



ICRC

Expert Meeting

**Direct Participation in Hostilities
Under International Humanitarian Law**

Background Paper

This background paper has been prepared by Jean-François Quéguiner for the June 2, 2003 expert meeting on "Direct Participation in Hostilities under International Humanitarian Law" that will be held at the TMC Asser Institute in The Hague. The aim of the paper is to provide an overview of different positions, as well as questions, that have been raised either in the doctrine or state practise on the issue of direct participation in hostilities under IHL. The paper was written in a personal capacity and does not express, nor does it intend to express, the institutional position of either the International Committee of the Red Cross or the TMC Asser Institute on any aspect of the topic discussed.

Introduction

Derived from Common article 3 to the Geneva Conventions, the notion of ‘direct’ or ‘active’ participation in hostilities¹ is found in multiple provisions of international humanitarian law (IHL). As an exhaustive analysis of the use of this concept throughout IHL treaty law is far beyond the scope of the expert meeting,² this paper will only address three of the most common uses of this notion: (i) to denote the right of combatants to directly participate in hostilities; (ii) to indicate loss of immunity from attack when non-combatants directly participate in hostilities and (iii) to indicate the legal regime applicable to persons captured or detained after having taken a direct part in hostilities.

- (i) First, the notion of direct participation in hostilities is used in international armed conflict to denote the right of combatants to directly participate in hostilities within the limits imposed by IHL.³ For example, Article 43 § 2 Additional Protocol I (AP I) states that “*Members of the armed forces of a Party to a conflict [...] are combatants, that is to say, they have the right to participate directly in hostilities*”. This authorization, however, is not an individual right granted to the combatant. It results from his or her affiliation to a party to the conflict. Normally, other persons who do not benefit from such an ‘organic’ link are not entitled to combatant status and do not enjoy such immunity.⁴
- (ii) Secondly, if a non-combatant nevertheless takes a direct part in hostilities, the notion indicates loss of immunity from attack during such participation. Thus, Article 51 § 3 AP I underscores that civilians shall enjoy protection against the dangers arising from military operations “*unless and for such time as they take a direct part in hostilities*”.⁵ The same

¹ Common Article 3 only uses the expression ‘active part in the hostilities’. This notion evolved later into ‘direct participation in hostilities’. Concerning the terms direct and active, the International Criminal Tribunal for Rwanda (ICTR) concluded: “*these phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous*”; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, decision of 2 September 1998, § 629. However, the Preparatory Committee for the Establishment of an International Criminal Court suggested a distinction between these notions in the specific context of the recruitment of children asserting that: “*The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat*”.

² For example, a specific use of the notion ‘direct participation in hostilities’ that will not be covered in this paper may be found in the definition of a mercenary: Article 47 § 2 AP I specifies that to fall under the definition, a person must have taken a “*direct part in the hostilities*” motivated essentially by personal gain. It should be noted that the expression ‘participation in hostilities’ is sometimes used in treaty law without the qualifier ‘direct’. For example, Article 31 § 4 AP I stipulates that neutral or other states not party to a conflict can detain “*wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft*”, only in such a manner that they “*cannot again take part in the hostilities*”. This paper will not address these situations either.

³ It should be mentioned that the status of combatant - and POW - only exist in international armed conflict. Although AP II uses the term ‘civilian’, the relevant treaty norms applicable in non-international armed conflict only distinguish between persons directly participating in hostilities and persons who do not directly participate. However, depending on the context, the term ‘combatant’ will be used in this paper either in reference to a specific legal status in international armed conflicts or in a generic sense as commonly used in regards to non-international armed conflicts.

⁴ Note however the exception of the ‘*levée en masse*’, allowing the inhabitants of a territory which has not been occupied to spontaneously take up arms to resist the invading troops if they carry arms openly and if they respect the laws and customs of war; see *inter alia* article 2 of the 1907 Hague Regulations concerning the laws and customs of war on land.

⁵ This logic can be transposed to all categories of non-combatants. Article 67 § 1 AP I, for example, stipulates that members of the armed forces and military units assigned to civil defence organizations “*shall be respected and protected, provided that (e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party*”.

wording is found in Article 13 § 3 AP II, under which "*Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities*". Loss of immunity from attack does not mean, however, that a person who directly participated in hostilities falls outside the scope of IHL protection in case of capture or detention, or when his or her direct participation ceases.

(iii) Thirdly, the notion is used to indicate the regime applicable to persons who have fallen into the hands of an adverse Party after having taken an active part in hostilities. This, for example, is the main purpose of Common Article 3 to the Geneva Conventions. Other illustrations include Article 77 § 3 AP I which states that "*if, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war*".⁶

There is no reason to assume that the expression 'direct participation in hostilities' has variable meanings in these three contexts. The consistency in content does not, however, necessarily mean that there is a clear standard by which an act may be labelled as 'direct participation in hostilities'. Through concrete examples of state practice and scholarly writings, this paper will first attempt to explore the scope of activities that are considered 'direct participation in hostilities' (I). Secondly, it will briefly consider the challenges posed to the implementation of the notion of 'direct participation in hostilities' in contemporary conflicts (II). Finally, it will look at the consequences of 'direct participation in hostilities' by civilians and whether the consequences that flow from such participation may be imposed on an individual or collective basis (III).

I. The lack of an explicit definition of the notion 'direct participation in hostilities'

A precise definition of the notion 'direct participation in hostilities' cannot be found either in the Acts of the 1949 Diplomatic Conference, or in the Acts of the 1974-1977 Diplomatic Conference. Nor can the exact meaning of this expression be derived from the domestic or international legislation and jurisprudence reviewed by the author. However, the *travaux préparatoires* of the Geneva Conventions and their Additional Protocols provide some guidance on the meaning of 'hostilities' (A), as well as on the conditions required for participation to be 'direct' (as opposed to indirect) (B), thereby providing some markers within which differences of judgment can operate.⁷

⁶ See also Article 45 AP I, which has a broader scope of application since it provides protection to all persons who take part in hostilities, not only those who directly participate.

⁷ The existence of a margin of judgment on the matter is undeniable and expressly recognized by the Commentary on the Additional Protocols, ICRC, Geneva, p. 516 § 1679. Many military manuals also emphasize this wide scope of judgment. Australia's Defence Force Manual, for example, notes that "*whether or not a civilian is involved in hostilities is a difficult question which must be determined by the facts of each individual case*" (§ 532). In the same vein, the U.S. Naval Handbook provides that "*Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time*" (§ 11.3). Along the same lines, a 1989 U.S. Executive order regarding the prohibition of assassination states: "*While there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant (...) There is a lack of agreement on this matter, and no existing law-of-war treaty provides clarification or assistance*"; U.S., Executive Order 12333 and Assassination, Memorandum prepared by the Chief of the International Law Branch, Office of the

A) The notion of 'hostilities'

The Geneva Conventions and their Additional Protocols make extensive use of the word 'hostilities' without including a definition. Though sometimes used as a synonym for armed conflict, the notion of hostilities seems to be more restrictive in meaning - as illustrated by the *Dictionnaire de la terminologie du droit international*.⁸ The notion 'hostilities' is used to designate defensive or offensive acts and military operations carried out by a belligerent during an armed conflict.⁹ Likewise, the *Dictionary of the International Law of Armed Conflict* defines hostilities as an “*act of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience*”.¹⁰

Based on these definitions, one can deduct three elements common to the notion of 'hostilities':

- The notion seems intrinsically linked with armed conflict (whether international or non-international).¹¹ In the absence of an armed conflict, an act committed against the armed forces of a State or their equipment would not fall under the notion of hostilities, but would be considered 'criminal' under national legislation.
- The notion also implies that the acts involved are committed by one (or more) 'belligerent(s)'. This does not mean that the term 'hostilities' could not be used if civilians also played a role, but its primary meaning denotes acts of violence carried out by armed forces which are under the responsibility of a Party to the conflict or by other organized armed groups. In other words, the notion of hostilities does not include armed violence committed entirely by criminal groups acting without a nexus to an armed conflict.
- Finally, the notion of hostilities requires acts of violence, meaning acts involving the use of force. According to the Commentary on the Additional Protocols, direct participation in hostilities “*should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces*”.¹²

Several additional elements further supporting the conclusion that the drafters intended to give the notion 'hostilities' a narrower meaning than the notion of 'armed conflict'.

Judge Advocate General, Department of the Army, 2 November 1989, reprinted in NASH M., *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

⁸ *Dictionnaire de la terminologie du droit international* (sous la direction de SALMON, J., Bruylant, Bruxelles, 2001, p. 550): “*Le terme [hostilités] est aussi souvent employé pour désigner le conflit lui-même*”. This is the case, for example, when expressions such as ‘throughout the duration of hostilities’ or ‘upon the outbreak or during the course of hostilities’ are used.

⁹ See *Dictionnaire de la terminologie du droit international* (*ibid.*, p. 550) which mentions, under the item ‘hostilités’: “*ensemble des actes offensifs ou défensifs et des opérations militaires accomplies par un belligérant dans le cadre d'un conflit armé*”.

¹⁰ VERRI P., *Dictionary of the International Law of Armed Conflict*, ICRC, Geneva, 1992, p. 57.

¹¹ Derived from the Latin word *hostilitas*, the term ‘hostility’ encompasses a state of enmity between individuals or nations, an act or series of acts displaying antagonism. Used in the singular, this term is not limited to an armed conflict situation and therefore seems to have a much broader sense than the plural ‘hostilities’. *BLACK 's Law Dictionary*, 5th ed., 1979, p. 664.

¹² Commentary on the Additional Protocols, *ibid.*, p. 618 (§ 1942).

First, it has been submitted that the express recognition of the right of combatants to directly participate in hostilities links this notion to military operations directly causing injury or damage to an enemy which, under IHL, only combatants are allowed to commit with criminal immunity.¹³

Secondly, the title of Part IV section 1 of AP I (General protection against the effect of hostilities) implicitly conveys a narrow sense of the notion of hostilities. The content of Articles 48 through 67 (in particular Articles 48 and 51) shows that hostilities from whose effect civilians are to be protected are military operations aimed against specific objectives.

Thirdly, the negotiating history of Article 51 § 3 AP I seems to confirm a narrow interpretation: during the second session of the Diplomatic Conference in 1975 several delegations expressed an understanding that hostilities included “*preparations for and return from combat*”. This statement for the record would have been meaningless unless ‘hostilities’ was meant to be narrowly interpreted.¹⁴

Finally, it should be remembered that, according to Article 5 of the Fourth Geneva Convention (GC IV), civilians might lose certain privileges when they are - within the national territory of the enemy or in territory occupied by it - definitely suspected of or engaged in activities hostile to the security of the state. While direct participation in hostilities would clearly be seen as a hostile activity prejudicial to the security of the state, the reverse is not necessarily true: an act may be viewed as prejudicial to state security, but not necessarily mean that a person is directly participating in hostilities.

