities. Thus, while inter-civilian violence occurring generally "on behalf of" a party to the conflict or in support of its political goals was not *per se* regarded as sufficient, there seemed to be unanimous agreement that inter-civilian violence carried out "specifically in support of the military operations of a party to the conflict" would constitute direct participation in hostilities.

It was also recalled that, in the absence of a nexus to already existing hostilities, violence used by civilians could only constitute direct participation in hostilities if it reached the threshold of intensity required for a non-international armed conflict. Only one expert held that even ordinary criminal activities or civilian disorder exceeding the scope of regular law enforcement means could be regarded as part of the hostilities if only military means were available to keep the situation from deteriorating.

#### **d) Use of Lethal Force in Hostilities and in Law Enforcement**

The question arose whether, in the case of an inter-civilian hostage taking occurring in a situation of armed conflict, the hostage takers could be directly attacked as legitimate military targets or whether they would have to be pursued according to law enforcement principles.

There was general agreement that lethal force could be used against hostage takers threatening the lives of the hostages or of those trying to liberate them. Several experts pointed out, however, that the legal basis for such use of lethal force was not the rules of IHL on the conduct of hostilities (i.e., not a direct participation in the hostilities by the hostage takers), but the principles of law enforcement, which require the acting authorities to attempt arrest prior to the use of lethal force. In summary, no objection was raised to the argument that, in exceptional circumstances, lethal force could be used outside the framework of the conduct of hostilities, namely within a law enforcement framework or in case of international interventions for the suppression of massive inter-civilian atrocities, such a genocide and ethnic cleansing, in so far as these interventions were not governed by IHL on the conduct of hostilities.

One expert underlined that the qualification of an act as direct participation in hostilities had to be made from the perspective of the soldier confronted with the situation and had to be linked to that soldier's reasonable evaluation that the civilian in question represented an actual threat to himself or his fellow soldiers, regardless of the civilian's personal motivations. Conversely, as a general rule, inter-civilian violence which did not expose the intervening soldiers to any threat should not be regarded as direct participation in hostilities.

However, another expert insisted that the decisive question remained whether the inter-civilian violence was part of the hostilities. For instance, the looting by civilians of a village that had been conquered and abandoned by a party to the conflict was a matter of law enforcement. But the violent ethnic cleansing of the same village by the same civilians as part of the military strategy of a party to the conflict would constitute direct participation in hostilities. In this context, the example of the Kosovo conflict (1999) was raised where the police forces of the Serbian Ministry of the Interior were directly targeted during the NATO bombing campaign precisely because of their involvement in ethnic cleansing, although it remained doubtful whether they had been formally integrated into the armed forces.

Finally, one expert underlined the importance of distinguishing the question of who could be lawfully attacked under the rules of IHL from the question of whether soldiers should attack these persons under the rules of engagement (ROE) governing a certain operation. The lawfulness of directly attacking a specific civilian was a question of IHL and could not depend on the orders of an individual commander or of the aim of a specific operation.

#### **e) Situations of Doubt**

While in some cases ordinary crimes could be easily distinguished from direct participation in hostilities, the question was raised as to how to proceed in situations of doubt. One expert held that, in urban warfare, a soldier confronted with armed civilians could not be expected to draw the distinction between plunder, looting and robbery but must be allowed to directly attack any civilian carrying a weapon, even if that civilian was only trying to loot a supermarket.

Another expert insisted, however, that in case of doubt about whether a situation of inter-civilian violence constituted direct participation in hostilities no lethal force could be used. This view was supported by a further expert who emphasized that carrying a weapon does not make a civilian an instantaneous target. There always had to be a decision as to whether the civilian in question actually posed a threat. He gave the example of a context where a 75 year old civilian woman had been photographed while carrying an AK-47. Although fighting was still going on at the time, this woman did not constitute a threat because she was carrying the weapon to a collection point where the armed forces were buying weapons to "get them off the streets".

It was also recalled that the distinction between ordinary crimes and direct participation in hostilities was very difficult to make in practice, particularly in societies where inter-clan rivalries escalated to the level of non-international armed conflict. In such situations, all clan members of fighting age had the tendency to get involved in atrocities against fellow civilians including women and children, acts that could well be regarded as direct participation in the hostilities. This difficulty was exacerbated in situations of failed states, where it could be next to impossible to establish whether a specific act of inter-civilian violence was carried out on behalf of an identifiable party to the conflict.

## f) **Distinction between International and Non-International Armed Conflict**

A few experts held that some aspects of inter-civilian violence should be evaluated differently in situations of international and non-international armed conflict. For example, while the international law of state responsibility provided clear rules as to when persons could be said to be acting "on behalf" of a party to an international armed conflict, there were no criteria of comparable clarity for situations of non-international armed conflict. Moreover, in situations of occupation, there was a special legal framework regulating the rights and obligations of the occupying power facing inter-civilian violence in an occupied territory.

Most experts, while not disputing the importance of these differences for other aspects of inter-civilian violence, found that they were not decisive for the qualification of an act as direct participation in hostilities. Although the practical difficulties of distinguishing between private crime and direct participation in hostilities may not be the same in international and non-international armed conflict, the legal criteria for the qualification of an act as direct participation in hostilities were the same. Clearly though, civilian conduct could only be regarded as direct participation in hostilities once a situation actually reached the threshold of an armed conflict in the first place.

## **2. Establishment and Exercise of Control over Military Personnel, Objects and Territory**

### **Introductory Remarks**

It was recalled that, in their responses to the 2004 Questionnaire (*Section I/2, "Establishment and Exercise of Control over Military Objects, Territory and Personnel for Reasons related to the Armed Conflict"*), most experts had held that the establishment and exercise of control by physical or electronic means over military personnel and objects or over computer networks and territory used by the adversary constituted direct participation in hostilities, whereas the seizing of control over financial assets of the adversary did not. Since this issue had not been further discussed during the subsequent Expert Meeting in October 2004, this Working Session was an opportunity to do so.

It was recalled that control could not only be of physical nature, such as over persons, territory, equipment or natural resources, but could also be of an electronic nature, such as over weapons systems or computer networks. Compared to the traditional notion of attack, the establishment and exercise of control could have a direct impact on military personnel and equipment without necessarily involving the use of armed force and without necessarily leading to death, injury and destruction. It would therefore be important to clarify the criteria based on which the exercise and establishment of control could qualify as direct participation in hostilities. This also included the question of the extent to which purely economic measures, such as the establishment of control over financial assets required by the adversary to finance the conduct of hostilities, would be sufficient to qualify as direct participation in hostilities.

## **Expert Opinions**

### **a) The Elements of "Armed Force" and of "Death, Injury or Destruction"**

There seemed to be general agreement among the experts that direct participation in hostilities did not necessarily require the use of armed force and did not necessarily have to cause death, injury or destruction. It was recognized that, in a situation of armed conflict, there were many ways of harming an adversary which would clearly amount to direct participation in hostilities without necessarily involving the usual means or consequences of warfare. Computer network attacks (CNA), for example, could harm the adversary without resort to traditional armed force. Nevertheless, a CNA remained an attack in the sense of IHL and had to be conducted according to the same rules as any other attack. It was also conceivable to capture military personnel or equipment, and even to deny hostile armed forces access to territory without resorting to armed force or causing death, injury or destruction. Clearly though, all these examples could amount to direct participation in hostilities. Therefore, the concept of direct participation in hostilities could not be limited to traditional war fighting scenarios.

### **b) Establishment and Exercise of Control over Financial Assets**

At the outset of the discussion on this point – given that CNA could qualify as direct participation in hostilities – one expert raised the question of why the same could not be said

for the establishment of control over financial assets of the adversary. Several experts responded that CNA and establishing control over financial assets were two disparate issues and that any act amounting to direct participation in hostilities required a sufficient nexus to the battlefield. Another expert nevertheless recalled the practical importance of the economic aspect of armed conflict. Notably in Africa, many contemporary armed conflicts were fought for control over economic activities and over natural resources such as diamonds, oil and gold. While recognizing this reality, several experts responded that economic motivations did not automatically qualify the establishment or exercise of financial or economic control as direct participation in hostilities.

In summary, the predominant opinion expressed by the experts was that depriving the adversary of financial assets or other clearly indirect advantages did not qualify as direct participation in hostilities. Several experts cautioned that taking a different view would mean including not only "war fighting" but also "war sustaining" activities in the notion of direct participation in hostilities and warned that this would amount to opening the "Pandora's box". Therefore, the concept of direct participation in hostilities could not include control over merely "war sustaining" assets, such as revenues which may eventually result in the purchase of arms and may ultimately enable the adversary to prolong the armed conflict.

In this context, one expert also recalled that the question of whether significant oil sales revenues could transform the oil industry into a military objective had generally been answered in the negative. Finally, another expert evoked the classical example of a weapons factory where the factory as such constituted a legitimate military target, but the factory workers themselves were not regarded as directly participating in hostilities and could not be directly attacked. Therefore, even if – in the most extreme case – financial or economic assets were to be considered legitimate targets, it was fair to assume that the persons controlling them could not be regarded as directly participating in hostilities.

### **c) Guarding Captured Personnel**

The question was also raised whether the exercise by civilians of control over enemy personnel, e.g., civilians guarding a prisoner of war (POW) camp, could constitute direct participation in hostilities.

At the outset of the discussion, two experts were not convinced that these civilian guards would in all cases have to be regarded as directly participating in the hostilities. According to

them, the function of a guard, similar to that of a cook, was of a merely "war sustaining" nature. Therefore, qualifying their activities as direct participation in hostilities would depend on whether they were armed and whether they would engage in hostilities if the adversary were to try to liberate the guarded POWs.

Several experts firmly rejected this view and emphasized that the function of a cook could not be compared to that of civilians guarding a POW camp. It was recalled that the main purpose of the latter activity was to prevent captured personnel from escaping and rejoining the armed forces of the adversary. This was a conspicuous example of a military activity that was part of the hostilities. This view was accepted by the previously disagreeing experts, one of whom recognized that his original view would only apply in very exceptional situations. In summary, the prevailing opinion seemed to be that guarding captured personnel of the adversary constituted a clear case of direct participation in hostilities.

### **III. Constitutive Elements of "Direct Participation in Hostilities"**

Working Sessions II and III continued and deepened the analysis and evaluation of four notions and requirements that had been discussed as possible constitutive elements of "direct participation in hostilities", namely the notion of "hostilities", the "nexus" requirement, the "causal proximity" requirement and the notion of "hostile intent".

#### **1. Hostilities**

##### **Introductory Remarks**

In the introduction to this Working Session it was proposed that the notion of "direct participation in hostilities" could be regarded as being composed of two elements, namely "hostilities" on the one hand and "direct participation" therein on the other. Therefore, the discussion should address the meaning and content of the term of "hostilities".

In that respect it was recalled that conventional IHL made extensive use of the notion of "hostilities" without, however, providing a definition. Nevertheless, the overall use of the term in the conventions suggested that the notion of "hostilities" was narrower than that of "armed conflict", but wider than the concept of "attack" as used in the First Additional Protocol in the sense of "acts of violence against the adversary, whether in offence or in defence".

It was suggested that it would be useful for the clarification of the notion of "direct participation in hostilities" to try to distinguish the notion of "hostilities" from "armed conflict", from "attack" and from other concepts that were sometimes used in a similar sense, such as "military operations", "activities hostile to the security of the state", and the notions of "hostile action" and of "hostile/harmful act". As amply illustrated in the background document, all of these notions were used in conventional IHL, and it was important not to confuse them with the concept of "direct participation in hostilities".

## Expert Opinions

### a) Preliminary Observations

Although doubts were expressed as to the feasibility of a clear cut definition of "hostilities", the experts generally recognized that a discussion of this question would be important for the clarification of the notion of direct participation in hostilities.

There also appeared to be general agreement among the experts that "hostilities" was a notion distinct from other concepts of IHL such as "armed conflict", "attack", "military operations", "activities hostile to the security of the state", "hostile action" or "hostile/harmful act". While none of the above terms were synonymous, particular caution was required so as not to conflate "hostilities" with "armed conflict" or with the very specific concept of "activities hostile to the security of the state". After all, many acts could be detrimental to the security of a state without ever amounting to hostilities. The notion to be interpreted in this clarification process, however, was direct participation in "hostilities" only, and not direct participation in activities such as "military operations", "activities hostile to the security of the state" or "hostile acts".

It was also noted that, for the purpose of this discussion, all of the notions in question were to be evaluated as terms of IHL describing conduct, events or situations occurring in situations of armed conflict. Thus, while activities such as peacekeeping or disaster relief operations could admittedly be carried out by military personnel, they obviously did not constitute "military operations" in the sense of the rules of IHL on the conduct of hostilities.

### b) Basic "Hierarchy" of Notions

Several experts proposed a basic "hierarchy" among the terms "armed conflict", "hostilities", "military operations" and "attack", all of which could be found in a single conventional rule, namely Article 44 [3] AP I. The prevailing opinion was that "armed conflict" was the broadest term and that the next term down the scale was "hostilities", which one expert described as the "actual prosecution of the armed conflict on behalf of the parties to the conflict". The next term down the scale was considered to be "military operations", because such operations constituted a subset within the conduct of hostilities, and "attacks" were said to belong to the

bottom of the scale, because they constituted just one aspect of military operations. With one exception, no objection was raised to this view.

In the dissenting expert's view, the notion of "hostilities" was restricted to actual engagement in fighting, while "military operations" should be regarded as wider than that. This narrow interpretation of "hostilities" would maximize civilian protection and would enable acts of direct participation in hostilities to be identified without having to determine vague elements such as the intent of the civilian or the result of an act. According to this expert, this approach corresponded best to the spirit of Article 51 AP I.

### **c) Narrow or Wide Interpretation of Hostilities**

It was questioned whether the notion of hostilities could be narrowly understood as referring exclusively to combat situations, particularly in view of the fact that a certain discretion had to be left to soldiers called on to decide whether or not a concrete acts amounted to "hostilities" and required a military response.

One group of experts argued that, from a policy point of view, it would be desirable to define hostilities as narrowly as possible, bearing in mind that the qualification of an act as direct participation in hostilities entailed loss of civilian immunity against direct attack. Therefore, the notion should be restricted to actual fighting, operations preparatory to actual fighting and other conduct posing an immediate threat to the adversary. In support of this view it was also argued that the prevailing intention at the 1974-1977 Diplomatic Conference was to interpret the notion of hostilities in Article 51 [3] AP I very narrowly, namely as referring to actual fighting, in order to spare civilians as far as possible.

Another group of experts emphasized that, despite these arguments, the conventional text did not refer to "direct participation" in narrower notions such as "attack" or "military operations", but to direct participation in "hostilities". Therefore, the term "hostilities" could not be restricted to actual fighting, to the neutralization of a certain object or the killing or capture of a certain person. The term "hostilities" also included certain logistical and intelligence activities and, taken together, essentially all the activities of a belligerent aimed at ultimately winning the war. Otherwise, the composite term of "direct participation in hostilities" would not make much sense.

It was also argued that maximum protection for civilians was an important, but by no means the only purpose of the rule on direct participation in hostilities. More particularly, the aim of the rule was also to strengthen the principle of distinction by keeping civilians away from the battlefield. This was achieved by depriving any civilian of his or her protection against direct attack if he or she got involved in activities intended to harm the adversary.

Finally, one expert said that there were basically two different approaches to interpreting the concept of "direct participation in hostilities" while safeguarding civilian immunity against direct attack. On the one hand, one could combine a narrower definition of "hostilities" with a broader interpretation of "direct participation". On the other hand, if the term "hostilities" was defined more broadly, then "direct participation" would have to be interpreted more narrowly.

#### **d) Hostilities and Belligerent Occupation**

One expert emphasized that the purpose of the Expert Meeting was to interpret the notion of direct participation in "hostilities" and not in "armed conflict". Therefore, a clear distinction had to be made between the notions of "hostilities" and of "armed conflict". This was particularly evident in the context of belligerent occupation, which did not necessarily involve hostilities and could be entirely peaceful. Thus, whether private contractors who participated in establishing or maintaining a belligerent occupation were also "directly participating in hostilities" depended on whether the military activities that were actually taking place on the ground could properly be described as "hostilities". If this was not the case, then the contractors in question could hardly be regarded as "directly participating" in hostilities, which did not exist in the first place.

