



ICRC

Expert Meeting on the Notion of "Direct Participation in Hostilities under IHL"

(Geneva, 23 to 25 October 2005)

Background Document Working Session I
Residual Issues from the Questionnaire
(Expert Meeting 2004)¹

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¹ **Remark:** This Background Paper has been prepared by Nils Melzer for the Third Informal Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law" (Geneva, 23 to 25 October 2005). The remarks and positions expressed therein are intended to facilitate the discussion and neither claim to be comprehensive or exhaustive nor intend to limit the discussion or preconceive its outcome in any way. The paper has been 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 topics discussed.

I. Inter-Civilian Violence and "Direct Participation in Hostilities"

1. Introduction

A question of particular importance in situations of contemporary armed conflict is whether acts carried out by civilians can qualify as "direct participation in hostilities" if they are not directed against the adversary, but against "peaceful civilians"² or objects protected against direct attack.

As noted by several experts during the 2004 Expert Meeting, attacks by civilians against other civilians ("soft targets") can no longer be regarded as a mere side-effect of armed conflict. On the contrary, particularly in asymmetrical situations such as non-international armed conflict and belligerent occupation, inter-civilian atrocities have become a frequent method in the pursuit of political goals.

Working Session I should provide the experts with an opportunity to address this topic on the basis of the responses given by the experts to the Questionnaire (2004).

2. Practical Relevance of Inter-Civilian Violence

In the recent past civilians have, for example, contributed to policies of "ethnic cleansing" pursued by parties to international and non-international armed conflicts through the deliberate killing, injuring and displacement of ethnically defined parts of the civilian population. The practical relevance of inter-civilian violence also extends to the phenomenon of terrorist attacks against civilians, as well as to the hostage-taking of numerous civilians for ransom or in order to influence the policies of an adverse party to an international or non-international armed conflict.

It must however be noted that inter-civilian violence, even if politically related to an armed conflict, is not necessarily always part of the hostilities. For example, ethnically motivated

² "**Peaceful Civilians**": For the purposes of this Background Paper the term "peaceful civilians" denotes civilians who at the relevant time do not "directly participate in the hostilities" and, therefore, are not subject to direct attack.

atrocities such as looting, rape and killing, can also occur spontaneously, though facilitated by political tension, instability and the general lack of security. Furthermore, hostage takings are not necessarily politically or militarily motivated, but can also be carried out for purely monetary reasons.

3. Practical Relevance of its Qualification as "Direct Participation in Hostilities"

According to the case law of international war crimes tribunals, acts of inter-civilian violence may be punished as war crimes if they, *inter alia*, have a "nexus" to the armed conflict. It is not clear, however, based on what criteria inter-civilian violence may also qualify as "direct participation in hostilities" entailing loss of civilian protection against direct attack. The response to that question is of utmost practical significance as it will determine whether civilians perpetrating atrocities against the civilian population may be directly attacked while so doing or whether they must be dealt with according to law enforcement principles.

- ∅ In order to qualify as "direct participation in hostilities", does inter-civilian violence have to be carried out:
 - Generally on behalf of a party to the conflict?
 - Specifically in furtherance of the political goals of a party to the conflict?
 - Specifically in support of the military operations of a party to the conflict?
 - In pursuance of any particular combination of the above?

- ∅ Does it make a difference whether the target of civilian violence is an "ordinary" civilian or an official of the government (e.g. civilian police officer, minister etc.)?

- ∅ Does it make a difference whether the target of attack are other civilians or objects protected against direct attack?

- ∅ As far as inter-civilian violence is concerned, how can purely criminal acts be distinguished from "direct participation in hostilities"?

∅ **See Background Materials** annexed to this Background Paper: Questionnaire (2004), Background Paper (2004), Report (2004).

II. Establishment and Exercise of Control over Military Personnel, Objects and Territory

1. Introduction

During the 2004 Expert Meeting, Section I / 2 of the Questionnaire concerning the *"establishment and exercise of control over military personnel, objects and territory for reasons related to an armed conflict"* was not specifically discussed. Since the establishment and exercise of control over persons, objects and territory does not necessarily require resort to armed force and does not necessarily lead to death, injury and destruction, it will be important to determine based on what criteria such acts may be qualified as "direct participation in hostilities".