However, even if these elements support the view that the notion 'hostilities' should be restrictively interpreted, they still do not determine its exact content. This is evidenced by the wording of the Commentary on the Additional Protocols which states “(...) *it seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon but also, for example, the time that he is carrying it as well as situations in which he undertakes hostiles acts without using a weapon*”.¹⁵

What is the definition of 'hostilities'? Is this notion narrower than the notion of 'armed conflict'? What is the difference between the notions of direct participation in hostilities and activities prejudicial to the security of the state?

B) Direct versus indirect participation in hostilities in law and practice

The term ‘direct’ participation in hostilities necessarily implies that such participation may be distinguished from ‘indirect’ participation. After a few remarks on the legal underpinnings of this dichotomy (1), this paper will attempt, through concrete examples of state practice, to illustrate the differences between ‘direct’ and ‘indirect’ participation in hostilities (2).

¹³ GEHRING, R. W., “*Loss of civilian protections under the fourth Geneva Convention and Protocol I*”, R.D.P.M.D.G., 1980, Vol. XIX (1-2), pp. 18-19.

¹⁴ Diplomatic Conference, Report to the Third Commission on the Work of the Working Group 4, Conference Document CDDH/III/224, 1975. GEHRING, R. W., “*Loss of civilian protections under the fourth Geneva Convention and Protocol I*”, *ibid.*, pp. 18-19.

¹⁵ Commentary on the Additional Protocols, *ibid.*, pp. 618-619 (§ 1943).

1) *The legal criteria for determining 'direct' participation in hostilities*

By way of reminder, the Commentary on the Additional Protocols I states that “*to restrict this concept [direct participation in hostilities] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participate in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatant (...)*”.¹⁶ According to the drafters of the Commentary, the notion of ‘direct participation’ in hostilities’ should not be interpreted too broad, as such an approach would leave civilians without protection and thereby render the principle of distinction virtually meaningless.¹⁷ On the other hand, the interpretation should also not be too narrow, as it needs to take into account the legitimate need of the armed forces to effectively respond to the means and methods of warfare that might be used by civilians. A definition incompatible with this military requirement would undermine the credibility of IHL and would, consequently, lead to a decline in respect for its rules by armed forces.

In an attempt to balance these legitimate and contradictory interests, the Commentary on AP I states that: “*Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place*”. Along the same lines, the Commentary on AP II reads: “*the notion of direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences*”.¹⁸ Disregarding the slight differences in language,¹⁹ the common denominator in these statements is that the behavior of a civilian must constitute a direct and immediate military threat to the adversary.²⁰ Therefore, civilians working in military objectives (e.g. munitions factories) would not be considered as participating directly in hostilities since such activity would not represent an act of violence

¹⁶ Commentary on the Additional Protocols, *ibid.*, p. 516 (§ 1679).

¹⁷ E. DAVID notes that the notion of direct participation in hostilities “*ne comprend évidemment pas la simple contribution à l'effort de guerre, sans quoi cela reviendrait à dénaturer complètement la règle de l'immunisation des civils: toute la population d'une partie belligérante participe en effet, de près ou de loin, à cet effort*”; DAVID, E., *Principes de droit des conflits armés*, 3^{ème} éd. Bruylant, Bruxelles, 2002, p. 249 (§ 2.17). “*Taking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort and it would not include taking part in arms production or military engineering works or military transport*”; ROGERS, A.P.V., *Law on the battlefield*, Manchester University Press, Melland Schill Studies in International Law, p. 7. GUILLORY, Michael E., “*Civilianizing the Force: Is the United States Crossing the Rubicon?*”, *Air Force Law Review*, p. 117.

¹⁸ Commentary on the Additional Protocols, *ibid.*, p. 516 (§ 1679) and p. 1453 (§ 4787). In 1999, the Inter-American Commission on Human Rights stated that it believed it necessary to clarify the distinction between ‘direct’ or ‘active’ and ‘indirect’ participation by civilians in hostilities in order to identify those limited situations in which it was not unlawful to attack civilians and developed this exact reasoning in: Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, §§ 53 and 56.

¹⁹ No explanation is provided on the eventual difference between a ‘direct’ and a ‘sufficient’ causal relationship.

²⁰ In the specific context of the ‘privatization’ of armed forces, an author has suggested that “*no civilian can ever lawfully directly participate in hostilities. Whether they are accompanying the forces, manufacturing munitions in a factory, or farming land in Iowa, civilians are noncombatants. No matter the level of danger they face because of their location, participation in combatant activities is forbidden. To be effective, a better description must take into account traditional civilian support roles while simultaneously encompassing the modern spectrum of civilian activities, wherever such activities occur. With this in mind, the following is proffered: civilians may support and participate in military activities as long as they are not integrated into combat operations. In this context, integration is becoming an uninterrupted, indispensable part of an activity such that the activity cannot function without that person's presence and combat operations are any military activities that are intended to disrupt enemy operations or destroy enemy forces or installations*”; GUILLORY, M. E., “*Civilianizing the Force: Is the United States Crossing the Rubicon?*”, *ibid.*, p. 117.

resulting *per se* in a direct danger for the adversary or for the civilian population. However, this group of civilians would have to assume the risks arising from an attack on that objective - their injuries and death would be incidental to an attack upon a legitimate target and therefore subject to the rule of proportionality.

A project paper prepared by the Australian Defense Force Headquarters adopts a broader view of what constitutes 'hostilities'. It suggests that not only “*activities directly involved in the delivery of violence*”, but also acts aimed at “*protecting personnel, infrastructure and materiel*”²¹ should be included in the notion of ‘direct participation’. In a similar vein, the U.S. Air Force Commander’s Handbook states that “*rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the U.S. Civil Air Patrol, who engage in military search and rescue activity in wartime*”.²²

The above-quoted elements are not the only ones that have been suggested as a means of making the distinction between 'direct' and 'indirect' participation in hostilities. In 1989, a U.S. memorandum of law concerning the prohibition of assassination stated that:

*“The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of segments of the civilian population with each nation’s conduct of military operations and vital support activities (...) Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military”.*²³

The dividing line between 'direct' or 'indirect' participation would therefore rest on the appreciation of the added value brought to the war effort by a civilian post as compared to a purely military activity. The Memorandum gives the example of civilian scientists occupying key positions in a weapons program that is regarded vital to a nation’s national security or war aims.²⁴ Such a criterion is clearly broader than the one proposed by the Commentary since civilians working in the military industry could be considered to be directly participating in hostilities and therefore be legitimate targets of attack.

Finally, it should be mentioned that the need to identify precise criteria for distinguishing between 'direct' and 'indirect' participation in hostilities has been contested: in

²¹ Directorate of Industry Engagement National Support Division, Australian Defence Force Headquarters, The Deployment of Civilian Contractors in Support of Australian Defence Force Operations, Deployment of Civilian Contractors Project Paper, 1999, par. 7.21. This criteria is restricted by a subsequent suggestion that civilians should not be involved in frontline units responsible for the delivery of violence (*idem.* at 7.35). The paper does not, however, provide an exact definition of the notion of involvement.

²² U.S., *Air Force Commander’s Handbook* (1980), § 2-8. The Handbook notes, however, that care of the wounded on land, and the rescue of persons downed at sea or shipwrecked, are protected activities under international law.

²³ U.S., Executive Order 12333 and Assassination, Memorandum prepared the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, *ibid.*, pp. 3415–3416.

²⁴ The Memorandum follows by noting that more than 90% of the World War II Project Manhattan personnel were civilians; their participation in the U.S. atomic weapons program was of such importance that they could have been considered to be liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on German rocket sites at Peenemunde in which scientists involved in research and development at that facility were killed were undertaken on the understanding that neutralizing the scientists was just as important as the destruction of actual missiles.

its judgment in the *Tadic* Case, the ICTY stated that Common Article 3 is violated when an act is, among other things, committed against a person taking no active part in hostilities. The Tribunal added:

“It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time”.²⁵

What should be the legal criteria for defining direct participation in hostilities? Would a direct or sufficient causal relationship between the act of participation and its immediate harmful consequences to the enemy be appropriate to cover all situations? Should actions aimed at the protection of personnel and materiel be included in the notion of direct participation? Should the value of the activity to the military war effort be also taken into consideration?

2) Direct or indirect participation in hostilities through concrete examples

It has already been noted that ‘direct participation in hostilities’ is not necessarily limited to a situation in which a civilian actually makes use of a weapon or otherwise participates in an attack, but could also include the time during which he or she is preparing for or returning from such attack, or undertaking other hostile acts without actually using arms. These situations will be reviewed in the section that follows.

a) Attacks

The notion of ‘attack’ as defined in article 49 AP I, encompasses “*acts of violence against the adversary, whether in offence or in defence*”. According to the Commentary on the Additional Protocols I, ‘attack’ means “*combat action*” and “*refers simply to the use of armed force to carry out a military operation*”.²⁶ These definitions seem to point to direct acts of physical fighting. However, it may be concluded that the effect of such direct acts - their violent consequences - does not necessarily have to be immediate but can also be delayed. This is implied in the Commentary to AP I: “*(...) the question arose whether the placing of mines constituted an attack. The general feeling was that there is an attack whenever a person is directly endangered by a mine laid*”.²⁷ Therefore, the term attack can be construed as covering any act of violence carried out in relation to the conflict aimed at causing harm to the life, limb or property of the adversary or the civilian population, either immediately or with delayed effect.

Little doubt exists that a civilian carrying out such an act, whether in open combat, through the placing explosive devices, by means of sabotage, or by co-ordinating active combat, would expose him or herself to a military counter attack. Military manuals tend to confirm that civilians carrying out such acts involving the use of weapons or other means to commit acts of violence against enemy personnel or materiel would be directly participating in hostilities. Some military manuals even provide illustrations of the kind of behavior that

²⁵ However, this statement was limited to the specific context of the case under review and should not be read outside its context.

²⁶ Commentary on the Additional Protocols, *ibid.*, p. 603 (§§ 1880 and 1882).

²⁷ Commentary on the Additional Protocols, *ibid.*, p. 603 (par. 1881).

would fall into this category. According to the Military Manual of the Netherlands, taking a direct part in hostilities means that “*the person involved engages in hostilities aimed at hitting enemy personnel or materiel. Examples include firing at enemy troops, throwing molotov cocktails or blowing up a bridge used for the transport of military materiel*”.²⁸ Sweden’s IHL Manual states that “*protection for civilians does not apply under all circumstances - exceptions are made for the time when civilians take direct part in hostilities, which is equivalent to their taking part in armed fighting*”.²⁹ For its part, Australia’s Defence Force Manual notes that “*Civilians bearing arms and taking part in military operations are clearly taking part in hostilities*”.³⁰ The U.S. Air Force Commander’s Handbook states that “*anyone who personally tries to kill, injure or capture enemy persons or objects*” is liable to attack.³¹ Ecuador’s Naval Manual follows almost the same language stating that: “*Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property lose their immunity and may be attacked*”.³²

Apart from actual use of weapon, what other activity constitutes participation by civilians in a military attack? Does a military attack necessarily involve an act of physical violence? Do the effects of the military attack have to be immediate or can they be delayed?

b) Preparation for and return from attack

The Commentary to AP I acknowledges that ‘direct participation in hostilities’ is not restricted to an attack, but also extends to the time that a civilian is preparing for an attack or returning from it: “*During the course of the discussions several delegations indicated that the expression ‘hostilities’ used in this article [51 § 3] included preparation for combat and the return from combat. Similar problems arose in Article 44 (Combatants and Prisoners of War) with regard to the expression ‘military deployment preceding the launching of an attack’*”.³³ The question is, of course, how to delimit acts that qualify as ‘preparation for combat’ and ‘return from combat’ that are included in the notion of ‘direct participation in hostilities’.