#### **e) Relation between Hostilities and Military Operations**

At the outset of the discussion it was noted that, in conventional IHL, the term "military operations" was not more expressly defined than "hostilities" and that care should be taken not to try to define one vague notion by reference to another. Nevertheless, the prevailing opinion was that, in situations of armed conflict, the notion of "hostilities" was wider than that of "military operations", because the latter term could be used in the singular for specific operations taking place within the larger framework of hostilities.

While several experts found that, generally speaking, the notion of "hostilities" corresponded to the sum of all "military operations" occurring in a situation of armed conflict, some added that the term "hostilities" could also extend to certain activities other than military operations. One expert recalled that the term military operations included not only "attack" in the sense of offence and defence, but also advances to, and retreat from, contact with the adversary. Another expert stated that military operations did not necessarily have to be aimed at achieving a specific objective related to the conduct of hostilities.

#### **f) Hostilities, War Sustaining Activities and the General War Effort**

There appeared to be general agreement among the experts that the concept of "hostilities" did not include activities of a merely "war sustaining" nature and that "hostilities" had to be clearly distinguished from the general "war effort". Otherwise, every civilian somehow contributing to the war effort could ultimately be regarded as directly participating in hostilities, from a housewife collecting tin cans for the metal industry and a farmer growing crops, to a nurse at a maternity ward who could be said to be raising future soldiers.

One expert pointed out that, ultimately, both "hostilities" and the general "war effort" would end up adversely affecting the military effort of the adversary. Therefore he suggested that a distinction between the two could be made by distinguishing activities that were intended to actually cause harm, from activities that merely built up the capacity to do so. For example, a civilian worker in an ammunitions factory did not actually cause any harm himself or herself, but was merely building up the capacity of a party to a conflict to harm its adversary. Therefore, the worker in question was not directly participating in the hostilities and retained his or her personal protection against direct attack. The civilian actually using that ammunition to cause harm to the adversary, however, could be regarded as directly participating in hostilities.

#### **g) Hostilities and Intelligence Gathering**

Some experts were of the view that intelligence gathering would certainly constitute direct participation in hostilities. One expert clarified, however, that intelligence gathering was not an act of war in and of itself and could only be regarded as "direct participation in hostilities" in wartime and not in peacetime. Nevertheless, even during armed conflict that person would remain subject to prosecution under the domestic law of the nation that captured him.

However, it was also pointed out that intelligence gathering was not necessarily directly related to violence against the adversary but could, for instance, be aimed at collecting information on the organization and decision-making process of the adversary. Several experts were of the opinion that only intelligence gathering that had a direct connection to attack or defence should be regarded as part of the hostilities.

## **h) Proposed Interpretations of the Notion of "Hostilities"**

One expert suggested keeping in mind that, if a definition of "hostilities" could be established at all, it would be legally relevant primarily for civilians and not for regular combatants, who could be attacked based on their status. Another expert recalled that the content of the term "hostilities" should be identical wherever it was used in IHL.

With regard to the method to be applied in legally interpreting the notion of "hostilities" it was pointed out by several experts that, according to Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the ordinary meaning of the term, as well as context, object and purpose, enjoyed priority over the *travaux préparatoires*. The *travaux préparatoires* constituted a subsidiary source of treaty interpretation and were admissible only where the meaning of a conventional rule remained unclear.

Some experts suggested that the ordinary meaning of "hostilities" simply implied conduct that was "hostile" or, in other words, that expressed some sort of objectively verifiable "hostile intent" in a non-technical sense. Hostilities would thus constitute the ensemble of hostile acts or all acts harmful to the adversary. The conduct in question had to be directed at the enemy or, at least, had to be related to actions against the enemy. There had to be some sort of an adversary relationship with the enemy. However, hostilities included not only defensive or offensive operations, but essentially any armed contact or any armed engagement with opposing troops. Three experts made more elaborate proposals with regard to the meaning of "hostilities":

**Proposal 1:** The first expert held that the decisive element distinguishing civilians from combatants was the latter's entitlement to directly participate in hostilities, that is to say, to take action harmful to the enemy. Therefore, hostilities must comprise "all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal". However, one expert criticized this definition, saying that it was perhaps appropriate for the

identification of objects that may be legitimately attacked, but that it was not suitable for making the same determination with regard to persons. After all, this expert added, the targeting of persons was subject to a more restrictive regime than the targeting of objects.

**Proposal 2:** According to the second expert, hostilities meant "all military activities directed against the enemy in an armed conflict". Several experts raised questions with regard to the term "military activity" used in this definition. Some experts, who otherwise supported the proposed definition, suggested that the term "military" might lead to confusion in the context of "civilian" direct participation in hostilities and suggested replacing "military activities" with "hostile activities" or perhaps simply "activities".

Other experts were more skeptical and argued, for instance, that the production of ammunition or of a bomb could represent a "military" activity, but that it would not be sufficient to constitute "hostilities". The threshold of hostilities was reached only once that ammunition or bomb was actually used against the adversary. Another expert enquired as to what conduct constituted a "military" activity in contexts such as the Rwandan genocide, where the initial violence had been of a predominantly inter-civilian character. It was recalled that a soldier had to be able to apply the principle of distinction based on simple criteria and that the problem could not be solved by drafting ROE that provided simplified guidelines for the use of lethal force for a specific context. Under British law, for instance, ROE that were not in compliance with the law were no defence for unlawful conduct.

The expert who proposed the definition in question clarified that it referred not only to "military" activities, but expressly to military activities "directed against the enemy". While disaster relief, civil defence activities or the direction of traffic by the military police could constitute "military activities", these activities were not directed against an enemy and therefore could not amount to hostilities, even in times of armed conflict. Likewise, activities that were not directed against an enemy, but against one's own armed forces, for example for reasons of insanity or intoxication, would not constitute "direct participation in hostilities".

This expert also clarified that, in his definition, the term "activities" was construed more broadly than "operations" or "combat" but, at the same time, much more narrowly than "contribution to the war effort". Finally, the term "military" was to be understood as the antonym of "civilian" and referred to any activity of a civilian that crossed the line into a military activity.

It should be noted that the two experts who had made Proposal 1 and Proposal 2 did not regard them as fundamentally contradictory, but rather as different expressions of the same interpretation of the term “hostilities”.

**Proposal 3:** One expert was of the opinion that “hostilities” was a tactical situation rather than an accumulation of individual acts, which were very difficult to define and delimit. He proposed adopting an approach which would combine a narrow interpretation of “hostilities” with a geographical element to form a “zone of hostilities”. Within this zone of hostilities there could be military objectives, such as houses where civilians prepared or conducted their operations, places where a car bomb was being installed and prepared or where a computer used for CNA was located. Targeting these military objectives rather than individual civilians would simplify the operation of the principle of distinction, because any civilian located in or around a military objective had to assume the consequences of a possible attack, regardless of his or her individual conduct or membership in an organized armed group. It would mean that the military commander could retain the initiative even in periods when no civilians were actually directly participating in hostilities. Thus, by targeting objects rather than persons, many difficult questions could be avoided.

## **2. Nexus**

### **Introductory Remarks**

It was recalled that the responses received to the Questionnaire and the discussions held at the 2004 Expert Meeting had shown a general agreement among the experts that an act qualifying as “direct participation in hostilities” must have a “nexus” to a situation of armed conflict. Therefore, no act lacking the required “nexus” – however harmful it may be – could result in loss of civilian protection against direct attack. Conversely, not every act with a “nexus” to an armed conflict automatically qualified as “direct participation in hostilities”. It thus appeared that the “nexus” requirement was only one of several elements of the notion of “direct participation in hostilities”.

It was also pointed out that the “nexus” requirement, although seemingly straightforward and uncontroversial, could not be dealt with simply by reference to the case law of the international ad hoc criminal tribunals, which required that an act must have a “nexus” to an armed conflict in order to qualify as a “war crime”. Since the focus of the present discussion

was not the qualification of an act as a "war crime", but as "direct participation in hostilities", the interpretation of the "nexus" requirement had to be adapted accordingly. The IHL rule on "direct participation in hostilities" applied exclusively to the conduct of hostilities, whereas "war crimes", a concept of international criminal law referring to situations of armed conflict as a whole, could also be committed outside situations of "hostilities".

The question put to the experts at this Working Session was therefore whether, in order to qualify as "direct participation in hostilities", civilian conduct required a nexus not only to an "armed conflict" in general but, more specifically, to the "hostilities" occurring in relation to that armed conflict.

## **Expert Opinions**

### **a) Relevance and Contextual Reference of the Nexus Requirement**

Initially, two experts questioned whether there really was a need for a nexus requirement to qualify civilian conduct as "direct participation in hostilities". In their opinion, the criterion of "directness" inherent in the notion itself already required a sufficient link to the hostilities. In their opinion, the word "nexus" raised too strong a connotation to the case law of the ICTY and the ICTR regarding the qualification of acts as war crimes. Several other experts, while maintaining that nexus was an important element of the concept of direct participation in hostilities, recognized that it could not be synonymous with the nexus required for the qualification of an act as a "war crime".

As illustrated by the example of inter-civilian violence, it would be too broad if the nexus element of "direct participation in hostilities" referred to the situation of an armed conflict in general and qualified every act of civilian violence somehow related to that armed conflict as direct participation in hostilities. Instead, it was said to be essential for qualification as direct participation in hostilities that an act be related to actual hostilities, that there be some association with fighting or with military operations occurring in the framework of the hostilities. As the wording of the notion clearly suggested, no conduct lacking a sufficient link or nexus to the hostilities could qualify as "direct participation in" hostilities.

One expert suggested that the nexus element could also relate to future hostilities or a future development in ongoing hostilities. This view was rejected by another expert who argued that

it was not permissible to attack civilians for activities they may or may not carry out in the future. While preparation for future hostilities may be an undesirable activity, there were other measures available to counter such activities than depriving civilians of their protection against direct attack. In response, the previous expert raised the example of certain planning activities that could constitute direct participation in hostilities.

## **b) The Nexus Requirement and the Problem of Subjective Intent**

Several experts recognized that, from a theoretical perspective, the aim of the civilian conduct would seem quite relevant for determining whether or not such conduct constituted direct participation in hostilities. However, in the reality of armed conflict it was simply not workable to base "split second" decisions on the subjective intent of the civilians in question. For instance, from a subjective perspective, civilians could capture weapons and military equipment for purely private gain, or in order to use the weapons and equipment against the adversary, or simply to deprive the adversary of weapons and equipment that he could possibly use in future hostilities. A soldier called to intervene in such a situation could not be expected to "get into the heads" of the involved civilians and determine their motivations before reacting. Therefore, the determination of a sufficient link between civilian conduct and hostilities had to be made according to objective criteria.

For some experts, the perception that civilian conduct was directed against one's own military campaign – as long as such perception was based on an objective and reasonable assessment – was sufficient to permit the use of lethal force in accordance with the rule on direct participation in hostilities. For example, if civilians penetrated a military compound in a situation of armed conflict in order to steal equipment, their conduct had the objective appearance of being directed against the military compound in question. Therefore, they would have to bear the consequences regardless of their actual motives. In particular, it was permissible to take all measures necessary to stop such civilian conduct, including resort to minimum force.

Other experts strongly rejected the above view and warned that it cannot be permissible to kill civilians based on the mere assumption that they were "hostile" or otherwise "up to no good". One expert recalled that, in both AP I and AP II, the rule on direct participation in hostilities was part of an Article entitled "Protection of the Civilian Population". Thus, the further away the conduct of an individual civilian was from posing an immediate threat –

shooting or planting a bomb – the more likely it was that the use of lethal force against the civilian would amount to what in human rights law was described as a pre-planned extrajudicial execution. Therefore, the civilian would have to be captured in order to determine his or her subjective motivations wherever possible. One expert also held that the stealing of military equipment, as opposed to the actual use of such equipment in hostilities, should not be regarded as sufficient to qualify as direct participation in hostilities.

Finally, one expert emphasized that, when distinguishing direct participation in hostilities from activities carried out for purely private gain, certain realities had to be taken into account. Groups such as gangsters, pirates and mafia often operated in a grey zone where it was difficult to distinguish them from those involved in an armed conflict. Clearly, groups could engage in hostilities for political or even purely economic interests that were beyond mere “private gain”. Such groups could not be regarded as ordinary mafia, but should be regarded as directly participating in the hostilities.

### **c) Content of the Nexus Requirement**

It appeared that, for most experts, the function of the nexus requirement was essentially to enable determination of whether a specific civilian conduct could in fact be regarded as being part of hostilities. If this was the case, the conduct in question would qualify as "direct participation in hostilities".

The content of the nexus requirement was discussed predominantly based on the first two interpretations of the term "hostilities" that had been proposed during the previous Working Session (see above).

Thus, according to several experts, civilian conduct taking place in a situation of armed conflict qualified as direct participation in hostilities if it constituted a "military activity directed against the enemy" or an “activity adversely affecting or aimed at adversely affecting the enemy’s pursuance of a military objective or goal”. It was also clarified that this terminology did not allow the targeting of civilians simply because they provided some indirect or causal contribution to hostilities.

### 3. Causal Proximity

#### Introductory Remarks

It was recalled that, according to the Commentary on Article 51 [3] AP I, "... 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".<sup>3</sup> There appeared to be general agreement among the experts that the qualification of an act as direct participation in hostilities required some degree of causal relationship between the act and the ensuing harm to the adversary. However, two major difficulties remained to be solved in this regard.

First, causal proximity between an act and the harm resulting from it can usually not be evaluated *ex ante*, but only *ex post*. However, a military response to direct participation in hostilities by civilians can usually not be delayed until the damage has actually been done. Therefore, some experts had argued at the previous Expert Meeting that the decisive criterion was the intended harm and not the harm already caused by an act of participation in hostilities. Moreover, in the context of hostilities, intent would as a rule have to be determined objectively, that is to say, from the perspective of the adversary and according to the specific circumstances of a case. Therefore, the first question to be addressed at this Working Session was whether the causal proximity of an act should be evaluated by reference to the harm that has actually occurred or to the harm that could objectively be expected to result from that act.

Second, the discussion should also try to clarify what degree of causal proximity between an act and its expected or actual consequences was required to cause loss of civilian protection against direct attack. While the experts had in 2004 generally recognized that the criterion of "indirect causation" was too wide, no consensus had been reached on the standards to be applied. While some experts had required "direct causation", others had held that this was not necessary and suggested the alternative criterion of "but for" causation (the harm would not occur "but for" the act). Still others had proposed a criterion similar to "aiding and abetting" (the act "materially facilitates" the occurrence of harm).

In discussing the "causal proximity" requirement, it was to be kept in mind that most civilian activities during an armed conflict could somehow be seen as harming the adversary. As the classical example of the ammunition factory worker illustrated, many civilian activities could

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<sup>3</sup> Commentary Article 51 [3] AP I, § 1944.

even be objectively indispensable for such harm to occur, without simultaneously qualifying as direct participation in hostilities.

## **Expert Opinions**

### **a) The Causal Proximity Requirement and “Direct” or “Active” Participation**

One expert argued that the actual issue behind the question of causal proximity was the definition of “direct”. The question was thus: at what stage could the chain of causation be regarded as having been “disconnected” for the purposes of qualifying an act as direct participation in hostilities? This was a well-known problem in the domestic law of torts and was unlikely to be resolved now. This expert therefore suggested that the term “active” was preferable to the term “direct”. Where civilian participation was not “active”, where the civilian in question did not actually carry out the act, it became a matter of mere intention, such as an attempt or a plan, and was no longer sufficient to entail loss of civilian immunity against direct attack. Other experts disagreed with this view. On the one hand, it was argued that “direct” and “active” were essentially synonymous and, on the other hand, reference was made to the express wording of AP I and AP II, which both used the term “direct” participation in hostilities.