While preparatory operations are not regarded as ‘attacks’, nevertheless they may be so closely linked to the intended attack that their military prevention is a priority for the adversary. As illustrated by the statement already quoted, the Commentary to Article 51 AP I does not provide a precise definition of preparatory operations but simply refers to Article 44 § 3 AP I. Although this provision pertains to a different matter, reference to it may be of interest for this analysis. Article 44 § 3 AP I provides that combatants must distinguish themselves from the civilian population at least while “*they are engaged in an attack or in a military operation preparatory to an attack*”. In situations where such distinction is not possible, combatants nevertheless have an absolute obligation to distinguish themselves by carrying arms openly “*during each military engagement*” and “*during such time as he [a*

²⁸ Netherlands, *Military Manual* (1993), p. V-5.

²⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43.

³⁰ Australia, *Defence Force Manual* (1994), § 532.

³¹ U.S., *Air Force Commander’s Handbook* (1980), § 2-8. See also the U.S. Air Force Pamphlet stating that “*taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material*”; U.S., *Air Force Pamphlet* (1976), § 5-3(a). According to the U.S. *Naval Handbook* (1995), § 11.3. “*Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked*”.

³² Ecuador, *Naval Manual* (1989), § 11.3.

³³ Commentary on the Additional Protocols, *ibid.*, pp. 618-619 (par. 1943).

*combatant] is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate”.*³⁴

These provisions clearly limit the scope of the terms 'preparatory to an attack' or 'deployment preceding the launching of an attack' by explicitly mentioning their 'military' nature. In this context some authors, while recognizing that “*a combatant commits no offence (...) if he does not distinguish himself when engaged in such military operations as recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda*”, nevertheless hold that the term military operations 'preparatory' to an attack should be construed broadly enough to include “*direct logistical support for units engaged directly in battle such as the delivery of ammunition to a firing position*”.³⁵

As regards return from combat, Article 44 § 3 AP I, interestingly enough, does not mention the period after an attack. Although this fact indicates that the importance of distinction might be differently evaluated in periods before, during and after an attack,³⁶ it should not result in hasty conclusions. According to the Commentary to AP I it seems that civilians returning from combat operations are still considered to be directly participating in hostilities, although no indications are available as to when such participation (i.e. return) ends.

Should preparation for attack be considered as falling within 'direct participation in hostilities'? Should return from attack be considered as falling within 'direct participation in hostilities'? What activities constitute preparation for and return from attack? When does preparation begin and when is return completed? What legal criteria could be used to define preparation for and return from attack if these notions are included in 'direct participation in hostilities'?

c) Hostile acts without the use of arm

As already mentioned, certain hostile acts that do not involve the use of a weapon may be qualified as direct participation in hostilities if they represent an 'attack' (certain acts of sabotage, giving orders to attack...). Other hostile acts that do not involve the use of weapons would not qualify as direct participation in hostilities unless they constitute military operations preparatory to an attack. Outside of an attack or preparation for an attack hostile acts without the use of a weapon should probably be considered indirect participation in hostilities.

Ø Civilians bearing arms

³⁴ Article 44 § 3 AP I has give rise to strong objection and is not believed to represent customary international law. However, the controversy is mainly linked to the fact that it grants legitimate combatant status to irregular fighters who follow at least these minimum standards of distinction.

³⁵ BOTHE, M. PARTSCH, K.J., and SOLF, A., New Rules for Victims of Armed Conflict, Martinus Nijhoff Publishers, The Hague, 1982, p. 252.

³⁶ If distinction is considered absolutely necessary for the period during which a person's immediate potential to cause harm and damage to the adversary can still be prevented or limited, once an attack ends and no further immediate harm is to be expected, the importance of distinction is apparently not considered absolutely imperative anymore or can at least be balanced against other factors.

The Commentary on AP I - in a passage already quoted - acknowledges that the notion of hostilities covers the time a civilian is carrying a weapon as well as situations in which he or she undertakes hostile acts without using a weapon. This interpretation was, however, made in the specific context of preparation for and return from attack, thereby implying a clear intent to use the weapon for offensive or defensive purposes. Common sense demands that civilians carrying a weapon during an attack and otherwise clearly indicating their readiness to use it cannot claim to be immune from attack. In certain situations, however, the simple fact of carrying a weapon does not necessarily imply a willingness to attack armed forces or to otherwise participate in hostilities. Carrying a weapon in self-defense is an example. The context in which a person bears arms should therefore be taken into account in determining whether he or she may be directly participating in hostilities.

The question of context is of even greater relevance given that several military manuals use ambiguous language: their wording implies that the simple fact of bearing arms can be considered to constitute direct participation in hostilities regardless of any clear intent of the bearer to use the weapon. For example, Belgium's Teaching Manual for Soldiers considers that "*a civilian who takes up arms logically loses the protection granted to civilians and may be attacked*".³⁷ El Salvador's Soldiers' Manual states that combatants must "*never attack (...) women, children, the elderly or any person who does not bear arms*".³⁸ And according to the US Field Manual "*persons who are not members of the armed forces (...) who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population*".³⁹

Ø Intelligence and guarding activities

Some military manuals include intelligence and guarding activities in direct participation in hostilities. For example, the US *Air Force Commander's Handbook* provides that "*anyone acting as a guard for military activity (...)*" is directly participating in hostilities and states that: "*Civilians who collect intelligence information, or otherwise act as part of the enemy's military intelligence network, are lawful objects of attack. Members of a civilian ground observer corps who report the approach of hostile aircraft would also be taking a direct part in hostilities*". Using almost the same wording, the U.S. Naval Handbook classifies as direct participation in hostilities "*collecting intelligence information or working for the enemy's military intelligence network*".⁴⁰ Ecuador's Naval Manual mentions in this category "*civilians serving as guards, intelligence agents or lookouts on behalf of military forces*".

Along the same lines, during the March-April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, a proposal was developed which aimed to prohibit "*recruiting children under the age of fifteen years into armed forces or using them to participate in hostilities*". The words 'using' and 'participate' were explained in a footnote to provide guidance in interpreting of the scope of this provision. This footnote reads: "*The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities*

³⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 14.

³⁸ El Salvador, *Soldiers' Manual* (undated), p. 3.

³⁹ U.S., *Field Manual* (1956), § 60.

⁴⁰ U.S., *Naval Handbook* (1995), § 11.3.

linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints".⁴¹

However, some state practice demonstrates a reluctance to assimilate intelligence or guarding activities with direct participation in hostilities. The Commentary to Article 77 AP I concerning children provides that direct participation does not include acts such as "*gathering and transmission of military information*".⁴² In its 1993 report, the U.N. Truth Commission for El Salvador considered the legality of an attack by members of the *Partido Revolucionario de Trabajadores centroamericanos* (one of the F.M.L.N. components) on a group of U.S. marines then serving as security guards at the U.S. Embassy in San Salvador. The attack took place as the victims, who were off duty, in civilian clothing and unarmed, were sitting at a table outside a restaurant. Following the attack, a communiqué issued by the F.M.L.N. General Command asserted that the four marines were legitimate military targets. The Commission noted, however, that it had full evidence that the U.S. marines were not combatants. It emphasised that:

"Their function was to guard the United States Embassy and there is no indication whatsoever that they took part in combat action in El Salvador. Furthermore, international humanitarian law defines the category of "combatant" restrictively. The allegation that they were performing "intelligence functions" has not been substantiated. In any event, carrying out intelligence functions does not, in itself, automatically place an individual in the category of combatant".⁴³

The report of the U.N. Commission is, however, of little help in identifying the circumstances in which intelligence activities would fall under direct participation in hostilities.

Ø Logistical and/or political support

According to the Commentary on AP I acts such as "*transportation of arms and munitions, provision of supplies*" should only be considered indirect participation in hostilities.⁴⁴

Although no express reference is made to political activities, an *a fortiori* reasoning would also allow the conclusion that political support for a party to the conflict should not be considered to constitute direct participation in hostilities. Along the same lines, sympathizing, accompanying or simply living in zones under the control of a belligerent would not qualify as direct participation. A wide range of practice derived from Latin America seems to confirm this approach.

In 1999, in a report on the situation in Colombia, the Inter-American Commission on Human Rights upheld the view that:

"Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be

⁴¹ LEE, R. S. (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

⁴² Commentary on the Additional Protocols, *ibid.*, p. 901 (par. 3187).

⁴³ U.N. Commission on the Truth for El Salvador, Report, U.N. Doc. S/25500, 1 April 1993, p. 155.

⁴⁴ Commentary on the Additional Protocols, *ibid.*, p. 901 (§ 3187). This statement is made - it is true - in the specific context of children directly participating in hostilities.

*considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party”.*⁴⁵

During the conflict in El Salvador the armed forces on numerous occasions reportedly attacked what the guerrillas called ‘the masses’, i.e. members of the civilian population who did not use arms or resort to violence but who were believed to sympathize with or collaborate with the F.M.L.N. and who lived in zones of guerrilla resistance or in conflict zones. In 1985, in a report on the situation of human rights in El Salvador, the Special Representative of the U.N. Commission on Human Rights stated that:

*“The Special Representative is actually convinced that as a result of or during fighting, the Salvadorian army produces civilian, and thus unwarranted casualties, particularly among the so-called masas, or groups of peasants who, while not personally involved in the fighting, coexist with the guerrillas and supply them with means of subsistence. In any event, inasmuch as the so-called masas take no part in combat, they must be considered civilians. The reference in article 50 of the 1977 Additional Protocol to the Third Geneva Convention [sic] of 12 August 1949, means that any persons who follow armed forces without forming an integral part of them, such as suppliers and members of work units or service units responsible for troop welfare, must be considered civilians. In the view of the Special Representative, if the masas who accompany the guerrilla troops meet the conditions established in those international instruments, they cannot be considered combatants; they are civilians”.*⁴⁶

In a resolution adopted in 1985, the U.N. Sub-Commission on Human Rights reiterated the point made by the Special Representative of the Commission on Human Rights in El Salvador:

*“According to the Geneva Conventions as long as the so-called “masses” do not participate directly in combat, although they may sympathize, accompany, supply food and live in zones under the control of the insurgents, they preserve their civilian character, and therefore they must not be subjected to military attacks and forced displacement by Government forces”.*⁴⁷

The report of the U.N. Truth Commission for El Salvador in 1993 described the government’s counter-insurgency policies as part of a pattern of violence employed by agents of the State and their collaborators. According to the report, inhabitants of areas where the guerrillas were active were automatically suspected of belonging to the guerrilla movement or collaborating with it and thus risked being executed.

The report also depicted the pattern of violence employed by the F.M.L.N., which considered it legitimate to physically eliminate people - such as traitors or informers, and even political opponents - who were labeled military targets. Examples of such practices included the murder of mayors, right-wing intellectuals, public officials and judges. The report added

⁴⁵ Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, §§ 53 and 56.

⁴⁶ U.N. Commission on Human Rights, Special Representative on the Situation of Human Rights in El Salvador, Final report, UN Doc. E/CN.4/1985/18, 1 February 1985, § 140.

⁴⁷ U.N. Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 3. Note that this statement was repeated in subsequent years; see UN Sub-Commission on Human Rights, Res. 1987/18, 2 September 1987, § 3; Res. 1988/13, 1 September 1988, § 3; Res. 1989/9, 31 August 1989, § 3.

that instructions given by the F.M.L.N. General Command concerning the execution of mayors were broadly interpreted and extensively applied, in particular between 1985 and 1989, when the *Ejército Revolucionario del pueblo* repeatedly carried out extra-judicial executions of political leaders, which the report called ‘non-combatant civilians’.

The Commission expressly rejected the arguments of the F.M.L.N., which tried to justify the executions on the grounds that the mayors and their officers were actively engaged in counter-insurgency activities, such as creating paramilitary forces, leading direct repressive activities against the civilian population or developing spy networks to detect F.M.L.N. members and their supporters. The Commission noted that by calling the mayors ‘military targets’, the F.M.L.N. was trying to say that they were combatants. It held that whether the mayors might or might not be considered ‘military targets’ was irrelevant since “*there is no evidence that any of them lost their lives as a result of any combat operation by the FMLN*”. The Commission emphasized that there was “*no concept under international humanitarian law whereby such people could have been considered military targets*”.⁴⁸ The Commission added that “*the execution of an individual, whether a combatant or a non-combatant, who is in the power of a guerrilla force and does not put up any resistance is not a combat operation*”.⁴⁹ The Commission considered the execution of mayors to be a violation of the rules of IHL and international human rights law.⁵⁰

In a 1985 report on violations of the laws of war during the non-international armed conflict in Nicaragua, Americas Watch described civilians as:

“Persons providing only indirect support to the Nicaraguan army by, inter alia, working in defense plants, distributing or storing military supplies in rear areas, supplying labor and food, or serving as messengers or disseminating propaganda. These persons may not be subject to direct individualized attack or execution since they pose no immediate threat to the adversary. However, they assume the risk of incidental death or injury arising from attacks against legitimate military targets”.⁵¹

The inclusion of a ‘rear area’ geographic limitation in connection with the distribution or storage of military supplies calls into question whether all logistical activity should be considered ‘indirect participation’. It should be noted that the statement, already referred to in the context of intelligence and guarding activities, by the Preparatory Committee for the Establishment of an International Criminal Court specified that the notion of direct participation in hostilities “*would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology*”.⁵² According to this statement, logistical activities would not, by their very nature, be excluded from constituting direct participation in hostilities. The criteria

⁴⁸ U.N. Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 44–45.

⁴⁹ U.N. Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 151.

⁵⁰ U.N. Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 149 and 153.

⁵¹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 31–32. Americas Watch reiterated this view in 1986 in its report on the use of landmines in the conflicts in El Salvador and Nicaragua (*Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 97–98). See also a similar statement issued by Africa Watch in 1989, in a report on violations of the laws of war in Angola; Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 138–139.

⁵² LEE, R. S. (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

would once again depend on the context, in particular on whether such acts are being conducted on the front line or behind it.⁵³

Can the mere bearing of arms by a civilian in hostilities be considered direct participation? How can direct participation in hostilities be distinguished from purely criminal acts? Do acts not involving the use of weapons - such as intelligence gathering and guarding activities, logistical and political support - constitute direct participation? If so, would such acts always constitute direct participation or only under special circumstances? Would it be feasible to draw up a comprehensive list of such acts?

II. Direct participation in hostilities in contemporary conflicts: specific challenges

Contemporary conflicts have given rise to further complications in terms of defining the notion of 'direct participation in hostilities'. While an exhaustive review of the issue would go beyond the scope of this paper, a few examples, including the increased use of high-tech warfare (A), the privatization of the armed forces (B), the resurgence of 'civilian self-defense committees' (C), and the 'war on terrorism' (D), will serve to illustrate some of the major challenges posed. Each of these situations involves an increased intermingling of civilian and military activities making it difficult to determine who is taking a 'direct part in hostilities' and what measures should be taken to protect those who do not directly participate.

A) Direct participation in hostilities in the context of Computer Network Attacks and Exploitation

Tentatively defined as "*operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves*",⁵⁴ Computer Network Attacks (CNAs) are conducted long-distance through radio waves or international communication networks. While they may not involve direct physical damage, the resulting system malfunctions can be as devastating.⁵⁵ Computer Network Exploitation (CNE), namely "*the ability to gain access to information hosted on information systems and the ability to make use of the system itself*", though not of a direct destructive nature, could have equally significant military implications; an example would be a belligerent's ability to secure full information on an adversary's location. The issue, therefore, to be determined is

⁵³ A.P.V. ROGERS (Law on the Battlefield, *ibid.*, p. 8) also mentions that a civilian driving an ammunition truck in a combat zone could legitimately be considered as taking a direct part in hostilities. Another author has, however, contested this geographic limitation: "*Commentators who argue that otherwise noncombatant conduct, such as providing military transport or logistical support, becomes combatant activities if performed at the frontlines are mistaken in two areas. First, they are using the increased danger inherent with accompanying forces to graft a geographic element onto the law where none exists. The logical extension of their arguments would make merchant seamen and civilian aircrews like the United States Civil Reserve Air Fleet combatants, when under international law they are not. Secondly, they fail to take into account the changing nature of technology and weapons delivery. A civilian need no longer be near the front lines to take a direct part in delivering destructive munitions or information*"; GUILLORY, M. E., "Civilianizing the Force: Is the United States Crossing the Rubicon?", *ibid.*, pp. 133-134.

⁵⁴ Joint Chiefs of Staff, Joint Doctrine for Information Operations, Joint Publication 3-13, 9 October 1998, p. 88. According to the Draft British Military Doctrine, a CNA is the "*use of novel approaches to enter computer networks and attack the data, the processes or the hardware*"; see RATHMELL, A., "Controlling Computer Network Operations", in: Information & Security, Volume 7, 2001, pages 121-144 (http://www.isn.ethz.ch/onlinepubli/publihouse/infosecurity/volume_7/c1/C1_index.htm).

⁵⁵ A computer virus could cause, for example, the opening of the floodgates of a dam, the explosion of an oil refinery in a populated area or the release of radioactivity of a nuclear power plant.

whether civilians engaging in a CNA or a CNE during an armed conflict⁵⁶ are directly participating in hostilities.

The first question is the applicability of IHL to information operations. The argument has been made that IHL is only designed for methods and means that are kinetic in nature, due to which computer attacks implying little physical (or only virtual) force, would fall outside the scope of this body of law. In other words, an individual involved in a CNA or a CNE could not be considered to be directly participating in hostilities since - in the absence of the use of a traditional weapon - there are no conventional hostilities.⁵⁷

Other scholars, however, have rejected this view arguing that “*the crux of the matter is not the medium at hand (a computer server in lieu of, say, an artillery battery), but the violent consequences of the action taken. If there is a cause and effect chain between the CNA and these violent consequences, it is immaterial that they were produced by high rather than low technology*”.⁵⁸

According to this view, the key determinant becomes the level of harm caused by the CNA. A CNA would be covered by IHL if such an attack results or could possibly result in injury, death, damage or destruction, i.e. situations which reach a sufficient level of intensity to be qualified as an ‘attack’. In other words, a CNA would be subject to IHL if it were either part of a classic conflict or a cyber war in which injury, damage or destruction is intended or foreseeable. In all other circumstances, the individual would not be participating in hostilities because he or she would not be committing acts likely to cause harm to the personnel or equipment of enemy armed forces.⁵⁹

The application of this reasoning to a CNE is difficult, as these types of operations are generally not intended to produce direct or immediate destructive consequences. A CNE could, of course, penetrate the information infrastructure of the enemy - thereby permitting a future hostile or potentially damaging activity - and consequently be considered the first step of an armed attack. But the practical difficulty that then arises is the inability to distinguish between an act of espionage, pre-attack exploration or an actual attack in progress that has not yet manifested itself.⁶⁰

Assuming a CNA or CNE falls under IHL, the second question is the status of the individuals engaging in such attacks. CNAs or CNEs will generally be carried out by specialized personnel. If such persons are incorporated into the armed forces of a belligerent, their legal status, rights and liabilities would not be distinct from combatants engaged in a

⁵⁶ Although CNA can occur in peacetime as well as during internal tensions and disturbances, the scope of the present analysis will be restricted to the consequences of such attacks during an armed conflict.

⁵⁷ For a presentation of this argument - that he contests - and relevant references, see SCHMITT, M., “Wired warfare: Computer network attack and *jus in bello*”, *IRRC*, June 2002, Vol. 84 (846), p. 368 (and note 9).

⁵⁸ DINSTEIN, Y., “Computer Network Attacks and Self-Defense”, in: SCHMITT, M., O’DONNELL, B. (eds.), *Computer Network Attack and International Law*, International Law Studies, Vol. 76, Naval War College, Rhode Island, 2002, p. 103. SCHMITT, M., “Wired Warfare: Computer Network Attack and *Jus in Bello*”, *ibid.*, p. 373.

⁵⁹ SCHMITT, M., “Wired Warfare: Computer Network Attack and *Jus in Bello*”, *ibid.*, pp. 383-384. This author however underlines that “*the facilities and equipment used to conduct the operations might well be valid military objectives and as a result, be subject to attack; but the operator themselves would not be attacked*”

⁶⁰ WINGFIELD, T. C., *The Law of Information Conflict - National Security Law in Cyberspace*, Aegis Research Corporation, 2000, p. 354. This author stresses that “*although some indicia of intent can be monitored, the intentions of a state are very difficult to discern*”.

traditional armed conflict.⁶¹ If, on the contrary, the technicians conducting a CNA are not part of the armed forces, a strong argument could be made that such civilians are directly participating in hostilities without complying with the requirements of combatant status. Consequently, they could be directly attacked and any damage inflicted on them would be irrelevant in terms of a proportionality calculation.⁶² The case of CNEs, however, is less clear due to the lack of clarity as regards the treatment of ‘classical’ intelligence gathering. A further issue is whether collecting information by computer should or should not be treated differently from any other means of intelligence gathering.