### **b) The Causal Proximity Requirement and the Notion of “Harm”**

Some experts questioned the requirement mentioned in the Commentary of “causation of harm”.<sup>4</sup> According to these experts, the term “harm” implied that some form of material damage to objects or persons was either inflicted or intended. However, “hostilities” did not necessarily have to “harm” the enemy. Thus, for the concept of direct participation in hostilities, the notion of “harm” was too narrow, unless it was interpreted more broadly to also include activities which did not necessarily inflict or intend to inflict actual damage. Examples would be “denying the enemy the use of” certain objects, equipment and territory, as well as certain intelligence operations, such as wiretapping the enemy's high command. While the latter simply aimed at gathering information without harming the adversary, it nevertheless clearly amounted to “hostilities”.

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<sup>4</sup> Commentary Article 51 [3] AP I, § 1944.

### **c) The Causal Proximity Requirement and the Notion of “Hostilities”**

One group of experts held that the entire element of “causal proximity” was part of the definition of “hostilities” and should not be addressed separately. According to this approach, every civilian who conducted activities that fell under the definition of “hostilities” would be considered to be directly participating in the hostilities. Some supporters of this view said that elements such as nexus, intent and causal proximity would only have to be evaluated in case of doubt as to whether a certain conduct was part of the hostilities. This solution would avoid overburdening the armed forces with the obligation of evaluating nebulous elements such as “causal proximity” and “intent” before taking action. After all, the criteria for “direct participation in hostilities” not only had to be sufficiently precise to allow the prosecution of the civilians in question after capture, but also simple and clear enough to remain understandable for the persons actually confronted with an operational situation.

It was pointed out, however, that giving up the causal proximity requirement would mean that any activity amounting to “hostilities” would automatically also amount to “direct participation in hostilities”. It could also be argued that the term “hostilities” referred to an objective situation between the involved parties to the conflict and that “direct participation” would constitute the linkage of a specific civilian act to that objective situation of “hostilities”. The result of this approach would be different from saying that any act of “hostilities” equaled “direct participation in hostilities”. These were two different approaches and a choice had to be made between them.

### **d) Continuation of the Discussion on the Notion of “Hostilities”**

In this context, several experts reiterated their opinion that the notion of “hostilities” should be interpreted narrowly. One expert explained that “hostilities” constituted a tactical situation rather than an accumulation of acts and essentially indicated engagement or involvement in “fighting”. According to another expert, the interpretation of hostilities as “situations of actual fighting” seemed to be the understanding also of the Commentary.<sup>5</sup> This would limit the concept of direct participation in hostilities to fairly obvious situations and thus avoid the difficulties of having to carry out an elaborate evaluation of causal proximity. Of course, no soldier was expected to wait until a civilian actually killed him or detonated a bomb, but the

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<sup>5</sup> Reference was made to Commentary Article 51 [3] AP I, § 1944.

closer the definition of “hostilities” remained to such obvious acts, the more likely the reaction would conform to the actual intent of the civilian in question and to the protection of civilians required by IHL. Conversely, a wide interpretation of “hostilities” created major problems, because of the increasing distance of what the Commentary meant by “actual harm”.

Other experts rejected equating “hostilities” with “actual fighting”. The wording of the conventional rule – while admittedly located in the section on the protection of the civilian population – was not direct participation in “attacks”, whether offensive or defensive, or in “fighting”, but in “hostilities”. For example, while a civilian clearing land mines in order to deprive the enemy of the advantage to be gained from mine laying was not engaged in “actual fighting”, his activities qualified as “hostilities” because they amounted to a “military activity directed against the enemy” or an “act adversely affecting the military aim pursued by the enemy”. The same was true for a civilian acting as forward observation involved in identifying targets and providing coordinates for future artillery fire.

#### **e) Minesweeping and “Hostilities”**

The example of civilian minesweeping caused further discussion. The example of the Dardanelle campaign was raised, where Turkish soldiers opened fire on civilians employed by the British admiralty to do minesweeping. Another, more hypothetical, example involved a civilian removing mines laid between trenches in the context of the First World War.

Some experts held that such a civilian posed no direct threat and was therefore not directly participating in the hostilities and, consequently, had to be arrested. Contrary to the targeting of combatants, direct attacks against civilians had to be based on actual threat. In view of Article 51 AP I, the targeting of civilians could not be based on the same criteria as the targeting of combatants.

Other experts insisted that the removal of mines deprived the adversary of the military advantage related to the mine laying and thus constituted direct participation in hostilities. Once it had been determined that a civilian was directly participating in hostilities, there was no “proportionality requirement” or obligation to consider whether the civilian could be captured. Instead, the civilian in question could be directly killed. Furthermore, it was held that the rule on direct participation in hostilities did not require an actual threat to the life or personal integrity of the adversary. This was a criterion relevant to the paradigm of self-defense, which was completely unrelated to the conduct of hostilities.

An intermediate position seemed to emerge when several experts suggested that the qualification of civilian conduct as direct participation in hostilities should depend not only on a number of abstract criteria, but also on the concrete circumstances governing the situation. While the Dardanelle campaign and the trenches of the First World War were examples where the shooting of minesweeping civilians may have been justified, that evaluation could change where a civilian wanted to assist the adversary, for instance by removing anti-tank mines from a field under the control of the soldiers called to intervene. If that civilian was unarmed, and there was no additional risk involved for the soldiers called to intervene, there was no reason why he should not be captured. The conclusion might thus depend on factors such as whether the territory in question was occupied or otherwise under military control. The example was also raised of a boy changing the road signs set up by the military police to indicate a particular route and causing the vehicles to go in the opposite direction. Such “hampering of military movements” could constitute either direct participation in hostilities or, depending on the circumstances, nothing but a childish trick. When interpreting the notion of “direct participation in hostilities” it was preferable to remain as close as possible to actual fighting, because the more difficult it was to identify the decisive criteria in practice, the wider the interpretation of the notion of “direct participation” would be.

#### **f) Driving Ammunition Trucks and “Hostilities”**

Reference was repeatedly made to the hypothetical example of “Bob” the ammunition truck driver, which had already inspired much discussion throughout the Expert Meeting process. Essentially, three important but distinct arguments emerged in this regard:

- One expert recalled that convoys of ammunition trucks were absolutely critical to the ability of any party to a conflict to conduct hostilities. Therefore, no soldier would hesitate to target individual civilians while they were driving such trucks for the benefit of the adversary. In the view of this expert, this would not constitute a violation of IHL and could not be compared to absurd examples, such as attacking a maternity ward because it was purportedly “breeding” future combatants.
- Other experts specified that, while the ammunition truck permanently remained a legitimate military objective, the driver himself regained civilian protection against direct attack whenever he left the truck, for instance to return home to his family for supper.

- One expert held, however, that the whole debate on the ammunition truck driver did not actually relate to “hostilities” but to the question of “direct” participation. Therefore, a distinction had to be made between driving the same ammunition truck close to the front line, which would constitute “direct” participation, and driving it thousands of miles in the rear, which would not.

#### **g) “Expected” or already “Inflicted” Harm?**

Some experts emphasized the difficulty stemming from the fact that the actual causal link between an act and its result could only be properly evaluated once the damage had already been done. Moreover, *ex post*, almost any result could somehow be traced back to a purportedly “direct” or even “indispensable” cause, even if the causal chain became extremely long. Therefore, the existence of a causal link between an act and a result should not be a decisive criterion for direct participation in hostilities.

Other experts nevertheless felt that the causal link between an act and its result was an important element. Several experts contended that the causal link must necessarily refer to the harm that can objectively be expected to result from an act, because the targeting of persons directly participating in hostilities essentially aimed at preventing them from inflicting harm. Two experts also held that, by referring to the “nature or purpose” of the act, the Commentary indicated that both “objective expectation” and the “harm that has actually occurred” could be considered in qualifying an act as direct participation in hostilities.<sup>6</sup> In reality, however, the recipient of the violence would mostly base himself or herself on violence already delivered rather than on some nebulous notion as to what he or she could expect.

#### **h) Continuation of the Discussion on Intent**

Two experts argued that, while different from the element of causal proximity, subjective intent would have to be taken into account when interpreting the notion of direct participation in hostilities. According to the first expert, the element of subjective intent was important because loss of civilian immunity from direct attack should not be based on accidental

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<sup>6</sup> Reference was made to Commentary Article 51 [3] AP I, § 1944.

activities that were perhaps wrongly perceived as constituting direct participation in hostilities. In many cases such intent would be fairly clear. In very ambiguous cases a reasonable soldier mistaking a civilian for a legitimate target would have a proper defense. But these practical difficulties were no excuse for excluding subjective intent from being a constitutive element of the notion of direct participation in hostilities. The second expert agreed in principle, but pointed out that the only intent which the concerned soldier could possibly identify was “hostile intent”.

The prevailing opinion appeared to be, however, that the concept of direct participation in hostilities did not require any subjective element. It was recalled that the wording of Article 51 [3] AP I did not contain any subjective element whatsoever and that, therefore, the determination as to the qualification of an act as direct participation in hostilities had to be based on objective criteria only. Thus, whenever an act amounted to “hostilities”, namely to a “military activity directed against the enemy” or an “act adversely affecting the military aim pursued by the enemy”, there was a case of direct participation in hostilities, regardless of whether it was carried out intentionally or unintentionally. Any introduction of subjective elements would make it impossible to provide armed forces with clear and operable rules.

#### **i) Required Degree of Causal Proximity**

The prevailing opinion appeared to be that, in order to qualify as direct participation in hostilities, an act needed more than just a remote causal link to harmful consequences. The difficulty was, however, that a “sufficient” causal link could not be objectively measured.

One expert suggested that “direct participation” was the term that described the required linkage between a civilian and the “hostilities” and held that there should be a tight linkage. It was also pointed out that neither “but for” causation nor “aiding and abetting” were suitable criteria, since the weapons factory worker would become a legitimate target under both standards, despite the general agreement that he was not directly participating in hostilities. Alternatively, it was suggested that qualifying an act as direct participation in hostilities might depend on how many interventions by others were necessary between a particular civilian conduct and the actual delivery of force. However, if that standard were strictly applied, then “Bob” the ammunition truck driver would never constitute a legitimate target since it was always someone else who actually used the ammunition against the enemy. Clearly though, direct participation in hostilities required a non-interrupted causal linkage between the conduct in question and the harm caused.

The emerging consensus seemed to be that, in modern warfare, geographical proximity may play a certain role but is not necessarily decisive for the qualification of an act as direct participation in hostilities. Instead, the required proximity is of a primarily causal nature and reflects the requirement of "directness" inherent in the notion of direct participation in hostilities. For example, in the case of an unmanned aerial vehicle capable of deploying ammunition, the platform could be remote-controlled by a computer specialist located on a different continent and possibly even in a civilian location. In addition to the individual guiding the aircraft, there may well be an individual illuminating the target, and guidance may be received from another platform, an AWACS aircraft flying overhead with various individuals performing various functions. Thus, the question of uninterrupted linkage could become very complex. In many operations, several individuals would probably have to be regarded as contemporaneously taking a direct part in the hostilities.

In certain operations of modern warfare, there could be civilians involved whose participation in hostilities should not be regarded as "direct" because there are other individuals involved "downstream" who are actually firing the ammunition. It has to be recognized that the contemporary reality of warfare involves a multitude of personnel and very complex weapons systems controlled by computer systems that have in turn been programmed in advance by computer specialists. Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.

Some experts also recalled that, apart from these issues of high-tech warfare, there remains the important reality of low-tech terrorist warfare, which raises legal questions of comparable complexity. It remains unclear, for example, whether a civilian inciting or training another to attack an adversary should be regarded as directly participating in hostilities. Concerning the question of training, other experts argued that, for example, the training of a military pilot was not related closely enough to the hostilities to lead to loss of protection, while the concrete training, instruction and assistance given to troops with regard to the conduct of a specific operation would clearly amount to direct participation in hostilities.

In more general terms, it was recognized that the uninterrupted causal link could always be interpreted too extensively. If no borderline was established, warfare would ultimately spill over into areas which are definitely too remote from the hostilities. It is therefore crucial to identify a certain "point of no return" indicating when the integration of an act into the conduct

of hostilities is sufficient to amount to direct participation in hostilities. Unfortunately, the identification of this point appears to be situational. One expert suggested, however, that the distinction between direct and indirect causation could be made based on a combination of the proposed definitions of “hostilities” on the one hand and the proposed “uninterrupted causal link” on the other. Consequently, any act preceding the decision to actually “adversely affect the military campaign of the adversary” or to carry out a “military activity directed against the enemy” could not be regarded as “direct” and, therefore, would not amount to direct participation in hostilities.

Finally, one expert suggested that there might be another element of the notion of direct participation in hostilities, which had not yet been properly identified. It is different from the terms “causal link” or “uninterrupted linkage”, and is probably best described in terms of “directed” or “focused” and is related to the definition of hostilities as such. This criterion would be “proximate” or “causally connected” and would, thereby, subsume the nexus requirement. Thus, training someone simply to teach him or her to fly would not amount to direct participation in hostilities, as opposed to training a person to fight against a particular enemy in a particular situation. The latter training did not necessarily have a more direct causal linkage and was not necessarily geographically more proximate, but was “focused” on the conflict as opposed to generally benefiting a military force.

## **4. Hostile Intent**

### **Introductory Remarks**

It was recalled that several experts had pointed out in 2004 that "hostile intent" was actually a rules of engagement (ROE) issue that did not belong to the body of IHL, but could constitute a criterion justifying resort to force, for instance in situations of self-defence. It had also been emphasized that *subjective* intent should not be a key element of an operable definition of “direct participation in hostilities” because subjective motivations could not be reliably determined in the reality of military operations. Overall, it appeared that many experts tended to reject "hostile intent" as an independent element of direct participation in hostilities. Some experts nevertheless seemed to be of the opinion that "hostile intent" could be a practical indicator for direct participation in hostilities.

Therefore, this Working Session should address the question of whether “hostile intent” should be understood not as an IHL term, but as an ROE criterion for practically identifying situations justifying the use of force against civilians, regardless of whether the specific situation was governed by IHL, human rights law, general international law or even domestic law.

## **Expert Opinions**

### **a) Unanimous Rejection of the Requirement of “Hostile Intent”**

The experts unanimously rejected the proposition that “hostile intent” could be regarded as an element of the notion of “direct participation in hostilities”. They agreed that “hostile intent” was not a term of IHL, but belonged to the technical terminology of ROE. ROE in turn constituted command and control instruments of domestic law designed to provide guidance to armed personnel as to their conduct in specific contexts. As such, ROE did not necessarily reflect the content of IHL and certainly could not be used to define the concept of direct participation in hostilities. For example, particular ROE may for political or operational reasons prohibit the use of lethal force in response to certain activities, although they would constitute direct participation in hostilities under IHL. Conversely, ROE may contain rules on the use of lethal force in situations such as self-defense against acts that did not constitute direct participation in hostilities. Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to “hostile intent” for the purpose of defining “direct participation in hostilities”. It was also pointed out that the ICJ’s *Oil Platforms Case* had definitely done away with this criterion.

One expert added that, even at the level of ROE, the introduction of “hostile intent” as a justification for the use of lethal force against civilians was very dangerous. Of its nature, the criterion of “hostile intent” was highly subjective and therefore prone to abuse and misunderstanding, especially when forces were involved in different cultural settings where it was difficult to correctly interpret a particular behavior or circumstance. “Hostile intent” could easily become a blank check for the use of force by reckless soldiers based on entirely subjective perceptions, even where the facts would clearly have prohibited such force. In conclusion, this expert warned that the introduction of “hostile intent” for the practical identification of situations where lethal force may be used amounted to opening the door to the creation of dangerous new rules in the future.

Another expert held that the confusion surrounding the criterion of hostile intent was the logical consequence of an extensive interpretation of the concept of hostilities. Where the notion of hostilities was so wide that it could even include tricks played by children, there was, of course, a need to narrow the notion down, which was attempted by way of introducing a requirement of “hostile intent”. Since this was not the right path to follow, the notion of hostilities had to be defined narrowly enough in the first place in order to avoid the whole issue of “hostile intent”.