Can a civilian contributing to a CNA or gathering information through a CNE be considered to be directly participating in hostilities even if there is no use of classical armed force? If so, what conditions would need to be fulfilled? How should acts linked to an armed conflict be distinguished from purely criminal acts?

B) Direct participation in hostilities in the context of the so-called ‘privatization’ of armed forces

In an effort to cut down expenses, several armed forces have - since the end of the cold war - increased the outsourcing of activities more or less directly linked with the conduct of hostilities.⁶³ These private ‘military service providers’, often labeled Private Military Companies (PMCs),⁶⁴ may replace or back up an army or an armed group to enhance their effectiveness. One can further distinguish ‘combat’ PMCs willing to carry or use weapons, from ‘non-combat’ PMCs which support military tasks through, for example, training or organization.

As regards combat PMCs, there is little doubt that the use of arms by their employees in the context of an armed conflict would be considered direct participation in hostilities. However, grey areas have emerged: an example would be when a contracted job is described as ‘police activities’ thereby blurring the nexus between the contracted tasks and the armed conflict. The implementation of an anti-drug plan by private companies in Colombia provides one of the best illustrations of the problem:

“As part of the anti-drug effort in Colombia, employees of DynCorp Technical Services (DynCorp) under contract with the Department of State are maintaining and piloting Blackhawk attack helicopters and manning search and rescue (SAR) teams. While such

⁶¹ The proposal to grant these individuals a status equivalent to persons who accompany the armed forces without being members thereof would probably be rejected on the basis that the type of person listed in Article 4 § 4 G.C. III are more analogous to computer technicians that keep the machine in order and not those that actually undertake the attack. Such military personnel would, therefore, certainly be assimilated to combatants and, as any combatant, could certainly be attacked and should be granted POW status upon capture; DOSWALD-BECK, L., “Some Thoughts on Computer Network Attack and the International Law of Armed Conflict”, in: SCHMITT, M., O’DONNELL, B. (eds.), Computer Network Attack and International Law, *ibid.*, 2002, p. 172.

⁶² DOSWALD-BECK, L., “Some Thoughts on Computer Network Attack and the International Law of Armed Conflict”, *ibid.*, p. 172.

⁶³ BOUVET, B., DENAUD, P., Les guerres qui menacent le monde, éd. du Félin, 2001, Paris, (entretien avec J. MARGUIN), p. 108.

⁶⁴ The literature traditionally draws a distinction between so-called ‘Private Military Companies’ and ‘Private Security Companies’ whose tasks are limited to ensuring the protection of various sites and which normally provide services of a civilian nature without increasing the effectiveness of an army or armed group (let alone replacing them). However, the relevance of such distinction in terms of IHL is debatable.

*activities are described as providing support for local police in coca eradication programs, these missions are often conducted against assets under the protection of the Marxist guerrillas of the Revolutionary Armed Forces of Colombia (FARC). This was evident in February of 2001 when one of the DynCorp SAR aircrews became involved in a firefight with FARC guerrillas while trying to rescue the Colombian police crew of a helicopter the guerrillas had downed”.*⁶⁵

Even if a private contractor conducting anti-drug or other anti-criminal activities could be considered to be directly participating in hostilities, the level of involvement required for such qualification remains uncertain. The use of armed force in the context of an armed conflict would certainly be sufficient; but would such an agency still be considered to be directly participating in hostilities if its involvement was limited to providing training or information to law-enforcement agency?

Non-combat PMCs generally perform traditional civilian support roles to the military armed forces, including building infrastructure (roads, airfields), providing transportation, billeting and food services and assuring prison facilities. It has been argued that although their placement may put them in danger, their activities should normally not be treated as a direct participation in hostilities under the law of armed conflict.⁶⁶ However, caution is required in the matter. The U.S. Department of the Air Force Pamphlet entitled *Federal Civilian Deployment Guide* notes, for example, that “*Civilians accompanying the armed forces and performing duties directly supporting military operations may be subject to direct, intentional attack*”.⁶⁷ Although the document does not elaborate on what is included under ‘duties directly supporting military operations’, it could be assumed that - depending on various factors - some of the above listed activities (for example transportation or supply of munitions in or near the front line) would be classified as a direct participation in hostilities.

One of the main problems posed with regards to non-combat PMCs concerns the military dependence on sophisticated equipment that has *de facto* made the armed forces reliant on civilian specialists. This phenomenon has led to the identification of a separate category of private companies - called Systems Contractors – which include those who “*support specific systems throughout their system’s lifecycle (including spare parts and maintenance) across the range of military operations. These systems include, but are not limited to, vehicles, weapons systems, aircraft, command and control infrastructure and communications equipment*”.⁶⁸ Even though they do not necessarily accompany the armed forces, civilian companies engaged in military information operations would probably fall into this category.

Far from ignoring this problem, the Commentary on the AP I states that “*The increasingly perfected character of modern weapons, which have spread throughout the*

⁶⁵ GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, p. 127.

⁶⁶ GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, p. 124.

⁶⁷ U.S. Department of the Air Force, PAM 10-231, *Federal Civilian Deployment Guide*, 1 April 1999, § 3.7 quoted *in*: GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, p. 115.

⁶⁸ In a joint publication (4-0) entitled *Doctrine for Logistic Support of Joint Operations*, the U.S. Joint Chiefs of Staff, identified three different types of contractors. In addition to the system contractor, it mentions the External Support Contractors, who “*work under contracts awarded by contracting officers serving under the command and procurement authority of supporting headquarters outside the theater*” as well as the Theater Support Contractors usually providing from the local vendor base goods, services, and minor construction to meet the immediate needs of operational commanders. GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, pp. 123-124.

world at an ever-increasing rate, requires the presence of such specialists (foreign adviser and military technicians), either for the selection of military personnel, their training or the correct maintenance of the weapons”. The Commentary qualifies such experts as “neither combatants nor mercenaries, but civilians who do not participate in combat” unless they take a direct part in hostilities.⁶⁹ In accordance with the Commentary, it is therefore safe to say that the civilian status of private companies is not in question if they only provide training or assure the maintenance of the systems in a non-combat context. However, it leaves unanswered the eventual classification of other activities during combat and the degree of involvement necessary to be considered as participating in hostilities. As regards the latter question, the *Civilian Employee Deployment Guide* of the U.S. Department of the Army adopts quite an extensive test:

“Civilians who take part in hostilities may be regarded as combatants and are subject to attack and/or injury incidental to an attack on military objectives. Taking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants”.

Assuming that by their very nature these systems are intended to harm the enemy either by destruction or through the acquisition of sensitive information, a part of the doctrine considers it self-evident that serving alongside combatants in “correcting any deficiencies that may arise, and thereby enabling the system to function as intended, can be construed as ‘likely to cause actual harm to the personnel and equipment of the enemy’”.⁷⁰

Under what conditions could a PMC be considered to be directly participating in hostilities? Could a party to an armed conflict lawfully launch a direct attack against a PMC with the employee contractors as the principle target? What would be the rules applicable in case of capture of an employee of one of these PMCs?

C) The so-called ‘Civilian Self-Defense Committee’

A regular feature of the Middle Ages, militias were generally defined as local armed groups who reinforced the state’s national forces. Throughout the 18th and 19th centuries such militias were progressively dismantled with the centralization of the use of force. Although they never totally disappeared, armed civilian groups are today enjoying a resurgence as a result of the inability of certain states to control the subversive activities of rebel groups operating within their territory. The creation of so-called ‘Civilian Self-Defense Committees’ has been publicized in the internal conflicts in Algeria and in Columbia, but other examples can be cited as well.⁷¹ In each of these cases, the state has given up one of its essential functions - securing the safety of its citizens - and has endeavored to protect the civilian population by encouraging it (or part of it) to participate in armed activities.

⁶⁹ Commentary on the Additional Protocols, *ibid.*, p. 579 (par. 1806).

⁷⁰ GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, p. 128. According to the author “to argue to the contrary would seem akin to suggesting that a shell loader is not a direct participant because someone else is firing the cannon”.

⁷¹ As we shall see, such Committees were also created in Peru allegedly to allow the civilian population to protect itself. Along the same lines, to counter the guerrilla warfare lead by Kurdish armed groups, the Turkish army created, in 1987, a system of ‘village protectors’ consisting *de facto* of self-defense militia.

The debate as to whether members of such Committees should be considered civilians or members of the armed forces depends on the legal and factual considerations inherent to each case and is beyond the scope of this paper.⁷² Of course, if the Committees are directly integrated into the military structure of a party to a conflict their members lose their civilian status. But, in many circumstances, the domestic legal texts regulating these armed groups deliberately avoid clarifying the status of their members.

The level of involvement of civilian armed groups in the internal armed conflicts varies. The duties of some of these Committees are officially limited to self-defense.⁷³ All domestic legal systems admit in some form that a proportionate use of force in response to an unlawful and imminent attack against a person or his or her property is a circumstance precluding wrongfulness. In the context of an armed conflict, however, the line between legitimate self-defense and direct participation in hostilities may be extremely difficult to draw. The ICTY addressed this issue in the context of a crime against humanity. The Tribunal referred to the Commission of Experts Established Pursuant to Security Council Resolution 780 which observed: *“It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms”*. The Commission then provided an example based on the situation in the former Yugoslavia and concluded that *“A head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm”*.⁷⁴

Qualifying the activities of Self-Defense Committees is even more problematic when their functions go beyond self-defense. In Colombia, for example, communal guard and private security services have been created under the name *‘convivir’*. These services take the form of rural security cooperatives composed of individuals whom the State has authorized to bear arms and who collaborate with the authorities by providing information to the public security forces on the activities of guerrilla organizations. In their regard, Colombia’s Defensoría del Pueblo (Ombudsman’s Office), asserted that:

“These organisations, nurtured by the national government itself, contribute nothing to the immunity of the civilian population, since they involve citizens in the armed conflict, divesting them of their protected status and making them into legitimate targets of attack (...) In the

⁷² In Peru, for example, the law does not specifically address the civilian or combatant status of members of self-defense committees. It mentions that the participation of draft-age persons in the committees is equivalent to the fulfilling of compulsory military service. In addition, Committee members have to be accredited by the competent military commanders and may be armed. Peruvian *Law on Self-Defence Committees* (1991), Article 1(7).

⁷³ For example, Peru’s Law on Self-Defense Committees specifies that in internal armed conflicts or in situations of internal violence, certain civilian groups, termed ‘self-defense committees’, are authorized to *“develop activities of self-defense of their communities”* and to offer temporary support to the armed forces and national police in ‘pacification’ tasks.