### **b) “Hostile Intent” and “Causal Proximity”**

According to one expert, the entire discussion of “hostile intent” was based on a confusion between subjective and objective elements. The real issue to be clarified was not subjective intent but the objective threshold at which the causal connection between a civilian activity and the ensuing damage rendered it part of the hostilities. The question was: how far “upstream” in the chain of causality one could still speak of direct participation in hostilities; should one go, for instance, all the way back to “preparation” or even to acts of “incitement”?

It was recalled that all the experts had concluded that an ammunition factory worker was not directly participating in hostilities. Nevertheless, the hostilities could not be conducted, the enemy could not be fired at and bombs could not be dropped if someone had not produced the ammunition or bombs. There was consensus on the fact that somewhere between the production of ammunition or bombs and their actual use against the adversary the causality became sufficiently proximate, and that this point had to be identified.

Another expert suggested that the answer would depend on the situation. For example, when coalition forces were engaged in open battle against insurgents in Iraq, virtually any civilian carrying a weapon of any type in that location and context was likely to be targeted. On the other hand, in the unstable and dangerous period that followed the capture of Baghdad by coalition forces, the occupying power did not prevent civilians from possessing firearms as a means of self-defense. Thus, in the latter situation, a routine patrol suddenly confronted with an armed civilian would have to decide based on the specific circumstances whether the carrying of arms reflected hostile intent.

One expert reiterated that there was probably a further key criterion other than “hostile intent”, “proximity”, “causal linkage” or “uninterrupted linkage”, which had not yet been

articulated properly. It was the criterion of “direct linkage of an act to the hostilities in general” and had so far been best described by the proposed definition of hostilities that used the notion of “an act directed against the enemy”. This could be illustrated by the example of the civilian directing an unmanned aerial vehicle over a battlefield. Many experts had concluded that this person, who was collecting target data for someone else who would subsequently directly attack, was directly participating in the hostilities. On the other hand, civilians could be running a satellite that was not necessarily collecting data on any specific battlefield. Their activity was not directed against the enemy at all and was thus similar to that of a cook who was keeping soldiers alive by preparing food for them. If the data collected by that satellite was later used to target the adversary there would be a causal link between the civilian and the targeting, but as his original activity had not been “directed against the enemy” it should not constitute direct participation in hostilities.

### **c) Importance of both High-Tech and Low-Tech Contexts**

Several experts emphasized that the deliberations should not be limited to examples of high-tech warfare where civilians were used by the armed forces in functions that would traditionally have been assumed by military personnel. Clearly, a civilian directing a weapons platform was assuming a distinctly military function and this undoubtedly amounted to direct participation in hostilities. However, these issues, which were to be further discussed on the third day of the meeting, should not divert attention from what Article 51 AP I and Article 13 AP II really wanted to address, namely the involvement of ordinary civilians in relatively traditional or, at least, low-tech armed conflicts.

The aim of the current discussion was to identify criteria that would prevent the mere fact of belonging to a particular ethnic or political group automatically being seen as contributing to the cause of the opposing party to an extent that amounted to direct participation in hostilities. This had proven to be a grave problem in many recent contexts, particularly of non-international armed conflict.

It was also recalled that any criteria developed for qualifying civilian conduct as direct participation in hostilities would have to equally apply to civilians fighting against technologically superior state armed forces and to civilians supporting or working for such forces.

**d) "Objectification" of Hostile Intent as Part of the Definition of "Hostilities"**

While agreeing that the ROE criterion of "hostile intent" could not be a useful constitutive element of direct participation in hostilities, several experts appeared to argue that this criterion could possibly be turned into an objective criterion, most notably as part of the notion of "hostilities". When identifying conduct amounting to direct participation in hostilities, one criterion could be whether the act in question objectively revealed "hostile intent" – as opposed to the subjective intention of the individual in question. This objective criterion would probably be very similar to the notion of "directed against the enemy" which was included in one of the proposed definitions of "hostilities". Only in this objectified sense could this criterion give reliable guidance to soldiers as to whom they could or could not identify as legitimate targets.

## **IV. Direct Participation in Hostilities and Membership in Organized Armed Groups**

### **Introductory Remarks**

It was explained that the overall aim of this Working Session was to consider the particular questions that arose as a result of the involvement of organized armed groups in non-international armed conflicts and, to the extent relevant, in international armed conflicts. While the involvement of organized armed groups is typical for non-international armed conflict, IHL applicable in such situations remains unclear as to whether members of organized armed groups are “civilians” – and thus subject to direct attack only for such time as they directly participated in the hostilities – or whether they can be directly attacked according to the same principles as members of state armed forces, that is to say, irrespective of their individual direct participation in hostilities.

Four key examples of existing approaches to the notion of “civilian” in non-international armed conflict were presented. The experts were requested to evaluate their theoretical and practical merits and, if deemed appropriate, to propose alternative solutions in the first part of this Working Session.

Second, the experts were requested to evaluate the theoretical merits, as well as the practical viability under conventional and customary IHL, of the so-called “membership approach”, according to which members of organized armed groups could be directly attacked for the entire duration of their membership and regardless of their personal conduct. The two theoretical arguments on which a “membership approach” could possibly be based, as well as the ensuing practical difficulties and humanitarian concerns were also presented.

Third, to the extent that the “membership approach” was found to be theoretically defensible and practically viable in situations of non-international armed conflict, it should be discussed whether the same approach could also be applied in situations of international armed conflict.

## **Expert Opinions**

### **1. Nature of Non-International Armed Conflict**

#### **a) Importance of the Concept of “Direct Participation in Hostilities”**

Referring to his own operational experience, one expert confirmed that counter-insurgency operations targeted mainly persons, not military objectives. Therefore, the notion of “direct participation in hostilities” was of utmost importance in situations of non-international armed conflict. In practice, most targeting decisions had to be taken in a "split second" by an individual soldier, who had no time to seek additional guidance. However, correct targeting was not only in the interest of the civilian population but also of the armed forces, because the erroneous killing of a peaceful civilian usually alienated the civilian population and created new enemies.

#### **b) Importance of Intelligence**

The same expert emphasized that, in the context of counter-insurgency operations, the collection of intelligence was not only absolutely critical but also involved great risks. In many non-international armed conflicts there were factions and gangs providing false intelligence to the armed forces in order to provoke an attack against a rival group or individual, sometimes even for reasons completely unrelated to the conflict. Counter-insurgency operations were probably the most complex and difficult operations any armed forces could engage in. Not only were the guerrillas systematically intermingling with the civilian population, but many armed forces also lacked appropriate training for counter-insurgency operations and tended not to apply force properly.

#### **c) Phases of Non-International Armed Conflict**

Based on an example dating from the Cold War, one expert suggested that non-international armed conflict was not a seamless phenomenon, but evolved in five distinct phases that should be taken into account when evaluating the nature and consequences of “membership” in organized armed groups. In the early phases, armed groups usually

operated covertly, money was raised, the political front organized and competition eliminated – the issue remained one of law enforcement. Once the government had identified the organization and started considering it a threat, the tendency was to deny that the threshold of armed conflict had been reached and to maintain that the group's members were nothing but criminals or terrorists without privileges under international law. In later stages, the insurgency would include various categories of persons such as the leadership, armed insurgents, “farmers by day, guerrillas by night”, logistical support, communications and intelligence gathering. At this point at the latest, it was important to be clear to what categories of persons the “membership approach” could apply. The final readiness of a government to afford captured insurgents privileges comparable to POW status usually arose only where the non-international armed conflict had become completely overt, and where the insurgency controlled portions of the territory and represented an actual challenge to governmental authority similar to an international armed conflict.

## **2. Notion of “Civilian” in Non-International Armed Conflict**

One group of experts held that, in non-international armed conflict, both members of organized armed groups and of state armed forces should not be regarded as “civilians”. This would remove doubts as to who was protected against direct attack and thus provide clarity in the application of the principle of distinction.

One expert recalled that both Article 3 common to the GC and AP II were based on the assumption that there were, on the one hand, opposing parties to a conflict fighting each other and, on the other hand, civilians who were not part of any of these forces. According to this expert, IHL acknowledged that the armed forces of the parties to a conflict killed and harmed each other and that there was no obligation to capture rather than kill. Anything else would not be operable and would ultimately lead to non-compliance with IHL on all sides. The only problem that had to be resolved was the “revolving door” of protection of civilians. But this was not a question of “membership”, because any person who became a member of the forces of either party to a conflict was no longer a “civilian”.

Two other experts also asserted that the notion of “armed forces” in Article 3 common to the GC included not only state armed forces, but also organized armed groups.

One expert pointed out that any armed conflict in which one party was composed of state armed forces and the other party was composed of so called “civilians” gave rise to the same practical dilemmas, regardless of the qualification of such a conflict as international or non-international. The armed groups on the rebel side did not act as civilians, but participated in the conflict without distinguishing themselves from peaceful civilians. Clearly, state armed forces could not prevail in an armed conflict in which everyone belonging to the opposing party was protected and where the state was only allowed to respond to attacks against its armed forces, without ever taking military initiatives of its own. This would excessively limit the capacity of the state to respond to a situation of non-international armed conflict. Therefore, a civilian who became a member of the fighting forces of the opposing party to the conflict should not be regarded as a civilian – or should at least be deprived of civilian immunity – for as long as his or her membership lasted. Unorganized civilians, on the other hand, should lose their immunity from direct attack only for such time as they were directly participating in the hostilities and should subsequently regain it.

### **3. Loss of Protection in Non-International Armed Conflict**

There appeared to be general agreement among the experts that loss of civilian immunity from direct attack due to direct participation in hostilities was not a “sanction for bad behavior” and that, similarly, the granting of immunity was not a “reward for good behavior”. Similarly, experts appeared to agree that, in case of reasonable doubt as to whether an individual was a lawful target, it should be assumed that he or she was entitled to civilian protection against direct attack. Opinions diverged, however, as to whether members both of the armed forces and of organized armed groups could be directly attacked at any time and place, without taking into account considerations of military necessity.

#### **a) Assumption of Civilian Protection in Case of Doubt**

One expert was of the opinion that the determination of whether an individual civilian had lost his or her immunity against direct attack had to be made based predominantly on intelligence information. As such information was often classified, the ensuing lack of transparency could easily be abused by states. This was a problem inherent in situations of armed conflict and could not be solved. However, in case of serious doubt as to whether a civilian had lost immunity against direct attack, the state would have to assume that the civilian in question

remained protected. Several other experts also asserted that, in case of serious doubt as to whether a civilian constituted a legitimate target, that civilian had to be considered as being protected against direct attack. No statements to the contrary were made.

## **b) Relevance or Irrelevance of Considerations of Military Necessity**

One group of experts suggested that the lawfulness of direct attacks against members of organized armed groups – or even against members of state armed forces – was subject not only to the correct operation of the principle of distinction (including the rule on direct participation in hostilities), but also depended on the actual existence of military necessity:

- Three experts argued that the view that members of organized armed groups could be directly attacked at any time had no basis in conventional IHL and could not be upheld. One of these experts referred to an actual case where governmental forces had searched for and executed an individual member of an armed opposition group in a peaceful village outside any situation of open combat. Since the individual in question had been unarmed, was clearly “off duty” and had not posed any threat whatsoever, there could be no military necessity to kill him. In the view of this expert, such conduct was contrary to the most basic notions of IHL and of human rights law. This illustrated that loss of protection against direct attack could not be absolute, even for members of organized armed groups. A second expert referred to the case of *Guerrero vs. Colombia* before the UN Human Rights Committee, which dealt with the execution of several members of an armed opposition group while the state armed forces involved had total control of the situation and could have arrested the individuals in question without additional risk. The Committee had considered this conduct a violation of the right to life.
- Three other experts were of the opinion that neither members of the state armed forces, nor members of organized armed groups could be directly attacked at all times. Hence, it was incorrect to claim that, in non-international armed conflict, the conduct-based approach caused an “imbalance” between state armed forces and organized armed groups.
- A fourth expert suggested that the “good old rule” according to which combatants could be killed at any time and any place was possibly outdated and had to be revisited for both international and non-international armed conflict.

However, another group of experts strongly rejected these views and made essentially the following arguments:

- According to several experts, as long as the threshold of armed conflict was reached, there was no legal basis in IHL to claim that parties had an obligation to capture rather than kill, to give an opportunity to surrender before an attack, or to operate against each other under a law enforcement paradigm.
- Two experts contended that government soldiers could be directly attacked even when they were “off duty”. Therefore, there was no reason why members of opposition groups could not be targeted in the same circumstances. According to these experts, members of organized armed groups in a situation of non-international armed conflict could be directly attacked at any time and place.
- Taking this logic further, another expert added that if members of armed groups were considered as directly participating in hostilities on a continuous basis and could be attacked at all times, then the same criteria would also have to be applied with regard to organized and armed employees of private security companies.
- Lastly, one expert recalled that the ICC Statute made it an offence in non-international armed conflict to direct attacks against “the civilian population as such or against individual civilians not taking direct part in hostilities”, but not against “any person” not taking a direct part in hostilities.<sup>7</sup> Thus, it was never made an offence to attack members of state armed forces who were not taking a direct part in hostilities.

#### **4. Notion of “Organized Armed Group” in Non-International Armed Conflict**

It was generally recognized that the application of a “membership approach” required clarity as to what constituted an “organized armed group” under IHL governing non-international armed conflict. One expert said that the term “organized armed group” meant a group that wished to become involved in a conflict by supporting the military campaign of one of the parties. To the extent that the activities of such a group exceeded the threshold of sporadic acts of violence, it could also become an independent party to the conflict.

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<sup>7</sup> See: Article 8 [2 e] (i) ICC Statute.

**a) “Four Criteria” Established by Article 4 GC III**

The Background Document had raised the question whether the "membership approach" could be restricted to organized armed groups fulfilling the four criteria established by Article 4 GC III for granting POW status to irregular forces in international armed conflict.

Several experts held that the criteria of "responsible command", "distinctive signs", "open carrying of arms" and "compliance with the law of armed conflict" related only to POW status in international armed conflict and had no place in a discussion on loss of civilian immunity from direct attack in non-international armed conflict. They could envisage exceptions in rare cases, such as where the parties to a non-international armed conflict agreed to extend the applicability of IHL governing international armed conflict to their conflict, usually where the rebels had established firm territorial control, proper structures and organization.

It was argued that, in practical terms, the "four criteria" neither suitably reflected "membership" in a particular non-state group, nor in the fighting forces of such a group. Moreover, tying the applicability of a membership approach to the fulfillment of the "four criteria" would encourage non-state actors *not* to organize themselves visibly, *not* to distinguish themselves from the civilian population, *not* to carry their arms openly and *not* to respect IHL, which of course was completely contrary to what was desired.

However, other experts recognized that the "four criteria" could be partly relevant to the identification of an "organized armed group". If the "membership approach" was not to undermine the protection of peaceful civilians, it could only be applied to organized armed groups which fulfilled the two criteria of "responsible command" and "fixed distinctive sign recognizable at a distance". While the "open carrying of arms" could be regarded as being of indicative value for the existence of "membership" and of an "organized armed group", it was not considered as a necessary prerequisite for either notion.

**b) Criteria Established by Article 1 AP II**

One group of experts suggested that the criteria of Article 1 AP II describing the non-state party to an AP II conflict, most notably responsible command, territorial control and a certain intensity of hostilities, could serve as useful guidance for identifying an "organized armed

group". Some experts specified that these elements were decisive in distinguishing organized armed groups, which could be a subject of IHL, from terrorist groups, which could not.

### **c) Determination According to Concrete Circumstances**

Several experts found, however, that it was difficult to define an "organized armed group" in the abstract and held that the identification of such a group, and of "membership", had to be made according to the facts of each concrete context of non-international armed conflict. This was the only way to accommodate the wide variety of organized armed groups involved in conflicts around the world, from highly organized and identifiable groups, to forces and factions that could hardly be distinguished from the civilian population, save for the time when they were actually carrying their weapons.

## **5. Theoretical Merits of the "Membership Approach"**

According to the group of experts who supported the "membership approach" there was an inescapable logic to the permanent or semi-permanent loss of immunity from direct attack that lasted as long as a civilian was considered to be part of the "fighting activities" of an organized armed group:

- According to one expert, the fact that an individual continued to be a member of an organization that was regularly engaged in the conduct of hostilities constituted in and of itself "direct participation in hostilities".
- Some experts nevertheless recognized that the "membership approach" constituted a policy preference, rather than an inevitable consequence of legal considerations.
- One expert pointed out that, contrary to human rights law, IHL was based on the idea of two or more parties conducting hostilities against each other. According to the principle of equal rights and duties of the parties, the principle of distinction could essentially be operated based on a "direct participation in hostilities" approach or on a "membership approach". Opting for a pure "direct participation in hostilities" approach would require increased protection for state armed forces too, meaning that they could also be

attacked only for as long as they directly participated in hostilities. Opting for a pure "membership approach" would not only leave the problem of unorganized civilian participation in the hostilities unresolved, but would also expose peaceful civilians to increased risks. Therefore, this expert proposed combining a very restrictive "membership approach", applied exclusively to state armed forces and to the non-state equivalent of organized "combatants", with the "direct participation in hostilities" approach, which would apply to all civilians who only occasionally participated in hostilities and who would therefore continue to benefit from the "revolving door" of protection. This expert stressed that any approach deviating from the principle of equal rights and duties would almost certainly entail general disrespect for IHL.

- One expert who favored the "membership approach" recognized, nonetheless, that not every member of an organized armed group could immediately be regarded as a legitimate target regardless of his or her personal conduct. In her view, however, the "membership approach" was certainly relevant for delimiting the temporal scope of loss of protection. Accordingly, members of an organized armed group who became involved in the hostilities should not be regarded as "civilians" for as long as the conflict continued and they belonged to a party to the conflict. As long as the legal analysis led to this result, it did not matter whether it was achieved based on the "membership approach" or based on a very extensive interpretation of "direct participation in hostilities". What was important to this expert was that the state's armed forces were permitted to target members of armed groups when they were "off-duty" or otherwise not momentarily involved ongoing hostilities.

Another group of experts strongly rejected the "membership approach" and essentially made the following arguments:

- One expert pointed out that, if "membership" alone was the decisive criteria for targeting, then even a cook and other support personnel could be directly attacked. Therefore, any membership approach had to be limited to the fighting members of an organized armed group. But, as the fighting members of an organized armed group were directly participating in the hostilities anyway, there was no need for a "membership approach" in order to be able to attack them. In this expert's view, it was clear that direct attacks against civilians had to be based exclusively on individual conduct. If states had intended to solve this problem based on "membership" or any other similar "status" they would have done so in the Additional Protocols. But the fact was that conventional law referred only to individual conduct.

- This expert also recalled the following: as far as international armed conflicts were concerned, the text of Article 51 AP I clearly excluded the "membership approach", because the very idea of distinguishing between civilians and combatants was that civilians could not be attacked based on their status but only based on their conduct, namely for as long as they directly participated in the hostilities. If "membership" – whether in armed groups or in armed forces – was equated with "direct participation in hostilities", there would no longer be any difference between status and conduct. However, it had to be recognized that "combatant" status was a very exceptional concept designed exclusively for contexts of international armed conflict, where membership in the armed forces was relatively well defined in treaty law and recognizable on the battlefield. It was only these circumstances that allowed combatants to be attacked and killed at any time, regardless of individual behavior and military necessity. This exceptional rule, although still valid, could not be extended to other categories of persons, who were not clearly defined and often not recognizable in practice. Therefore, this rule could not be applied in non-international armed conflict, where IHL did not foresee any status, and where the principle of distinction had to be applied exclusively based on individual conduct. The expert also emphasized that when the other experts proposed a "restricted" membership approach – which would exclude the cook, the driver and the gardener, but would include the tactical planner, the actual fighter and his commander – they had in fact already discarded the "membership approach" through the back door and reintroduced the "direct participation in hostilities" approach based on the actual conduct of individual members of an organized armed group. This expert favored an approach that would be based on the concept of "direct participation in hostilities" and would involve defining that notion somewhat more extensively than just "firing weapons".
- The same expert also argued that the imbalance caused by the "revolving door" phenomenon did not justify the adoption of a "membership approach". If the revolving door phenomenon did indeed lead to a certain imbalance, this was not too shocking because, in most cases, the reality of governmental forces was very different from that of the armed opposition. Moreover, in view of the very text of Articles 51 AP I and 13 AP II, namely the conventional wording "for such time as", it had to be recognized that the phenomenon of the "revolving door" was not only unavoidable but even intended by the drafters of the Protocols.

- Finally, one expert argued that the notion of “membership” should perhaps not be construed as a matter of affiliation, but rather as a temporal continuum of a civilian’s direct participation in the hostilities conducted by an organized armed group. Thus, instead of a “membership card”, the decisive element for prolonged loss of protection would be the fact that a civilian had actually taken a direct part in hostilities, continued to do so and intended to do so in the future.

## 6. Human Rights Law Perspective

It was recalled that the aim of the Expert Meeting was to clarify a legal notion, which IHL had left unclear. In that context, the question was raised to what extent any clarification of the notion of direct participation in hostilities would have to take into account the relevant standards of human rights law. There appeared to be general agreement among the experts as regards the continued applicability of human rights law in situations of both international and non-international armed conflict. There also appeared to be general agreement that, strictly speaking, human rights law was binding only on states and that, for the time being, recent developments indicating an extension of human rights obligations to non-state actors could not be regarded as *lex lata*. The experts further appeared to agree on the *lex specialis* status of IHL as recognized in the ICJ’s Advisory Opinions on *Nuclear Weapons (1996)* and on the *Wall in the Occupied Palestinian Territory (2004)*. Opinions differed, however, with regard to the extent to which human rights law influenced or limited the interpretation of vague or unclear notions of IHL such as “direct participation in hostilities”.

One group of experts contended that the lack of clarity of the notion of “direct participation in hostilities” constituted an actual gap in IHL, which had to be bridged by reference to human rights law. Accordingly, the notion of “direct participation in hostilities” could not be interpreted to allow the use of lethal force beyond the restrictive standards of human rights law. To do otherwise would undermine not only existing human rights law but also the standards which states were trying to achieve in the codifications of IHL in 1949 and 1977.

- Several experts recalled that there was extensive human rights jurisprudence under the UN system, as well as under the European, American and African regional systems, applying human rights law on the right to life in situations of armed conflict. It was held that, according to that case law, it was a violation of the right to life to use lethal force

against a person who could reasonably be arrested without representing an immediate threat to the life or limb of others.

- The situation was different only where someone was regarded as an immediate threat to the life of others – whether based on his previous behavior or on what he could reasonably be expected to do next – and where the only opportunity to prevent a serious crime was by use of lethal force. In such situations, Principle 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials could be said to permit a sort of “targeted killing”.
- Thus, any approach that would allow direct attacks against civilians outside a situation of actual or imminent fighting opened the door to summary or arbitrary executions. Therefore, despite the problem of the “revolving door”, any criteria for the identification of “membership” in a non-international armed conflict must remain as close as possible to actual fighting.
- In conclusion, to the extent that the “membership approach” could bring clarity to IHL, it did so at the expense of civilian protection and opened the door to serious human rights abuses, most notably of the right to life but also of other human rights, such as the presumption of innocence, the right to a fair trial and the freedom of association.
- One expert also recalled that there had not been a single case where a human rights body had concluded that it was a violation of the right to life to kill an individual who was carrying arms openly, with a distinctive sign, in the middle of a military operation. The real problem were the frequent cases where individuals took off their uniforms, insignia and weapons, left the armed group and were then executed by government forces on the road or in a village located somewhere in a grey zone over which neither party exercised complete control. Under current human rights law, such acts were considered “summary and arbitrary executions”, a trend that was increasingly reaffirmed in international law.

Another group of experts argued, however, that the notion of “direct participation in hostilities” already contained a *lex specialis* rule and that this rule had to be interpreted according to the logic and standards of IHL, which best reflected the realities of armed conflict.

- If human rights law is interpreted inconsistently with the reality of hostilities in armed conflict, this is likely to increase the risk for the very persons whom the law tries to protect, namely peaceful civilians.
- It was admitted that, the closer a situation is to one of internal violence requiring a law enforcement approach, the harder it is to apply the “membership approach” and the greater is the risk of a collision between the principles governing human rights law and IHL. One difference that should not be forgotten is, for instance, that the “tolerance” of incidental damage is much lower under human rights law than under IHL.
- Therefore, while the membership approach could only apply during a phase of conflict where the armed group in question already showed an organized structure, it could not be earnestly argued that there was an obligation to capture rather than kill in full scale hostilities.

## **7. Practical Viability of the “Membership Approach”**

Several experts emphasized the practical risks that a “membership approach” would cause for the protection of the civilian population:

- According to one expert, a “membership approach” would not solve the problem of civilian participation in hostilities. Not only is there no clear and generally accepted definition of “organized armed group”, but the practical identification of membership in such groups is also a serious problem.
- One expert recalled that “membership concepts” are nothing new and have been widely used in practice. Experience shows that the gap between the use and abuse of a membership approach is quite narrow, particularly where members frequently moved between the political and the armed wings of an organized armed group. The criteria for identifying “membership” are in the vast majority of cases based on the subjective presumptions of the individual called to make a targeting decision. The problem was that, under the membership approach, individuals could be targeted irrespective of the actual threat that they pose to those who are firing at them.

- Another expert pointed out that, in non-international armed conflict, membership in armed groups is often not permanent in any way that would be comparable to combatants belonging to the armed forces of a state. Instead, the fighting force was recruited locally and *ad hoc*, according to the needs at hand. In practice, it would be difficult or even impossible to identify membership reliably, especially in situations involving several opposing armed groups, changing coalitions and the lack of actual territorial control on the part of the government.
- One expert suggested that, due to the grave consequences of loss of immunity from direct attack, the membership approach would have to be restricted to members whose objective behavior shows that they are actively and permanently involved in an organized armed group, rather than just relying on an abstract concept of “membership”.
- Further, several experts stressed that the “membership approach” requires a clear distinction between “combatant” and “non-combatant” members of organized armed groups, such as cooks, postmen and secretaries.
- Several experts also recalled that the difficult issues raised by high-tech warfare should not divert attention from the fact that the majority of current armed conflicts were non-international and involved ruthless and unprofessional forces both on the governmental and the guerilla sides. In such contexts, there was often an already pronounced tendency to attack individuals simply because they belonged to a certain group, ethnicity or family, a tendency that would be exacerbated by a “membership approach”. The only chance of maintaining a minimum of civilian protection would be to say that, for targeting decisions, what matters is not the group to which the person in question belongs, but the activities in which he engages. And, while the “revolving door” certainly was a real problem, there was also the terrible reality of disappearances, ethnic cleansing and summary executions that could not be ignored in addressing the practical viability of a membership approach.
- One expert explained that in many African contexts, marked by inter-tribal, inter-communal and inter-ethnic confrontation, membership in an organized armed group was not voluntary. On the contrary, where the government lacked territorial control civilians simply had no choice but to join an armed group if they wanted to survive. Once the mere fact of “membership” became a sufficient justification for direct attacks, peaceful civilians would inevitably be assassinated based on wrong presumptions or on

mere suspicion. Situations of non-international armed conflict were already complex enough for professional armed forces, who were called on to switch between military hostilities, law enforcement and pacification depending on the visible conduct of a particular civilian. The introduction of the abstract criterion of “membership” would only further complicate the situation and entail great risks for the civilian population. In conclusion, the only reliable way of implementing the principle of distinction was to base it on the criterion of “conduct” and not of “membership”.

- One expert gave the example of ten members of an organized armed group sleeping between operations in a village house under the territorial control of the governmental authority. In the opinion of this expert, the governmental armed forces would be obliged to surround the house and give its inhabitants an opportunity to surrender before directly attacking them. As long as the inhabitants were not fighting back it simply could not be asserted with sufficient reliability that they were actually legitimate military targets. Any other approach would inevitably lead to terrible mistakes and abuse. While “membership” in an organized armed group was not sufficient in and of itself, in situations of doubt it was nevertheless a good indicator that a civilian’s conduct constituted direct participation in hostilities. The actual loss of protection, however, could not be triggered by “membership”, but only by “direct participation” in an act amounting to “hostilities”. Thus, once the notion of “hostilities” was defined, the only thing left to clarify was the meaning of “direct participation” based on the nature, time, place and purpose of the act.
- According to one expert, the advantages of a pure conduct-based approach were that the civilian population remained protected and that the interpretation of the notion of direct participation in hostilities would be the same in international and non-international armed conflict.

Other experts were of the opinion that, in practical terms, the membership approach was more likely to protect peaceful civilians than to expose them to direct attacks:

- Several experts stressed that a "membership approach" would not necessarily lead to an infringement of human rights protection. The logic behind the possible application of a "membership approach" was to increase protection for, and not to expand lawful targeting of, peaceful civilians. After all, it could not seriously be regarded as a human rights violation to permit direct attacks against civilians who fulfilled criteria comparable to those established in Article 4 of GC III, who wore uniforms or otherwise distinguished

themselves from the civilian population, who carried arms openly, who conducted military operations on a fairly wide scale and exercised control over territory and population. On the other hand, a "membership approach" would be totally infeasible in situations that remained below the threshold of a full-blown internal armed conflict, as was for instance the case with Spain's confrontation with ETA.

- One expert held that, since "combatant" status did not exist in non-international armed conflict, a "membership approach" would be extremely helpful for identifying those who were not entitled to civilian protection and, thus, for the actual implementation of the principle of distinction on the ground.
- One expert, while recognizing that a wide interpretation of "direct participation in hostilities" would be problematic in terms of the protection of the civilian population, suggested that these possible risks could be mitigated by providing that the parties would be obliged to examine or exhaust the option of "feasible arrest", at least where they exercised sufficient control over territory. While no soldier could be required to undertake what would be tantamount to a suicide mission, situations were indeed conceivable where capture was a reasonable option. Since reality could not be expected to adapt to the law, this could be a balanced way of adapting the law to reality.
- Another expert was not convinced that the element of territorial control would be particularly helpful. He pointed out that, in armed conflict, the government was by definition not in total control of the situation. Indeed, it was the very absence of such control that enabled opposition groups to prosecute military operations.

A third group of experts recognized that there was a certain difference of opinion between those experts who favored and those who rejected the "membership approach", but stressed that the gap between the two opinions was not so wide that it could not be bridged:

- On the one hand, hardly anyone, whether expert or soldier, would reject the proposition that there was an obligation to arrest rather than kill when it was obvious that a member of an organized armed group could be captured with very little or no additional risk.
- On the other hand, hardly anyone would claim that governmental armed forces were legally required to venture on "suicide missions" into guerrilla-held territory in order to capture rather than kill.

- The "grey area" seemed to be somewhere in the middle, for example where soldiers at a checkpoint had to decide whether or not to fire at an approaching car that reasonably could just as well be carrying armed insurgents or suicide bombers as peaceful civilians.
- Therefore, the discussion should focus on finding solutions for this "grey area" instead of continuously stressing the relatively minor differences of opinion.

## **8. Incentives for Members of Organized Armed Groups**

Several experts emphasized that, since the membership approach meant that members of organized armed groups could not only be directly attacked at all times, but could also be punished simply for having shot back at those attacking them, it would be important to provide them with some sort of incentive to distinguish themselves from the civilian population and to comply with IHL. In view of the fact that the activities of members of armed groups were punishable under domestic law, it clearly was not sufficient to offer them the unconvincing title of "good criminal" if they respected IHL. Therefore, if a membership approach was to be chosen, it was suggested that a policy preference be made to encourage states to treat captured members of armed groups as POWs or, at least, not to penalize them for having directly participated in hostilities. Another expert recalled that, during the American Civil War, the US government did not rely on its right to try captured confederate soldiers for treason, but effectively treated them as POWs.