⁷⁴ ICTY, Judgement, *The Prosecutor v. Tadic*, IT-94-I-T, 7 May 1997, §§ 640-643. In the *Blaskic* case (ICTY, Judgement, *The Prosecutor v. Blaskic*, IT-95-14-T, 3 March 2000, §§ 402-410) the Trial Chamber held that the presence of a territorial defence force set up as a form of civil defense did not transform the village of Ahmici into a military objective. In a very different context Human Rights Watch asserted that *“When individual Israeli settlers take an active part in hostilities, as opposed to acting in legitimate self-defense, they lose their civilian protection and become legitimate military targets during the period of their participation”*; Human Rights Watch, *Erased in a moment: Suicide Bombing Attacks Against Israeli Civilians*, 2002, p. 55. See also

view of the Ombudsman's Office, the operation of the Convivir cooperatives means that civilians participate directly in the armed conflict, thereby becoming combatants".⁷⁵

Could a civilian use arms in legitimate self-defense without being considered to be directly participating in hostilities? Which acts committed by civilian armed groups linked with a party to a conflict (bearing arms, intelligence...) would qualify as direct participation in hostilities? Can the same rules be applied to official police or security forces or should a different standard be adopted?

D) The 'war on terrorism'

Following the attacks of 11 September 2001, the U.S. and its allies declared a global 'war on terror' involving, in some cases, the use of military force. An example is *Operation Enduring Freedom* in Afghanistan, an international armed conflict falling within the definition of article 2 common to the Geneva Conventions, the legal qualification of which was never contested. However, the global 'war on terror' is a much broader concept that includes counter-terrorist activities against non-state actors and goes beyond the scope of a 'traditional' armed conflict. It is conducted against groups that would not be entitled to combatant status and does not fulfill other criteria (territorial and temporal) for an armed conflict. This paper will not attempt to clarify the legal qualification of the 'war against terrorism'.⁷⁶ It will simply describe some of the challenges posed by this 'new' type of violence to the notion of direct participation in hostilities.

Until recently, international law treated counter-terrorist operations - at least outside of the actual battlefield - as law-enforcement issues.⁷⁷ States, therefore, had the duty to use all feasible measures to arrest and prosecute suspected terrorists rather than targeting them with lethal force. It has been argued, however, that the 'war on terror' could lead to a reinterpretation of the rules on targeting. It is clear that non-state actors directly participating in hostilities during an (international or non-international) armed conflict may, for such time as they participate, be lawfully killed or wounded. By analogy, terrorist organizations, though not operating in a traditional armed conflict context, have been assimilated to paramilitary groups whose members do not respect the laws and customs of warfare. In other words they have been viewed as 'unlawful combatants' directly participating in hostilities, consequently subject to direct attack and, if captured, not entitled to POW status. This assimilation raises the practical question of how to distinguish between direct participants in hostilities and civilians who are not participating. As one author put it: "*in a war against members of a terrorist organization who wear no uniform, are not obviously engaged in hostilities, and may be found anywhere in the world, the basic act of identifying the enemy is already controversial*".⁷⁸

⁷⁵ Colombia, Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, pp. 48–49.

⁷⁶ In particular, this paper will not deal with the many issues raised regarding *ius ad bellum*, e.g. what is the responsibility of the state in whose territory terrorist groups are based? Is it lawful to attack state sponsors of terrorism under the U.N. Charter? If so, are such states allowed to use their inherent right of self-defense?

⁷⁷ The law of war is certainly not the only body of law relevant to dealing with terrorist and counter-terrorist operations.

⁷⁸ DWORKIN, A., "The Yemen Strike: The War On Terrorism Goes Global", in: Crime of War Project (November 14 2002), <http://www.crimesofwar.org/onnews/news-yemen.html>

Furthermore, the lawfulness of ‘targeted killings’ has been called into question even when they are conducted in the context of a situation undoubtedly covered by the law of war. This practice is even more controversial when it takes place outside the scope of a traditional armed conflict. An example were the strong diplomatic reactions to the destruction of a car carrying six persons - supposedly including a senior terrorist suspect - by means of a missile fired from an unmanned drone in a remote part of Yemen on 2 November 2002. The operation raised the issue of the dividing line between lawful acts of war against civilians directly participating in hostilities and summary executions in violation of human rights law. In this context, it has been suggested that new rules of engagement be adopted for new forms of violence, taking into account intangible factors such as the degree of certainty with which suspects can be identified, their alleged seniority within the terrorist group, and the possibility of detaining them through law-enforcement means.⁷⁹

Lastly, it should be noted that counter-terrorist operations are not necessarily carried out by the armed forces of a state but can also be conducted by special forces or intelligence agencies. The status of these agents may be an issue given that, if they were not lawful combatants, they would have no right to participate in hostilities and their actions could be considered unlawful.

Can a state, or a coalition of states, be at “war” in the legal sense against transnational non-state actors? How can the line between law-enforcement and conduct of hostilities be drawn? Can members of criminal organizations be considered direct participants in hostilities and therefore legitimate targets outside of the context of a traditional armed conflict? What should be the applicable legal regime for civilians having committed acts of terrorism in cases of capture or detention? Would it be necessary - or feasible - to draft new rules of engagement adapted to the war against terrorism? What is the status of special forces conducting counter-terrorist operations within the ‘war on terrorism’?

III. The legal consequences of direct participation in hostilities

This last section will focus on the legal consequences of direct participation in hostilities. As discussed above, in international armed conflicts, combatants i.e. members of the armed forces have the right to directly participate in hostilities. Unless they violate IHL, their participation must have no penal consequence and in case of capture they benefit from POW status. The situation is more complex concerning civilians - colloquially called ‘unlawful combatants’ or ‘unprivileged belligerents’ - who take a direct part in hostilities and who consequently do not enjoy POW status if they fall into the hands of the enemy.⁸⁰ The result of direct participation in hostilities on their part, in both international and non-international armed conflict, is a loss of immunity from attack. Several issues arise in regards to the temporal limitation on such loss of immunity, which will be addressed in section (A). The legal regime applicable to civilians taking a direct part in hostilities in case of capture or detention also raises some tricky questions regarding, for example, the scope of application of GC IV and the acts for which the individual can be criminally tried - addressed in section (B).

⁷⁹ DWORKIN, A., “The Yemen Strike: The War On Terrorism Goes Global”, *ibid.*

⁸⁰ See DÖRMANN, K., “The Legal Situation of Unlawful/Unprivileged Combatant”, *IRRC*, 2003 (849), pp. 46-47.

A) The consequence of ‘direct participation in hostilities’ within the rules on conduct of hostilities

1) *Loss of immunity against attack*

As a trade-off for the protection they enjoy against the dangers arising from military operations, civilians should not directly participate in hostilities. According to Article 51 § 3 AP I, their direct participation in hostilities automatically entails loss of immunity from attack “for such time as they take a direct part in hostilities”.⁸¹

In principle, the trade-off is unproblematic. Numerous military manuals reiterate the general rule more or less according to the language of AP I⁸² and many examples of state practice can also be found. Thus, for example, in 1992, in its final report to Congress on the conduct of the Gulf War, the U.S. Department of Defense stated that “as a general principle, the law of war prohibits (...) the direct, intentional attack of civilians not taking part in hostilities”.⁸³ This point was also reinforced by the ICTY in the *Kupreskic* trial. In that case the defense had challenged the civilian character of the Muslim population of Ahmici by alleging that the village was being defended. The defense further contended that non-combatant status should be determined based on the facts and that it cannot be claimed by persons who had previously taken part in any way in hostilities, i.e. had previously taken up arms or who had spontaneously taken up arms to resist an attacker. According to defense

⁸¹ This provision was adopted by 77 votes in favour, one against and 16 abstentions. CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 16, § 117.

⁸² For instance, Australia’s Defence Force Manual (1994, § 532, see also §§ 527 and 918) states that “civilians are only protected as long as they refrain from taking a direct part in hostilities”; the Military Manual of Benin (1995, Fascicule III, p. 4) provides that “civilian persons may only be attacked when they participate directly in hostilities”; the LOAC Manual from Canada (1999, p. 3-4, § 28, see also p. 7-5, § 46) provides that “civilians who take a direct part in hostilities (other than a levée en masse) are unlawful combatants. They lose their protection as civilians and become legitimate targets for such time as they take a direct part in hostilities”; the Commanders’ Manual of Croatia (1992, § 10) states that “civilians may not be attacked, unless they participate directly in hostilities”; According to Ecuador’s Naval Manual (1989, § 11.3) “civilians who participate directly in hostilities ... lose their immunity and may be attacked”. France’s LOAC Summary Note (1992, § 1.3) provides that “civilians may not be attacked, unless they participate directly in hostilities” (see also *LOAC Teaching Note* (2000), p. 5); Italy’s LOAC Elementary Rules Manual (1991, § 10) stipulates “civilians may not participate directly in hostilities and may not be attacked, unless they take a direct part in hostilities”; Kenya’s LOAC Manual (undated, Précis No. 2, p. 10) states that civilians lose their protection from attack “when they take a direct part in hostilities”; along the same lines, Madagascar’s Military Manual (1994, Fiche 3-O, § 10) mentions that “civilian persons may not be attacked, unless they participate directly in hostilities”; The Military Manual of the Netherlands (1993, p. V-5) underscores that “civilians enjoy no protection [against attack] if they participate directly in hostilities”; New Zealand’s Military Manual (1992, § 517) provides that “civilians shall enjoy (...) protection [against attack] unless and for such time as they take a direct part in hostilities”; Spain’s LOAC Manual (1996, Vol. I, § 5.2.a.2) states that “civilians must not take a direct part in hostilities nor be the object of attack, unless they take a direct part in hostilities”; Sweden’s IHL Manual (1991, Section 3.2.1.5, p. 43) states that “protection for civilians does not apply under all circumstances – exceptions are made for the time when civilians take direct part in hostilities”; Togo’s Military Manual (1996, Fascicule III, p. 4) provides that “civilian persons may only be attacked when they participate directly in hostilities”; The UK LOAC Manual (1981, Section 3, p. 10, § 9 and Annex A, p. 44, § 8) mentions that civilians “lose their protection [from attack] when they take part in hostilities” and further add that soldiers “must not attack civilians who are not actually engaged in combat”; according to US Air Force Pamphlet (1976, § 5-3) “civilians enjoy the protection afforded by law unless and for such time as they take a direct part in hostilities” while the US Naval Handbook (1995, § 11.3) provides that “civilians who take a direct part in hostilities ... lose their immunity and may be attacked”; the YPA Military Manual (1988, § 67) of the SFRY (FRY) states that “it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations”.

⁸³ U.S., Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

submissions, the civilian deaths in Ahmici resulted from skirmishes between warring factions and hence, were militarily justified. The Tribunal asserted that the protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in exceptional circumstances, among which figured the abuse of rights by civilians. In the words of the Tribunal:

“In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them. (...) if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention of 1949”.

The clear and uniform practice on this issue in the context of international armed conflicts necessitates no further comment.⁸⁴ The question, however, is more complex in non-international armed conflicts. This is *“a consequence of the fact that no one has the ‘right to participate in hostilities’ in a non-international armed conflict (a right which is an essential feature of combatant status) and is in line with the fact that the law of non-international armed conflict does not protect according to the status of a person but according to his or her actual activities”*.⁸⁵ However, even in the absence of combatant status in this context, AP II expressly reiterates, similar to AP I that *“The civilian population as such, as well as individual civilians, shall not be the object of attack”* (Article 13 § 2) and that they consequently enjoy immunity from attack *“unless and for such time as they take a direct part in hostilities”* (Article 13 § 3). Applicable rules therefore only distinguish between individuals taking a direct part in hostilities and those who do not (or no longer do so).⁸⁶

The question then becomes whether - in the absence of combatant status in non-international armed conflict - the notion of 'direct participation in hostilities' has a different meaning. It has been argued, for example, that classification of logistical support as direct participation in hostilities should be handled differently depending on the qualification of the conflict given that civilians could be compelled to act under pressure or constraint in a non-

⁸⁴ As mentioned in the 1989 U.S. memorandum of law concerning the prohibition of assassination *“there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants”*.

⁸⁵ BOUVIER, Antoine, SASSOLI, Marco, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 208.

⁸⁶ As an illustration, Germany's Military Manual (applicable in both international and non-international armed conflicts) states that *“civilians who do not take part in hostilities shall be respected and protected”* but that *“persons taking a direct part in hostilities are not entitled to claim the rights accorded to civilians by international humanitarian law”*; Germany, *Military Manual* (1992), § 502. § 517. With respect to non-international armed conflicts in particular, the Military Manual of the Netherlands states that *“the protection of civilians ends when and for as long as they participate directly in hostilities”*; Netherlands, *Military Manual* (1993), p. XI-6. Along the same lines, Colombia's Instructors' Manual expressly mentions that civilians lose their protection against attack *“when they participate directly in the hostilities”* and further adds that *“civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)”*; Colombia, *Instructors' Manual* (1999), p. 16, see also p. 28. Also, in 1985, in a report on violations of the laws of war in Nicaragua (*Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32), Americas Watch stated that *“civilians, however, lose their immunity from attack for such time as they assume a combatant's role”*. It reiterated this view in 1986 in a report on the use of landmines in the conflicts in El Salvador and Nicaragua (*Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 98); in a report on violations of the laws of war in Angola (*Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139), Africa Watch stated that *“civilians, however, temporarily lose their immunity from attack whenever they assume a combatant's role”*.

international armed conflict.⁸⁷ Most state practice, however, treats loss of immunity in the same manner whether in international or non-international armed conflict.

Article 51 § 3 AP I and 13 § 3 AP II restrict the loss of immunity from attack to civilians directly participating in hostilities. As regards unarmed members of a guerrilla movement, whose participation in military operations remains indirect, the Commentary to the AP I specifies that “*as a general rule [they] should be taken under fire only if there is no other way of neutralizing them*”.⁸⁸ In other words, the Commentary admits the possibility of “neutralizing” individuals allegedly guilty of indirect participation, but applies the protections and standards of law-enforcement operations to such cases.

Is the notion of direct participation in hostilities identical in international and non-international armed conflict? Are the consequences of direct participation in hostilities in terms of loss of immunity from attack identical in international and non-international armed conflict? What measures may be taken against individuals indirectly participating in hostilities?

2) *The time element: for what period does an individual directly participating in hostilities lose his/her immunity?*

The Commentary on the Additional Protocol I confirms that direct participation in hostilities leads to a temporary loss of immunity by civilians from attacks:

*“It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection and he may no longer be attacked”.*⁸⁹

Practice is quite unambiguous in this regard. In addition to the multiple Military Manual statements already quoted, a reference may be made to the 1997 report of the Inter-American Commission on Human Rights regarding the events that took place at La Tablada in Argentina on 23 January 1989, when 42 armed individuals launched an attack against an Argentine army barracks. The attackers alleged that the purpose of the attack was to prevent an imminent military coup d'état that was supposedly being planned there. The arrival of Argentine military personnel resulted in a skirmish lasting approximately 30 hours, which left 29 of the attackers and several State agents dead. The Commission, seized by surviving attackers, concluded that even if the clash was brief in duration, common Article 3 of the 1949 Geneva Conventions and other relevant rules regarding the conduct of internal conflict were applicable. The Commission stated that when civilians, such as those who had attacked the base at La Tablada, assumed the role of combatants by directly taking part in fighting, whether singly or as members of a group, they thereby became legitimate military targets, but only for such time as they actively participated in the combat. As soon as they ceased their

⁸⁷ “*On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that unarmed civilians who follow their armed forces during an international armed conflict in order to provide them with food, transport munitions or carry messages, for example, lose their status as civilians. In the context of an internal armed conflict, however, unarmed civilians who collaborate with one of the parties to the conflict always remain civilians. According to the report, this distinction is justified by the fact that in internal armed conflicts, civilians are forced to cooperate with the party that holds them in its power*”. Customary Law Study, Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire.

⁸⁸ Commentary on the Additional Protocols, *ibid.*, p. 528 (par. 1694).

⁸⁹ Commentary on the Additional Protocols, *ibid.*, p. (par. 1944).

hostile acts and thus fell under the power of Argentinean State agents, they could no longer be lawfully attacked or subjected to acts of violence.⁹⁰ Along the same lines, in a 2001 report on Israel and the occupied territories, Amnesty International referred to Article 51 § 3 AP I (although this instrument has not been ratified by Israel) and stated that:

*“Palestinians engaged in armed clashes with Israeli forces are not combatants. They are civilians who lose their protected status for the duration of the armed engagement. They cannot be killed at any time other than while they are firing upon or otherwise posing an immediate threat to Israeli troops or civilians. Because they are not combatants, the fact that they participated in an armed attack at an earlier point cannot justify targeting them for death later on”.*⁹¹

Criticism has, however, been leveled at what some call the ‘revolving door’ interpretation, meaning that a civilian could reclaim the benefit of immunity from attack as soon as he or she has dropped his or her arms. To avoid this zone of immunity, a membership approach has been suggested: the mere fact of being a member of a group directly participating in hostilities would be sufficient criterion for loss of immunity. Presenting such argument, an author noted that:

*“[At the other end of the spectrum is] the view that there is a loss of privileged status as long as the person is a “member” of the group engaged in hostilities. To the extent that the opposing force involved may have been denied combatant status solely as a result of a group characteristic a strong argument may be made that a “combatant like” approach to whether they may be targeted would be appropriate. While criminal law generally does not embrace the notion of culpability on the basis of membership in a group alone combatancy is itself “membership” based. That does not mean in respect of non-state actors that all supporters or even members of such an entity may be involved in the planning for or application of violence as the entity may include military and political components depending on its level of sophistication and its governance structure”.*⁹²

Such a theory might be considered unnecessary in the context of an international armed conflict where precise definitions of combatant and civilian status are available. However, the question may be asked if it would be legally feasible and opportune to accept the membership approach in a non-international armed conflict and under what conditions.

Regardless of the theory adopted, one principle remains clear: civilians who have surrendered must not be considered to still be directly participating in hostilities.

How can the period during which a civilian who directly participates in hostilities loses immunity from attack be defined in practical terms? Could, under certain circumstances membership in a group be used as a criterion for determining direct participation in hostilities? If so, under what circumstances and what legal criteria could be used to identify members of a group constituting a legitimate target of attack?

⁹⁰ Inter-American Commission on Human Rights, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 177–178, 189 and 328.

⁹¹ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 29. In another report (*Israel and the Occupied Territories: Shielded from Scrutiny: IDF Violations in Jenin and Nablus*, November 2002, p. 62), Amnesty International reiterated “persons who take a direct part in hostilities may temporarily lose their status as protected persons, but they do so only for such time as they take direct part in hostilities”.

⁹² WATKIN, Ken, “Combatants, Unprivileged Belligerents and Conflicts in the 21st Century”, HPCR Policy brief (<http://www.ihlresearch.org/portal/ihli/Session2.pdf>) p. 12.

B) Legal consequences of a direct participation in hostilities in case of capture by the enemy

As already seen, combatants are entitled to prisoner of war status upon capture and cannot be punished for hostile acts committed pursuant to the law of armed conflict. On the other hand, civilians (or any other non-combatants) are not supposed to participate directly in hostilities and, if they do so, can be prosecuted under domestic law for their acts regardless of whether or not they have violated any provision of IHL. A preliminary issue is the legal regime applicable to such situations.

1) *Legal regime applicable to persons participating in hostilities who fall into the hand of the adverse Party without being entitled to POW status*

a) Status issues

Under the plain wording of GC IV, all persons - including those who directly participate in hostilities - are entitled to the protection of that treaty provided they fulfill the nationality criteria and are not covered by GC I to III. Under Article 4 § 1 of GC IV: “*Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals*”.⁹³

The scope of this provision is reduced by specific exceptions provided for in the second paragraph of Article 4 which excludes nationals of a state not party to the Convention, as well as nationals of neutral and co-belligerent states in enemy territory and nationals of co-belligerent states in occupied territory, assuming that normal diplomatic relations exist in each case. It should be noted that the fact that a civilian directly participated in hostilities is not mentioned as a criterion for exclusion from the protection of GC IV.

Furthermore, Article 5 of GC IV which allows (under strict conditions) for certain derogations from the rights provided by GC IV uses the term ‘protected person’ with regard to those detained as spies or saboteurs, as well as persons definitely suspected of or engaged in activity hostile to the security of the state/occupying power. The text of Article 45 § 3 AP I - at least implicitly - confirms that civilians directly participating in hostilities, if they fulfill the nationality criteria, are protected under GC IV.⁹⁴ The recent jurisprudence of the ICTY also defends this ‘two-box’ approach: “*If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she*

⁹³ The Commentary on this Convention confirms this ‘two-box’ approach: “*Every persons in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law*”; Commentary on Geneva Convention IV, ICRC, 1958, p. 51.

⁹⁴ The provision reads: “*Any person who has taken a direct part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Geneva Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention*”;

necessarily falls within the ambit of Convention IV provided that its article 4 requirements are satisfied".⁹⁵

Finally, several military manuals, as well as a part of the legal literature, also clearly share the view that GC IV covers civilians directly participating in hostilities if they fulfill the nationality criteria.⁹⁶

Divergent opinions have, nevertheless, been expressed in scholarly writing regarding the applicability of GC IV. Some legal commentators reject the applicability of IHL including, GC IV, to civilians who take a direct part in hostilities without, admittedly, providing a detailed legal reasoning for their positions.⁹⁷ Still other scholars mention the scope of protection granted by IHL (i.e. Article 75 AP I in particular), but nevertheless give the impression that unlawful combatants constitute a 'third category' in between combatants and civilians.⁹⁸

b) Internment

Internment is one of the measures that can be taken under GC IV to deal with civilian who directly participates in hostilities. Notwithstanding the case where a civilian himself demands to be interned, under the Convention civilians may only be interned if such internment is absolutely necessitated by state security, and if security could not be guaranteed by the application of less rigorous means. According to Article 42 § 1 GC IV aliens in enemy territory may be interned only "*if the security of the Detaining Power makes it absolutely necessary*". In situations of belligerent occupation, Article 78 § 1 of the same Convention provides that the occupying power may intern a person if it regards it "*necessary for imperative reason of security*". Likewise, Article 5 §§ 1 and 2 GC IV states:

"Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the

⁹⁵ ICTY, Judgement, The Prosecutor v. Delalic et al., IT-96-21-T, 16 November 1998, § 271.