Several experts recognized, however, that it was highly unlikely under current circumstances that any government would give privileged status to rebel fighters instead of regarding them as criminals under domestic law. In the opinion of one expert, it was already a sufficient incentive that current IHL governing non-international armed conflict encouraged the parties to grant the broadest possible amnesty after the end of an armed conflict.

A group of several experts said that the question of amnesties and incentives for non-state actors, though undeniably important in practice, should not be linked to the clarification of the notion of direct participation in hostilities and should not be discussed at the Expert Meeting. First, the question of incentives had nothing to do with the actual conduct of hostilities, but became relevant only after capture. Second, this question had its own complexity which

should not be underestimated. And third, it had to be borne in mind that linking these two issues would be likely to indefinitely delay possible recognition of a “membership approach” by governments and others.

## **9. “Membership Approach” in International Armed Conflict**

One expert found that a membership approach would be helpful also in situations of international armed conflict. This would mean that members of armed groups, although lacking combatant status *de jure*, would *de facto* be treated as if they were combatants for the purpose of the conduct of hostilities. This category of persons, who neither behaved like civilians nor qualified as combatants, had recently been described as “unlawful combatants” by some states.

Another expert reiterated that conventional IHL clearly excluded a “membership approach” in international armed conflict, because it provided that civilians – contrary to combatants – could not be attacked based on their status, but only based on individual conduct amounting to direct participation in the hostilities. If “membership”, whether in armed groups or in armed forces, was equated with “direct participation in hostilities”, then there would no longer be any difference between status and conduct.

## V. Temporal Scope of Direct Participation in Hostilities

### Introductory Remarks

It was recalled that one of the most important issues to be clarified in relation to the notion of "direct participation in hostilities" was the temporal scope of the ensuing loss of protection, i.e., the question from what moment on and for how long a civilian could be directly attacked because of his or her direct participation in hostilities. It was further recalled that the clarification process had so far essentially yielded three different approaches, which in the Background Document had been called the "Specific Acts Approach"<sup>8</sup>, the "Affirmative Disengagement Approach"<sup>9</sup> and the "Membership Approach".<sup>10</sup>

The experts were requested, as a first step, to compare the theoretical merits and practical viability of these three approaches. Second, particularly with regard to the specific acts approach, the experts were requested to try to distinguish between "preparatory measures" that qualify as "direct participation in hostilities" and "preparatory measures" that are too distant from the hostilities to entail a loss of protection against direct attack. Third, it was noted that the discussion should also address the question whether "deployment to" and "return from" military engagements constitutes direct participation in hostilities and, if so, when such "deployment" and "return" begins and ends.

Lastly, it was pointed out that the Background Document was based on two premises that were deemed inherent in conventional IHL: The first was that the duration of a particular instance of "direct participation in hostilities" and the duration of the ensuing "loss of protection" against direct attack were identical. The second and consequent premise was that the legal mechanism of the "revolving door" of civilian protection was inevitable. In other words, the duration of loss of protection against direct attack depended directly on the beginning and end of "direct participation in hostilities".

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<sup>8</sup> According to the "Specific Acts Approach", the loss of civilian protection against direct attack lasts exactly as long as the specific acts amounting to direct participation in hostilities.

<sup>9</sup> According to the "Affirmative Disengagement Approach", the loss of civilian protection against direct attack lasts from the first specific act amounting to direct participation in hostilities until the civilian in question disengages from such activities in a manner objectively recognizable to the adversary.

<sup>10</sup> The "Membership Approach" essentially combines the "Affirmative Disengagement Approach" (members of organized armed groups) with the "Specific Acts Approach" (unorganized civilians).

## Expert Opinions

### 1. Specific Acts Approach

One group of experts rejected the "specific acts approach" as being too narrow and argued that it allowed civilians to abuse the phenomenon of the "revolving door" of protection to an extent that made it virtually impossible for the opposing armed forces to operate. In summary, the following additional comments were made:

- Instances where the "specific acts approach" could reasonably apply in practice were rare and probably comprised less than one percent of the targeting decisions taken during an armed conflict, namely where civilians directly attacked the armed forces without being part of an organized group. In practice, most of those cases would probably be quite obvious to the soldiers involved and would even justify the use of lethal force in self-defense.
- It was, however, pointed out that even members of state armed forces could alternate between active duty and civilian life, e.g., in the case of reservists. By the same token, the "revolving door" of protection had to be granted to civilians directly participating in hostilities as long as the consecutive "switches" were not too frequent. The limit as to how many "switches" were permissible could not be drawn in the abstract, but had to be determined based on the concrete circumstances of each case. Clearly though, the purpose of the "revolving door" of protection was not simply to accommodate the convenience of each and every individual civilian.
- Some experts who preferred the "affirmative disengagement approach" nevertheless indicated that they could agree with the "specific acts approach" if it were based on a sufficiently wide interpretation of "preparatory measures", "deployment to..." and "return from...". According to these experts, it was absurd to argue that any civilian directly participating in hostilities immediately regained his or her protection against direct attacks just because the specific act in question was terminated. Even after the act, the civilian could be disarmed, arrested and the threat neutralized by whatever type of force would be necessary in the circumstances.

- One expert held that the conventional phrase “for such time as” in Articles 51 API and 13 APII was unhelpful, because it enabled an excessive interpretation of the “revolving door” of protection. This expert nevertheless did not adhere to the idea that a single act of “direct participation in hostilities” should systematically lead to permanent loss of civilian protection against direct attack.

Another group of experts held that the "specific acts approach" reflected the existing IHL rule on direct participation in hostilities more accurately than the “affirmative disengagement approach” or the “membership approach”, which were too broad. In summary, the following additional comments were made:

- One expert recognized that the “specific acts approach” could not be interpreted too restrictively, and that the “specific acts” covered would include any conduct that amounted to “hostilities”. In other words, a realistic interpretation of the notion of direct participation in hostilities had to extend to “direct planning”, “direct logistical support”, “direct intelligence”, "deployment to" and “immediate return from" the scene of action, but could not go beyond that.
- One expert expressed grave doubts about the practical viability of the "affirmative disengagement approach" in the case of ordinary civilians who were not permanent members of a particular group but took part in the hostilities only occasionally, whether voluntarily or under coercion. The reality of armed conflict simply did not allow sufficient intelligence resources to keep track of individuals or of their desire to disengage. Therefore, military action against unorganized individuals would in practice have to be based on actual and immediate hostilities, that is to say, on the “specific acts approach”.
- Lastly, as far as unorganized civilians were concerned, one expert argued that the “specific acts approach” was also preferable because the direct participation of these persons in the hostilities and the duration of their activities were often not a matter of choice but of coercion by an organized armed group. It was impractical to require affirmative withdrawal of membership or that civilians “affirmatively disengage” in that kind of situation. In response, another expert pointed out that, regrettably, personal choice could not be relevant for the question of loss of protection. For example, in one context he had experienced, a 14 year old girl had been killed by soldiers while she was laying booby traps in spite of the fact that the insurgent forces had clearly coerced her to engage in this activity. She was not a member of the insurgent group, but she

was at that time performing a specific act that amounted to direct participation in hostilities.

## **2. Affirmative Disengagement Approach**

Several experts clearly favored the "affirmative disengagement approach" over the "specific acts approach", which was perceived as being too narrow for a realistic interpretation of the notion of "direct participation in hostilities". However, several serious concerns were voiced by others with regard to the practical viability of this approach:

- It was questioned how individuals could affirmatively declare their disengagement in practice, particularly in the de-personalized reality of modern aerial warfare and in the context of remote controlled weaponry. In that regard, the question was raised as to whether "ceasing" to take part in hostilities in the sense of Article 4 AP II required positive action and, if so, what kind of action this should be.
- Doubts were also expressed as to the feasibility of actually keeping track of individual declarations of "affirmative disengagement" in contexts where perhaps thousands of civilians were involved in the hostilities.
- At least as far as unorganized civilians are concerned, error and abuse could only be avoided if preference was given to the "specific acts approach". While several experts tended to favor the "affirmative disengagement approach" with regard to organized armed groups, it was conceded that this approach would be more realistic where an entire group wanted to disengage, rather than where the disengagement concerned only individual members.
- Several experts also recalled that a civilian wishing to "affirmatively disengage" would probably have to expect reprisals against himself or his family by the armed group from which he was disengaging. Additionally, the person disengaging could not exclude being criminally sanctioned for having participated in the hostilities. Thus, unless the civilian's security was guaranteed and some form of amnesty or other incentive was provided, it simply was not realistic to expect affirmative disengagement.

- Lastly, a wider agreement appeared to emerge that a distinction had to be made between unorganized civilians and "non-combatant" members of organized armed groups on the one hand, and fighting members of such groups on the other. There was a preference for applying the "specific acts approach" to unorganized civilians and "non-combatant" members of organized armed groups and the "affirmative disengagement approach" to fighting members of such groups. A determination that affirmative disengagement had taken place would depend on the concrete circumstances of the context and could not be defined in advance.

### **3. Membership Approach**

While the "membership approach" was considered to be an extremely useful concept by some experts, others strongly rejected the idea that a civilian should lose protection against direct attack based on the mere fact, and for the entire duration, of his or her "membership" in an organized armed group. Overall, there appeared to be agreement that the "membership approach" could not be applied in a broad and generalized manner so as to permit direct attacks against all members at all times. Instead, several experts made attempts to formulate a "restricted" or "limited" membership approach. In summary, the following additional comments were made:

- One expert recalled that targeting was not just a reaction to an immediate threat but that, in practice, ninety-nine percent of targeting decisions addressed the overall threat of the adversary's military campaign and involved persons who were not necessarily conducting hostile acts at the moment of attack. Therefore, targeting decisions had to rely on some sort of collective categorization, especially in confrontations with non-state actors, where limited availability of intelligence was notorious. This expert supported the "membership/affirmative disengagement" approach for both international and non-international armed conflict.
- One group of experts was of the opinion that members of organized armed groups that represented a party to a non-international armed conflict in the sense of Article 1 AP II could no longer be regarded as "civilians". Thus, until they affirmatively disengaged from the group and became civilians again, members of such groups could be lawfully targeted according to the same principles as members of state armed forces.

- It was generally recognized that, in reality, members of organized armed groups affirmatively denouncing their membership had to expect to be treated as "traitors" or "deserters" by the armed group in question and were, additionally, likely to face criminal sanctions from the government for their previous activities in the armed group. Many experts emphasized the importance of amnesties and other incentives in this regard, but others found that this was a practical problem that could not be resolved and that the responsibility of assuming the risks related to membership ultimately rested with the individual members.
- In any case, in order to regain protection, the disengagement of a member had to be clear and unambiguous. It was simply not realistic to expect an attacker to differentiate between those elements of an organized armed group that may have decided no longer to participate and those elements in the group who may have decided to carry on.

Most experts recognized that the "membership approach" had to be restricted so as not to automatically allow direct attacks against all members at all times irrespective of any circumstances. One group of experts found, however, that a "limited membership approach" could be a viable solution with regard to organized armed groups that could be relatively precisely identified. The following proposals were made:

- The basic idea of the "membership approach" was that, from the perspective of their adversary, members of organized armed groups posed a continuing military threat comparable to the armed forces of an opposing state and could therefore be targeted in the same way as combatants. The assumption was that members were going to continue their hostile activities on an day to day basis; therefore the threat did not end and protection remained suspended even when they temporarily interrupted their activities, for example in order to rest or sleep.
- Several experts proposed restricting the membership approach, first, to organized armed groups that could be relatively precisely identified and, second, to "fighting members" of such groups. "Fighting members" were members who were regularly conducting "hostilities" for a group, as opposed to cooks, secretaries and similar personnel. The identification of fighting members could be facilitated by a functional approach, which would match the functions of the individual members with those existing in traditional armed forces, such as command, actual war-fighting, logistics and intelligence.

- Under this line of thinking, an individual's "membership" would then indicate that he or she still belonged to the military wing of the group and was, thus, still continuously directly participating in hostilities, regardless of his or her particular conduct at the moment of an attack. Loss of protection would only cease once the fighting member in question had disengaged in an objectively recognizable manner.
- This "limited membership approach" would allow effective operations also against members who are actually organizing and leading the hostilities carried out by the armed group, without perhaps ever carrying a weapon. It would allow the targeting of certain members of an armed group at a moment when it is actually feasible to do so and when the risk of "collateral damage" is lowest.
- According to several experts, the "limited membership approach" would also exclude members who had in some way differentiated or separated geographically from the group, for instance by returning home in between military operations. At that stage, targeting would be permissible only based on the "specific acts approach" and, according to one expert, the decisive question for the use of lethal force would not be whether the direct participation in hostilities of that member had ended, but simply whether he or she still constituted an immediate "threat". The same expert said that "threat" was a better criterion than "military necessity" because "military necessity" could easily be abused to justify the killing of all kinds of people.
- Some experts also appeared to be of the opinion that the "membership approach" should be restricted in terms of the legal consequences of membership. While "membership" could serve as a powerful indicator that the conduct of a particular civilian constituted direct participation in hostilities, it was not sufficient in and of itself to entail loss of civilian protection against direct attack. Conventional law made very clear that a civilian could only be targeted during the time that he or she actually took a direct part in hostilities. Afterwards, the person could only be arrested and prosecuted for what he or she had done.

#### **4. "Deployment to..." and "Return from"...**

The general view appeared to be that the question of whether the temporal scope of loss of protection against direct attack extended to "deployment to..." and "return from..." military

engagements was relevant primarily for civilians subject to the “specific acts approach”. In summary, the following remarks were made:

- Several experts emphasized that the reliability of targeting decisions during that period depended strongly on the circumstances and on the availability of good intelligence. More particularly, it was pointed out that, during the phase of “deployment to...”, the adversary necessarily had to determine the plan and intentions of those involved in the deployment based on what could reasonably be assumed from the objective circumstances prevailing in a situation.
- As far as the “return from...” phase was concerned, it was stressed that “withdrawal” had nothing in common with being *hors de combat*. As long as armed units had not surrendered, they constituted legitimate targets even during retreat, because they could renew their offensive at any moment and thus continued to pose a perceptible and substantial threat.
- Intent as reflected by objective circumstances could also play a significant role in determining the end of the “return from...” phase. Good intelligence based on all available information in a particular situation could indicate whether a civilian was actually returning to civilian life or whether he or she was about to redeploy for other military engagements.

## 5. “Threat” as a Temporal Criterion

Expert opinions were divided on the question of whether the duration for which a civilian posed a “military threat” to the adversary was a criterion for the determination of the temporal scope of loss of protection against direct attack. In summary, the following points were made:

- Several experts stated that the only reason why civilians directly participating in hostilities could be directly attacked in the first place was that, at that specific time, they posed a military threat to the adversary. It was specified that, in the context of the conduct of hostilities, “threat” was not necessarily limited to the notion of “immediate threat” in the sense of law enforcement, but also included threats to society, public authority and general law and order. In the reality of non-international armed conflict, soldiers simply did not have time to deliberate on sophisticated targeting criteria, but a

decision to target civilians often had to be taken based on a "split second" evaluation of the actual threat they posed rather than on membership or status.<sup>11</sup>

- Other experts rejected this view and recalled that there was nothing in the wording of the conventional rule on "direct participation in hostilities" that expressly referred to a "threat". The criterion of "threat" belonged to the paradigms of self-defense and law enforcement and not to the conduct of hostilities.
- Lastly, one expert contended that the conditions and modalities established by IHL for the targeting of military objectives also applied to persons. Although these rules did not refer to "threat" as a criterion, they required that considerations of military necessity and proportionality be taken into account. Thus, IHL allowed – but never imposed – the adoption of a "shoot to kill" policy in certain circumstances.

## 6. The Consequences of Doubt

The issue of the temporal scope of loss of civilian protection against direct attacks gave rise to various scenarios in which the person called on to make a targeting decision was faced with a situation of doubt, for instance as to whether the civilian in question was a member of an organized armed group, or whether the civilian had already begun to – or still was – directly participating in hostilities, or whether that person had affirmatively disengaged, etc. The prevailing opinion appeared to be that, in case of reasonable doubt as to whether a civilian constituted a legitimate military target, that person had to be presumed to be protected against direct attack. In summary, the following statements were made:

- One expert asserted that, in his training activities for the armed forces, importance was given to modes of reaction in situations of doubt, where a person or object was merely suspected to be a legitimate target. In most cases, the first choice of action was not to open fire but to control the situation by other means. This was a decision to be taken based, *inter alia*, on the principles of necessity and proportionality.

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<sup>11</sup> In this context, several experts recalled that the issue of "unprivileged belligerency" became relevant only after capture and did not have anything to do with the question of targeting during the conduct of hostilities. This issue was therefore irrelevant for a clarification of the notion of "direct participation in hostilities".

- One expert stressed that, in situations of armed conflict, it was unrealistic to require any kind of “certainties” as a precondition for lawful attacks. In practice, the majority of targeting decisions had to be based on the most accurate intelligence information that was actually available in the circumstances at hand.
- Another expert emphasized that the standard of doubt applicable in the conduct of hostilities was “reasonable doubt” and not doubt as applied in criminal law proceedings. In other words, it was sufficient for the attacker to do everything “feasible” to determine whether or not he was attacking a legitimate target.
- Lastly, one expert stated that the existence of reasonable doubt with regard to the membership of a particular person in an organized armed group meant that the “specific acts approach” had to be applied instead of the “membership approach”.

## VI. Private Contractors and Civilian Employees

### Presentation Hays Parks

In his presentation, Hays Parks raised the following main points:

- Relevance of the phenomenon of civilian contractors in the context of Iraq: once the context moved from the "major combat operations" phase to the "occupation" phase the importance of the role of civilian contractors increased drastically.
- Historical perspective: Civilians accompanying the armed forces during armed conflicts are not a new phenomenon. Outsourcing accelerated at the end of the Cold War when the armed forces started to shrink and weapons systems became increasingly sophisticated and required more technical expertise.
- In Iraq, civilians played a significant role maintaining, servicing and in some cases operating highly technical equipment even during major combat operations. The subsequent occupation phase brought the need to provide a number of services for the civilian population, particularly in view of the responsibility of the occupying power to care for the civilian population according to Article 43 H IV R. Foreign contractors were hired to substitute for the Iraqi civilian services and not for the armed forces of the occupying power.
- The general transformation of the military, the trend towards outsourcing of functions to civilian contractors and the need to make sure these trends are consistent with the Law of War prompted the US Department of Defence (DoD) to reassess and update the role of outsourcing vis-à-vis the use of military forces. Two main questions were asked: Firstly, to what extent should current military duties be outsourced to civilian contractors? Secondly, what military and DoD civilian positions are "inherently governmental" and therefore not to be contracted out?
- Several studies have shown that the trend towards outsourcing is global rather than unique to recent U.S. operations in Afghanistan and Iraq. In fact, civilian contractors are increasingly employed not only by governments, but also by NGOs and the private

industry (to ensure protection) and the UN (the use of private military companies may offer a solution for UN peacekeeping operations.)

- Several difficulties were identified: First, the categories of duties performed by the military is far from static: although there are three general categories of duties - namely combat arms, combat support and combat service support activities - military duties do not always and consistently fall into neat boxes. Furthermore, difficulties are also created by the varying terminology used by experts and by the existence of legal myths.
- State practice shows that civilians have played a variety of roles in support of military forces throughout history. For example: Norwegian armed forces during the 17th and 18th centuries were followed by a large number of civilian contractors, wives, children, men and prostitutes; in 1941, civilian contractors employed in the construction of the U.S naval base on Wake Island made a defence line along with the Marines and were treated by the Japanese as POW; the civilian aviation group known as the "Flying Tigers" flew combat operations against the Japanese in Burma in 1941/1942 in support of British and American troops; the Ethiopian government hired an entire former Soviet Union fighter wing with aircraft, pilots and command and control during its conflict with Eritrea in 1997/1998.
- Civilians accompanying the armed forces in the field are entitled to POW status. In this regard, the "major combat operations" phase (where the POW issue is at stake) should be distinguished from the "occupation" phase where there presumably is no enemy military force anymore.
- The potential role of civilians will depend on where in the conflict spectrum the context is situated. US DoD is in the process of developing three directives. The first one, which is the only one completed, clarifies steps taken with regard to civilian training, etc. when outsourced; the second one explains which function is inherently governmental and which is not; the third one tells the contractors how to contract. All contain law of war content as part of the consideration process.
- Issues at stake: What constitutes "direct participation in hostilities"? Are these contractors entitled to POW status or to be considered as unprivileged belligerents? How can civilians accompanying the armed forces be effectively prosecuted if they violate of the Law of War? Should these civilians be armed?

- Armed civilian contractors (PMCs/PSCs) are still an exception in armed conflict situations. Combat arms are “inherently governmental,” as are any other military positions in which discretion in the use of force is required. The armed forces are concerned by this phenomenon for two reasons: drain of their most qualified personnel; difficulty of identification/distinction and risk of “friendly fire”. The need for “industry standards” merits consideration.

## **Presentation Emanuela Gillard**

In her presentation, Emanuela Gillard raised the following main points:

- The phenomenon of PMCs/PSCs is far from new. What is new is, on the one hand, the nature of the activities they are performing which are coming increasingly close to the heart of military operations and, on the other hand, the number of persons and companies involved in these activities.
- As PMCs/PSCs often find themselves in direct contact with persons protected by IHL, the ICRC has decided to establish contact with these new actors and with states that have responsibility for them. The purpose of the contact is to ensure awareness of the responsibilities under IHL by companies and relevant states, as well as knowledge of the ICRC' mandate and activities by the PMCs/PSCs.
- There is no vacuum in the law when these companies are operating in a situation of armed conflict. The staff of PMCs/PSCs and, if they are hired by states, such states have concurrent responsibilities under IHL. However, very few states have adopted national regulation setting out conditions that have to be met and approvals obtained by companies in order to be allowed to provide their services abroad or operate in a particular country.
- Four key legal issues were raised in relation to contractors operating in situations of armed conflict:

### *1. Status of the staff of PMCs/PSCs under IHL*

While the companies themselves do not have a status under IHL, the individual members of the companies do. This status depends on the nature of their relationship with the state that hires them and on the nature of the activities that they carry out. While not central to IHL, the issue of mercenaries has nevertheless focalised much of the debate; from the point of view of IHL these persons would be in the same position as civilians taking a direct part in hostilities. Much more crucial is the question whether the staff are combatants, civilians or civilians accompanying armed forces (Art. 4 (4) GC III).

### *2. Responsibilities under IHL of the staff of PMCs/PSCs*

Regardless of their status (combatants, civilians, civilians accompanying the armed forces), the staff of PMCs/PSCs is bound by IHL and faces individual criminal responsibility for any war crime it may commit. Steps that could be taken by PMCs/PSCs in order to ensure their staff respect IHL were identified. Alongside the individual criminal responsibility of the staff, there is also the question of the responsibility of the company. There are few states that recognize the criminal responsibility of companies, which means that civil proceedings have to be brought against companies, the problem then being that very few states have extraterritorial civil jurisdiction.

### *3. Responsibilities under IHL of states that hire PMSc/PSCs*

It is based on general public international law. In particular states

- cannot absolve themselves of their responsibilities under IHL merely by contracting someone to carry out certain activities;
- are under an obligation to ensure respect for IHL by the PMCs/PSCs they hire;
- may be responsible for violations of IHL committed by the PMCs/PSCs they hire.

Moreover, the Geneva Conventions require all states to take measures to suppress all acts contrary to the Conventions and exercise universal jurisdiction over grave breaches. These obligations imply that states must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMCs/PSCs hired by the state. There have been practical difficulties in enforcing this criminal responsibility of individuals at the national level (immunity of PMCs and their staff from the local courts, unwillingness of states to exercise extra-territorial jurisdiction, ...)

*4. Responsibilities under IHL of the states in whose territory PMCs/PSCs are incorporated or operate*

Common article 1 of the Geneva Conventions requires all states to take steps to ensure respect for IHL by the companies. In this regard, states in whose territory PMCs/PSCs are operating are in a particularly favourable position to affect their behaviour. The establishment of a licensing or a registration regime may be a way for these states to exercise some control over PMCs/PSCs. Key possible elements of a registration regime were identified.

- In 2005 the Swiss Government in cooperation with the ICRC launched an inter-governmental initiative to try to promote respect for IHL and human rights by these new actors and the states that hire them. This initiative aims, first, to reaffirm existing legal responsibilities of the companies, their staff and states under international law, in particular IHL and HR, and secondly to develop guidelines for national regulation for states in whose territory PMCs/PSCs are registered or operate as well as for states hiring PMCs/PSCs.

## **Introductory Remarks**

It was recalled that the two introductory presentations had been very broad in scope in order to provide a comprehensive overview of the topic of private contractors and civilian employees. The discussion during the Expert Meeting should, however, focus on those aspects of the topic that were relevant to clarifying the notion of “direct participation in hostilities” under IHL. Thus, the primary aim of this Working Session was to determine whether private contractors and civilian employees were subject to the rule of IHL on direct participation in hostilities and, if so, which activities typically performed by them would entail loss of civilian protection against direct attack.

Clearly, the applicability of the IHL rule on direct participation in hostilities depended on whether private contractors and civilian employees could be regarded as “civilians” under IHL. In responding to that question, there were essentially two different categories of persons to be taken into account. On the one hand, there were the private contractors and sub-contractors who were mostly employed by “private military / security companies” (PMC/PSC), which were in turn hired either by governments and state armed forces, or by non-state actors, NGOs and even private individuals. On the other hand, there were the civilian employees of governmental armed forces.

The first part of the Working Session was dedicated to contexts of international armed conflict and aimed at determining whether private contractors and civilian employees involved in such conflicts remained “civilians” or whether they could also qualify as “members of the armed forces” of a party to the conflict and, thereby, as “combatants”. It was recalled that this question had already been addressed during the 2004 Expert Meeting and had given rise to diverging opinions on whether, for the purposes of IHL on the conduct of hostilities, “membership” in the armed forces required a formal act of incorporation under domestic law or whether it was sufficient to fulfill certain conditions *de facto*.

As a second step, the experts were requested to answer the same question in the context of non-international armed conflict. While the criteria for “membership” in the armed forces of a state were unlikely to be different in international and non-international armed conflict, it had to be determined to what extent private contractors who were involved in non-international armed conflict on behalf of organized armed groups could become members thereof. It should also be discussed whether private military companies could potentially be considered to be organized armed groups, qualifying as independent parties to a non-international armed conflict.

## **Expert Opinions**

### **1. Membership in the Armed Forces**

There appeared to be general agreement among the experts that the IHL rule on “direct participation in hostilities” applies only to persons who are “civilians” in the sense of IHL, that is to say, who are not members of the “armed forces” of a state. There also seemed to be general agreement that the great majority of private contractors and civilian employees currently present in contexts of armed conflict carry out functions and activities that are unrelated to the conduct of hostilities and could therefore not qualify as members of the armed forces based on these functions and activities alone. Opinions diverged, however, on whether such functions and activities could give rise to membership in the armed forces where private contractors and civilian employees were mandated by a state to directly participate in the hostilities on its behalf.

One group of experts held that the definition of “armed forces” in IHL governing international armed conflict was essentially of a functional nature. To the extent that private contractors and civilian employees were mandated to directly participate in the hostilities on behalf of a state, they had to be regarded as members of its armed forces and, more importantly, as combatants who could be targeted regardless of their individual conduct at the time of attack. In summary, the following additional comments were made:

- One expert recalled that, in interpreting the notion of “armed forces”, it had to be kept in mind that this term was defined not only in IHL but also in the respective domestic legislation and that the purposes of these definitions were not necessarily identical. For example, while the 1907 Hague Regulations and Article 43 AP I defined “armed forces” within the meaning of IHL, the notion of “armed forces” used in Article 4 GC III referred to domestic law. This was illustrated by the fact that Article 4 A [1] GC III referred to militias that were “part of the armed forces” and Article 4 A [2] GC III to “other” militias that were not. Under IHL, however, both categories were indisputably recognized as “members of the armed forces”. Clearly, when defining “membership in armed forces” with the aim of clarifying the personal scope of applicability of the notion of “direct participation in hostilities”, the analysis had to be conducted based on, and for the purposes of, IHL and not of domestic legislation.
- It was also pointed out that the text of conventional IHL did not rule out that private contractors could form part of state armed forces. However, whether this was the case depended not only on the function of the contractors in question, but also very much on the degree of factual integration. Even though Article 43 AP I was difficult to interpret, it was important to keep in mind that Article 4 A GC III regulated entitlement to POW status and not membership in the armed forces.
- Several experts also recalled that, under IHL governing international armed conflict, the basic concept of “armed forces” comprised persons who were prosecuting an armed conflict for a state party, and “combatants” were those who were entitled to actually conduct hostilities on behalf of the state. These basic ideas were well reflected in Article 43 AP I, which referred to groups, units or forces fighting for a party to a conflict, as opposed to the mafia or a group of bank robbers. In view of this background, it would be absurd if states could replace part of their official armed forces by private contractors and tell them to conduct hostilities on their behalf without recognizing them as members of their armed forces and, thus, without providing them with immunity

against criminal prosecution for doing what they were supposed to do. This would entail that captured contractors would not be entitled to POW status and could be tried as “unlawful combatants” under the domestic law of the adversary.

- According to one expert, contractors conducting hostilities on behalf of a state are not fighting a private war and are not mercenaries; it is the state that puts them on the battlefield in the first place. Even if these contractors have a certain autonomy in the conduct of their tactical, operational or strategic mission, their activities are carried out on behalf of a state party. In sum, as soon as private contractors conduct hostilities under the general command and control of a state, they become incorporated into its armed forces.
- Another expert specified that where a state knowingly allows contractors to conduct hostilities on its behalf – although this was not originally foreseen in the contract – then this would amount to *de facto* hiring the contractors in question for that purpose and would lead to the same result as an original mandate. Contractors conducting hostilities without any authorization of a state, on the other hand, remained civilians subject to the rule on direct participation in hostilities.
- One expert recalled that in the *Strugar case* (January 2005) the ICTY’s Trial Chamber gave some guidance on criteria for membership in the armed forces. In the concrete case, the conclusion whether or not a civilian has been incorporated into the armed forces depends primarily on the individual’s actual function with regard to these forces, and not on whether he or she benefits from a military or civilian pension.
- Lastly, one expert stated that the mere fact that there is an exercise of military authority over individuals or groups of individuals is not sufficient to give rise to membership in the armed forces. Furthermore, while the performance of certain functions and tasks could amount to direct participation in hostilities and entail loss of civilian protection against direct attack, this criterion is not conclusive for determining membership in the armed forces. Instead, this expert recalled that, since the time of the “just war” theory, the lawfulness of hostilities had always depended on their “public” character as opposed to private wars. Hostilities were of public character when they were conducted with the authorization of a sovereign, even if the authorized acts were carried out by private farmers. Conversely, absent such authorization by a sovereign, a war became *ipso facto* unjust. This logic was still relevant today and also applied to the issue of private contractors. Only contractors who had actually been entitled by a state to

commit acts harmful to the enemy could be regarded as belonging to its armed forces, regardless of any formal incorporation. An entitlement to conduct hostilities on behalf of a state could be given individually or generally to all members of a group meeting certain criteria, such as the armed forces, but it could only be given by duly authorized representatives of the state. Since it was the entitlement to commit acts harmful to the enemy that was the constitutive element of membership, persons lacking such entitlement could not be regarded as members of the armed forces and their activities had to be evaluated under the rule on “direct participation in hostilities”, even if they qualified as civilians accompanying the armed forces under Article 4 [4] GC III.