⁹⁶ IPSEN, K., in: FLECK, D. (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, p. 301; McCoubrey, H., *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Dartmouth, Aldershot, 2nd ed., 1998, p. 137; DAVID, E. *Principes de droit des conflits armés*, Bruylant, Brussels, 2nd ed., 1999, pp. 397 et ss. G. ALDRICH ("The Taliban, Al Qaeda, and the Determination of Illegal Combatants", *AJIL*, Vol. 96, 2002, p. 892) is however less assertive on the matter. For further and more precise references, cf. DÖRMANN, K., "The Legal Situation of Unlawful/Unprivileged Combatant", *ibid.*, p. 59 (note 36).

⁹⁷ For example DETTER de LUPIS, I., *The Law of War*, Cambridge University Press, 2000, p. 136; GOLDMAN R.K., TITTEMORE, B.D., "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law". <http://asil.org/taskforce/goldman.pdf>, p. 38; GREENWOOD, C., "International law and the "war against terrorism", *International Affairs*, 2002, p. 316; Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 74.

⁹⁸ BAXTER, R. R., "So-called 'Unprivileged Belligerency': Spies, Guerillas and Saboteurs", *B.Y.I.L.*, 1951, pp. 328 and 336-338. In a recent article, a distinguished scholar explained the objections to the 'two-box approach': this interpretation would be in tension with the specific terms of Article 4, which excludes nationals of neutral and co-belligerent states from the Convention's protection; also Articles 45 and 75 AP I imply that certain detainees may have a status distinct from that of POWs and civilians under GC III and GC IV, respectively. Finally, he notes that the inclusion of unlawful combatants under the protection of GC IV would probably erode the key distinction between combatants and civilians that is fundamental to the laws of war; see ROBERTS, A., "The Laws of War in the War on Terror", U.S. Naval War College, International Law studies, Newport, RI, 2003, p. 31 (to be published).

state, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such state.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention”.

One can deduce from the provisions of Articles 42, 57 and 5 of GC IV that the necessity standard applies to civilian directly participating in hostilities - given that the concept of ‘activity hostile to the security of the state/Occupying Power’ certainly encompasses direct participation in hostilities.

A key unresolved issue is the nature of the activities that should be considered so prejudicial to the external or internal security of a state as to justify detention. In this respect, the ICTY noted that while the assessment of the prejudicial nature of the activity must be largely based on the appreciation of the relevant authorities, their discretion cannot be exercised arbitrarily.⁹⁹ The Tribunal further indicates what it would regard as being arbitrary. For instance, in the *Celebici* case the defense argued that the detention of persons who may not have carried arms could be justified by the absence of loyalty to the Bosnian authorities and the support they provided to rebel forces. According to the Defense, even if civilians are “*not engaged in actual fighting, then they are certainly in a position to provide food, clothing, shelter and information to those who are*”. The Appeals Chamber opined that:

“There is no necessary inconsistency between the Trial Chamber’s finding that the Bosnian Serbs were regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and the finding that some of them could not reasonably be regarded as presenting a threat to the detaining power’s security. To hold the contrary would suggest that, whenever the armed forces of a State are engaged in armed conflict, the entire civilian population of that State is necessarily a threat to security and therefore may be detained. It is perfectly clear from the provisions of Geneva Convention IV referred to above that there is no such blanket power to detain the entire civilian population of a party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a particular risk to the security of the State”.

According to the Tribunal international law clearly prohibits the collective imprisonment of persons based on their ethnic origin. Any decision on internment must be taken on an individual basis and cannot be justified simply by the fact that persons hold a certain nationality or sympathizes with the enemy.¹⁰⁰ Likewise, the Trial Chamber affirmed that the fact of being a male of arm-bearing age cannot be the sole justification for detention.¹⁰¹

It is regrettable that the Tribunal stopped short of determining whether the detention of civilians who possessed arms - which could have been used or were actually used against the forces of Bosnia-Herzegovina - was necessary for the preservation of the detaining power’s security and could therefore be justified under IHL.¹⁰² In a recent decision, the Tribunal mentioned that “[*Although the language of this provision may suggest a broad application of*

⁹⁹ ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, § 574.

¹⁰⁰ ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, §§ 1130-1134.

¹⁰¹ ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, §§ 576-577.

¹⁰² ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, § 1131.

*Article 5 to a variety of situations,] the Chamber observes nevertheless that “activities hostile to the security of the State”, are above all espionage, sabotage and intelligence with the enemy Government or enemy nationals and exclude, for example, a civilian’s political attitude towards the State”.*¹⁰³

Articles 43 and 78 § 2 GC IV oblige detaining powers to respect certain procedural guarantees, including the right of appeal against detention and the right to periodic review of detention. In this context, the Tribunal asserted that even if the initial detention was authorized under IHL, prolonged detention is a violation of its norms if detainees do not benefit from fundamental procedural guarantees.¹⁰⁴

Regarding non-international armed conflicts, even though Articles 4 and 5 of AP II address the situation of persons deprived of their liberty for reasons related to the armed conflict, they do not include the grounds which could justify such internment. It should be noted that human rights law and domestic law need to be used to fill that gap.

In international armed conflict, what is the scope of protection enjoyed by individuals who directly participated in hostilities and fell into the power of the enemy: what is the applicability of GC IV and of AP I in such cases? What is the field of application of Article 5 of GC IV? How does the absence of combatant status affect the treatment and protection of persons who have directly participated in hostilities and have fallen into enemy hands in non-international armed conflict? What are the applicable norms?

2) Loss of immunity against penal prosecution

The main difference in terms of legal consequences between combatants and civilians who directly participate in hostilities is that the latter may be criminally prosecuted for such participation under the domestic law of the detaining state.¹⁰⁵ The question is sometimes raised as to whether domestic criminal prosecution could ensue for the mere fact of directly participating in hostilities or whether a person who directly participated needs, in addition, to have committed a specific act prohibited under domestic law (e.g. murder).

It has also been suggested that the competence of states to punish civilians for participation in hostilities should be limited to an “*act committed in the course of the same mission that ended up in his capture by the adversary (...)* Hence, should the enemy capture

¹⁰³ Political activity was, however, used by the Appeals Chambers in the *Celebici* Case as one of the criteria for determining whether a person could reasonably be considered as posing a serious danger. Only subversive acts undertaken on the territory of one of the Parties to the conflict or acts directly favouring an enemy side could be considered as acts threatening the security of a State and legitimate the internment of a person who by his acts, knowledge or qualifications constitutes a menace to the security of the belligerent Party. ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, §§ 576-577.

¹⁰⁴ The Trial Chamber noted that a Military Investigatory Commission had been created to identify the crimes allegedly committed by the persons confined in the prison. However, the power of this Commission was limited to initiating investigations of prisoners and conducting interviews with them in order to obtain relevant information concerning other individuals not yet arrested and suspected of armed rebellion. Even when they recommended the release of prisoners, Commission members could not supervise their actual release. ICTY, Judgement, *The Prosecutor v. Mucic et al.*, IT-96-21, 16 November 1998, §§ 1135-1137.

¹⁰⁵ For example, South Africa’s LOAC Manual states that “*if persons identified as civilians engage the armed forces, then they are regarded as unlawful combatants and may be treated under law as criminals*”; South Africa, *LOAC Manual* (1996), § 28(b). See also ROGERS A.P.V., “War Crimes Trails under The Royal Warrant: British Practice 1945-1949”, *I.C.L.Q.*, pp. 780-783.

[him] at a later stage, it may not prosecute him for the misdeeds of the past”.¹⁰⁶ The question, therefore, is whether this rule, enshrined in the 1907 Hague Regulations concerning spies and reiterated in AP I for members of the armed forces who have not distinguished themselves from the civilian population as required by Article 44 § 5 could, by analogy, be applied to civilians who directly participate in hostilities.

IHL does not criminalize direct participation in hostilities *per se*. However, using 'war crime' as a generic expression for any type of IHL violation, some military manuals list direct participation in hostilities by a non-combatant as an offense against the law of armed conflict.¹⁰⁷ Such an interpretation has also been suggested by the United States Military Tribunal at Nuremberg in the Hostages Trial, when it stated that:

*“the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars (emphasis added). Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender”.*¹⁰⁸

Press accounts often refer to participation in hostilities by civilians as a 'war crime'. It is unclear, however, whether such statements use the term 'war crime' in the generic sense described above, or whether they reflect an understanding of the term as indicating a serious violation of IHL, leading to the possible application of the principle of universal jurisdiction. Any interpretation that would result in the conclusion that civilians who directly participate in hostilities could be subject to the principle of universal jurisdiction would be highly doubtful, as no provision of IHL treaty law enables such an interpretation.

Finally, there is little doubt that civilians can be held liable for war crimes if, in the course of participation in hostilities, they commit grave breaches or other serious violations of IHL.

Can civilians be prosecuted under domestic law merely for directly participating in hostilities or must they also have committed another act punishable under domestic law? Are civilians who directly participate in hostilities punishable only for acts committed in the course of the

¹⁰⁶ DINSTEIN, Y., “The Distinction between Unlawful Combatants and War Criminals”, in: DINSTEIN, Y. (ed.), *International Law at a Time of Perplexity*, 1989, p. 112.

¹⁰⁷ Canada’s LOAC Manual further states that “*participation in hostilities by non-combatants*” is a violation of customary law and recognised as a war crime by the LOAC; Canada, *LOAC Manual* (1999), p. 16-4, § 21(g). New Zealand’s Military Manual provides that “*participation in hostilities by non-combatants*” is a war crime recognised by the customary law of armed conflict; New Zealand, *Military Manual* (1992), § 1704(5). Along the same lines, Nigeria’s Manual on the Laws of War mentions “*participation in hostilities by civilians*” as an example of a war crime; Nigeria, *Manual on the Laws of War* (undated), § 6. Finally, according to the U.K. Military Manual, “*participation in hostilities by civilians is an example of a punishable violation of the laws of war, or war crime, beyond the grave breaches of the Geneva Conventions*”; UK, *Military Manual* (1958), § 626.

¹⁰⁸ Hostage Trial of 8 July 1947-19 Feb. 1948, *Law Reports of Trials of War Criminals*, United Nations Wartime Commission, Vol. XV, 111 (London, 1947-49). In that respect, it should be mentioned that the Charter of the International Military Tribunal (London, 8 August 1945) define the notion of war crime as encompassing violation of the law or customs of war (Article 6 b). The United States Supreme Court also addressed this issue in *Ex Parte Quirin*, (317 U.S. 1 (1942)): “*By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful*”.

mission that resulted in capture? Is direct participation in hostilities a war crime punishable under the law of armed conflict?