Another group of experts rejected this view and held that membership in state armed forces was regulated primarily by domestic law and required a formal act of incorporation. In summary, the following additional comments were made:

- One expert held that the status of private contractors was not clear in international law. As long as states did not clarify the issue, contractors remained “civilians” and their protection against direct attacks depends on whether their activities amount to direct participation in hostilities. Since civilian status was not beneficial in case of capture, states should regulate this issue as soon as possible.
- Two experts explicitly rejected the view that the definition of armed forces in Article 43 AP I constituted customary IHL. It appeared somewhat unrealistic to try to discuss the definition of armed forces on the basis of a provision that was not recognized by at least one of the major military powers. Instead, one had to revert to the Hague Regulations, although this meant that the definition of armed forces could hardly extend to private contractors.
- One expert recalled that it was not international law, but the domestic legal system that determined the *de jure* organs of a state. It was up to the state alone to regulate the issue of membership in its armed forces. Admittedly, as illustrated by the ICJ's *Nicaragua Case* and the ICTY's *Tadic Case*, international law could recognize certain individuals as *de facto* organs even though they were not *de jure* organs under domestic law. However, in the opinion of this expert the concept of *de facto* organ was unnecessary in the context at hand, because any contractor who *de facto* participated in hostilities would anyway become a combatant and, thereby, be subject to direct attack.

- Another expert held that it was difficult to conclude that civilians participating in hostilities for a state automatically became part of its armed forces, even though the state itself did not regard them as such. However, they did lose their immunity against direct attack and, although civilians, did not have to be taken into account as “collateral damage” for the purposes of the proportionality test. Moreover, as long as they did not become part of the armed forces, such civilians would have to be regarded as unprivileged belligerents without entitlement to POW status.
- One state had solved this problem by assigning private contractors to reserve duty and by instantaneously incorporating them into the armed forces whenever they got involved in hostilities. In practical terms, the decisive question remained, of course, which activities of these contractors and employees would amount to direct participation in hostilities, particularly with regard to activities that did not include the use of direct force, such as working as a mechanic on an aircraft or landing unmanned aircraft.
- In more general terms, one expert cautioned that the levels of primary and secondary rules of international law should not be confused. More particularly, the (secondary) question of attributability of an act under the law of state responsibility had nothing to do with (primary) question of who was a combatant or a member of the armed forces.
- Finally, one expert recognized that it was certainly important how membership in the armed forces was regulated in domestic legislation, but said that it had not become clear in the discussion whether this criterion was also conclusive under IHL. Apart from that criterion, this expert considered that the following were potentially important additional indicators of membership in the armed forces: the employment of a contractor by the department of defense, subordination to military discipline and justice for issues beyond violations of IHL, subordination to the military chain of command and control, integration into the military hierarchy and the receipt of identity cards or other forms of identification ordinarily given to members of the armed forces. Conversely, in the view of this expert, the fact that a contractor had been hired to assist a state’s armed forces, that he or she wore a uniform or that his or her activity was of military nature appeared to be decisive for qualification as “direct participation in the hostilities”, but not for the determination of “membership in the armed forces”.

## 2. Mercenaries

- While several experts found it absolutely conceivable that some of the private contractors present in contexts of armed conflict could be “mercenaries” under the definition of Article 47 AP I, it was generally recognized that the threshold for such qualification under Article 47 AP I was high and that corresponding cases would probably remain very rare. In summary, the following points were made:
- One expert recalled that several activities performed by contractors were very similar to those that had been performed by mercenaries for many years. Private contractors did not go to war for a cause or for honor, but simply for economic gain, and were ready to switch allegiance depending on who paid more or who put more military pressure on them. Their activities did not merit to be glorified and, in the view of this expert, brought many contractors very close to the category of mercenaries. Therefore, the experts should not be too complacent about this phenomenon.
- In response, another expert cautioned that not all private military companies merited condemnation. Over the last twenty years, most private military or security companies had in practice been hired by sub-Saharan nations, primarily to improve the discipline and performance of their armed forces and to train them in IHL and human rights law. This kind of constructive assistance certainly could not be compared to the mercenaries used in the 1950s and 1960s to destabilize African nations. Another expert added that the assumption that mercenaries violated IHL more frequently than persons conducting hostilities for some fanatical reason had not yet been proven. A third expert recalled that it was beyond the scope of the Expert Meeting to address the fundamental legitimacy of private military and security companies, but pointed out that the Human Rights Commission had set up a working group on mercenaries that was going to address the issue of private military and security companies from that perspective.
- One expert stressed that the conventional definition of “mercenary” in Article 47 AP I was so narrow, and the list of conditions so long, that virtually none of the categories of persons under review here could come within that definition. Other experts responded by noting that the question of nationality, in particular, could no longer be regarded as central today. This was particularly true with regard to private companies, which could change their nationality of incorporation at any time. Moreover, private military

companies actually hired individuals of various nationalities. It was absolutely conceivable that some of these individuals could actually qualify as “mercenaries” under the definition of Article 47 AP I.

### **3. Civilians Accompanying the Armed Forces**

There appeared to be general agreement among the experts that private contractors assisting the armed forces could be regarded as “civilians accompanying the armed forces” in the sense of Article 4 A [4] GC III. Opinions diverged, however, with regard to the question whether private contractors mandated by states to conduct hostilities on their behalf could qualify as civilians in the sense of Article 4 A [4] GC III, whether they were entitled to POW status in case of capture and whether they enjoyed immunity from prosecution for direct participation in hostilities under the domestic law of the capturing state:

- One expert contended that if civilians directly participated in hostilities with the authorization of a state, Article 51 [3] AP I suggested that they could be directly attacked for such time as they were so participating, and Article 4 [4] GC III suggested that they would still be entitled to POW status upon capture and could not be regarded as “unprivileged belligerents”. In the view of this expert, civilian contractors would be subject to criminal prosecution under the domestic law of their captors only if their conduct exceeded the terms of their contract or included an element of perfidy.

The prevailing view was, however, that governments could not authorize civilian contractors to take a direct part in the hostilities on their behalf without making them members of the armed forces. In summary, the following additional arguments were made:

- Several experts held that civilians in the sense of Articles 4 [4] and 4 [5] GC III were never meant to be combatants or to have combatant functions, but merely to accompany the armed forces without being members thereof and without taking a direct part in hostilities.
- According to several experts, governments authorizing civilians to take a direct part in hostilities on their behalf without incorporating them into the armed forces created “unprivileged” belligerents. If only persons qualifying under Article 4 A [1], [2],[3] and [6] GC III or Article 43 AP I could be “privileged” combatants, this meant by implication that those falling under Article 4 [4] GC III were not privileged combatants. Therefore, if they

took a direct part in the hostilities they must become “unprivileged” belligerents, that is to say, they would be subject to prosecution for their direct participation in the hostilities under the domestic law of the capturing state.

- One expert also contended that a civilian authorized by a state to directly participate in hostilities on its behalf did not become an unprivileged belligerent, but simply became incorporated and, thereby, a privileged belligerent.

#### **4. Private Military Companies, Organized Armed Groups and Parties to a Non-International Armed Conflict**

There appeared to be general agreement among the experts that, in principle, a private military/security company could not only constitute an “organized armed group”, but also an independent “party” to a non-international armed conflict. In summary, the following individual arguments were made:

- In order to determine the existence of a non-international armed conflict, international law did not ask whether the persons involved had a contract or what their motivations were, but merely looked to whether a situation of violence exceeded the level of internal tensions or disturbances.
- Any “party” to a non-international armed conflict must at least qualify as an “organized armed group”, that is to say, be a group under a responsible command.
- Organized armed groups could become parties to non-international armed conflicts even if they or their members were motivated by financial gain. In reality, many armed groups in many conflicts were motivated by financial gain, and even the decision to join the regular armed forces was often financially motivated, particularly in countries where military service was not compulsory. Therefore, the financial motivation of private military companies did not disqualify them from being a party to a conflict. The determination of whether this was actually the case depended on the particular facts.
- In order to determine whether private contractors were fighting on behalf of an organized armed group, a similar test could be used to that applicable to states under the law of state responsibility. If private contractors directly participated in hostilities and

if, in doing so, they acted “on the instructions” and “under the direction or control” of an organized armed group, then they could be regarded as conducting hostilities on behalf of that group. Of course, a private military company could also qualify as an independent party to a conflict, whether by confronting the governmental armed forces or another organized armed group. With regard to qualifying as a party to a conflict, no difference was made between a private contracting force and a rebel group. With regard to the determination of the temporal scope of the loss of protection, however, the “specific acts approach” should be used and not the “membership approach”.

## **5. Temporal Scope of Loss of Protection**

One group of experts proposed determining the temporal scope of loss of protection from direct attack according to a “limited membership approach” regardless of whether that determination concerned private contractors or any other civilian:

- Four experts favored a “limited membership approach”, according to which loss of civilian protection against direct attack would not be based on “membership” alone, but additionally on the function fulfilled by an individual member within the group. If that function required a member to take a direct part in hostilities on a regular or continuous basis, then that member would lose protection against direct attack for as long as that function was being fulfilled. The traditional functions fulfilled by members of governmental armed forces are war-fighting, command and control, intelligence and logistics. In order to come to reasonable targeting decisions, these traditional functions had to be analogized and compared with the non-traditional functions fulfilled by members of organized armed groups or the employees of private military companies. In that sense, “function” and “membership” were cumulative elements. Conversely, a lone civilian performing isolated acts of direct participation in hostilities would benefit from the “revolving door” of civilian protection. One of the experts additionally stressed that, in case of doubt as to whether a civilian who had directly participated in hostilities would continue these activities in the future, he or she must enjoy the benefit of the doubt and be considered to have regained civilian immunity against direct attack.
- One of the experts supporting the “limited membership approach” further conceded that it had to be restricted to groups that really posed a military threat to the state armed forces. Unorganized individuals who only occasionally participated in hostilities were probably not the main concern of the armed forces anyway.

- Another expert stated that membership in an organized armed group did not depend on whether the individual in question was a private contractor or not. However, different results would be obtained with regard to the temporal scope of loss of protection depending on whether one relied on the “specific acts approach” or on the “membership approach”. This expert opted for a “qualified membership approach”, which would be limited to clearly identifiable groups, whereas the “specific acts approach” had to be applied to organized armed groups that were not clearly “identifiable”.

Other experts were more cautious about applying a “limited membership approach” to private contractors:

- One expert observed that there were contradictory views as to the meaning of the “limited membership approach” in non-international armed conflict. One view appeared to be that the “limited membership approach” could only apply to those groups that were very easily identifiable in order to avoid the problems posed in more fluid situations, which occurred in so-called “bush warfare” and made it very difficult to identify both the group and its members. Other experts appeared to say that the “limited membership approach” had to be based not so much on membership, but additionally on whether the individual in question performed classic fighting activities. Since these contradictions regarding the “limited membership approach” had not been resolved, this expert preferred the “specific acts approach”.
- Another expert warned that the results of a simplistic “membership approach” allowing attacks on members at any time and at any place would be absurd. In the view of this expert, “membership” in an armed group could be an indicator, but could not be an absolute criterion for loss of civilian protection. The indicative element of membership had to be combined with the question of whether the concrete, but not necessarily immediate, “threat” posed by the individual in question could be eliminated by means other than the use of lethal force.

Several experts made specific statements with regard to involvement of contractors in situations of belligerent occupation:

- Two experts stated that, as a matter of law, a situation of occupation following the end of major hostilities still constituted a situation of international armed conflict and that

“direct participation in the hostilities” remained possible in the occupation phase. One of the experts specified that “hostilities” always occurred within the greater situation of an armed conflict, one subset or variation of which could be a situation of belligerent occupation. In that context, “direct participation in hostilities” would have to refer to hostilities taking place in relation to the situation of occupation.

- Another expert confirmed that in situations of belligerent occupation hostilities could also involve a non-state armed group. In that case the same rules should apply to the group and its members, regardless of whether the conflict was considered to be of an international or non-international nature.

## VII. Way Forward

During the concluding session of the Expert Meeting, the organizers revisited the issue of the next stage of the clarification process. Based on the discussions held at the opening session and on additional questions and remarks received in the meantime, the following was concluded:

- There appeared to be agreement among the experts that it was not feasible to come up with an abstract definition that would cover all conceivable instances of “direct participation in hostilities”, whether or not it was accompanied by a non-exhaustive list of examples.
- There also appeared to be agreement among the experts that the end result of the process of clarifying the notion of “direct participation in hostilities under IHL” should be a report or “interpretive guidance” that would identify, to the extent possible, the elements of the notion of “direct participation in hostilities” and reflect, in a commentary, the different interpretations given to them by the experts, as well as outline the legal and practical consequences of the different approaches.
- The organizers will submit the draft of a final report / interpretive guidance for discussion at the next Expert Meeting. In order to allow the experts sufficient time for review, the text would be distributed to the participants about two months in advance of the 2006 Expert Meeting, which will take place at the end of 2006
- There appeared to be agreement that the entire proceedings of the Expert Meetings – e.g., the various background and other documents – and not only the final document, should be made publicly available.<sup>12</sup> This was an issue that would also be further discussed.

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<sup>12</sup> Summary Reports of the annual Expert Meetings that have been held so far are already available on the organizers' websites ([www.icrc.org](http://www.icrc.org) / [www.wihl.nl](http://www.wihl.nl)).



# **The Notion of Direct Participation in Hostilities under International Humanitarian Law**

## **Agenda**

**Third Informal Expert Meeting,  
International Committee of the Red Cross  
TMC Asser Institute**

**Geneva, Switzerland, 23 – 25 October 2005**

## Sunday, 23 October 2005

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### Welcome

9.00 – 10.30

#### Opening Session

- Welcome
- Introductory Remarks by the Organizers and Participants

10.30 – 11.00

#### Coffee Break

### Residual Issues from the Questionnaire (2004)

11.00 – 12.45

#### Working Session I

1. Inter-Civilian Violence and "Direct Participation in Hostilities"
2. Establishment and Exercise of Control over Military Personnel, Objects and Territory

12.45 – 14.15

#### Lunch

### Constitutive Elements of "Direct Participation in Hostilities"

14.15 – 16.00

#### Working Session II

- Hostilities
- Nexus
- Causal Proximity
- Hostile Intent

16.00 – 16.30

#### Coffee Break

16.30 – 18.00

#### Working Session III

- Continuation of Discussion from Working Session II

18.30

#### Cocktails

19.30

#### Dinner

## Monday, 24 October 2005

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### "Direct Participation in Hostilities" and Membership in Organized Armed Groups

09.00 – 10.30

#### Working Session IV

- Legal Consequences of "Membership" in Organized Armed Groups in Non-International Armed Conflict
- Merits and Viability of a "Membership Approach" in Non-International Armed Conflict?

10.30 – 11.00

#### Coffee Break

11.00 – 12.45

#### Working Session V

- Continuation of Discussion from Working Session IV
- Merits and Viability of a "Membership Approach" in International Armed Conflict?

12.45 – 14.15

#### Lunch

### Temporal Scope of "Direct Participation in Hostilities"

14.15 – 16.00

#### Working Session VI

- The "Specific Acts" Approach
- The "Affirmative Disengagement" Approach

16.00 – 16.30

#### Coffee Break

16.30 – 18.00

#### Working Session VII

- "Preparatory Measures"
- "Deployment to..." and "Return from..."

#### Free Evening

## Tuesday, 25 October 2005

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### Private Contractors and Civilian Employees

9.00 – 10.00

#### Introductory Presentations

- Presentation Hays Parks
- Presentation Emanuela Gillard (ICRC)

10.00 – 10.30

#### Coffee Break

10.30 – 12.45

#### Working Session VIII: Issues specific to International Armed Conflict

- Criteria for "Membership in Armed Forces" under IHL/IAC
- Definition of "Civilian accompanying Armed Forces" (Art. 4 GC III)
- Consequences of DPH for "Civilians accompanying Armed Forces"

12.45 – 14.00

#### Lunch

14.00 – 15.15

#### Working Session IX: Issues specific to Non-International Armed Conflict

- Criteria for "Membership in Armed Forces" under IHL/NIAC
- Can Private Companies or their employees qualify as "organized armed groups (party to a non-international armed conflict)?"
- If not, can individual contractors qualify as members of armed groups?

15.15 – 15.30

#### Coffee Break

15.30 – 16.30

#### Conclusion / Way Forward

16.45

#### Farewell Drinks