Working Session I should provide the experts with an opportunity to address this topic on the basis of the responses given by the experts to the Questionnaire (2004).

2. Expert Responses to the Questionnaire 2004

The responses given by the experts to the Questionnaire (2004) can be summarized as follows: While the establishment and exercise of control by physical or electronic means over personnel, objects, computer networks and territory used by the adversary were almost unanimously regarded as "direct participation in hostilities", only a minority of experts came to the same conclusion for the described seizing of control over financial assets of the adversary. As in other subsections, a certain disagreement could also be observed over the qualification as "direct participation in hostilities" of activities related to the described establishment and exercise of control (i.e. threats, preparation, deployment etc.).

3. Specific Questions

In particular, apart from other issues that may be addressed by the experts, the discussion should clarify the following questions:

- Ø Since the above described acts of "establishment and exercise of control" do not necessarily require resort to armed force and do not directly cause death, injury or physical damage, what are the criteria qualifying or disqualifying them as "direct participation in hostilities"?

- Ø More specifically, if the seizing of control over financial assets can qualify as "direct participation in hostilities", how can a reliable distinction be made between such control and hostile economic activities that would not constitute "direct participation in hostilities"?

Ø See Background Materials annexed to this Background Paper: Questionnaire (2004), Background Paper (2004).
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III. ANNEX: Background Materials (Expert Meeting 2004)

1. Acts related to an Armed Conflict against Protected Persons and Objects

A. Questionnaire Expert Meeting 2004, Section I / 6

- 6.1. Looting[] or unlawful destruction[] of civilian property.
- 6.2. Deliberate killing[], injury[], unlawful deprivation of liberty[], or humiliating and degrading treatment [].
- 6.3. Interfering with a civilian computer network (e.g. of a hospital, an electricity, heating or water distribution system, a public transport system or flight traffic control) resulting in harm to the civilian population [].
- 6.4. With regard to the examples above which you considered to constitute "direct participation in hostilities", could the following *related behaviour* also qualify as "direct participation"?
- Threatening to carry out such activities[].
 - Immediate preparation of such activities [].
 - Deployments to [] or return from [] the geographic location where such activities are going to take place or have taken place.
 - General (not immediate) planning[] or organizing[] of such activities (such as establishing of general policies and capabilities in pursuance of such activities).

B. Background Paper Expert Meeting 2004, Section I / 6

Summary: The sixth category of examples describes different acts directed against persons and objects protected by international humanitarian law. It generated considerable controversy, often with an almost equal number of experts supporting opposing views.

6.1. Looting and unlawful destruction of civilian property:

Looting and *unlawful destruction* of civilian property was considered not to constitute DPH by 9 and 7 experts respectively, opposed in both cases by 4 experts contending the contrary (6 and 8 "n/a" respectively).

One expert pointed out that, while qualifying unlawful destruction of civilian property as DPH would depend on the situation, a military commander may use deadly force to prevent destruction that would impede his military mission.

6.2. Deliberate killing, injury, unlawful deprivation of liberty, or humiliating and degrading treatment.

The qualification as DPH of the deliberate killing and injury of protected persons opposed equal groups of experts (6 "yes"; 6 "no"; 7 "n/a"). One expert pointed out that such killing and injury would have to be part of sustained and coordinated operations in order to qualify as DPH.

Unlawful deprivation of liberty and humiliating and degrading treatment, on the other hand, were said not to constitute DPH by 7 experts, against 5 "yes" and 7 "n/a".

One expert who abstained with respect to all the questions in this subsection stated that the responses would depend on the situation, namely on who is the perpetrator, who is the target and what is the reason for the act. The same expert pointed out that deadly force may also be used in law enforcement, regardless of whether the perpetrator was engaged in DPH.

6.3. Interfering with a civilian computer network (e.g. of a hospital, an electricity, heating or water distribution system, a public transport system or flight traffic control) resulting in harm to the civilian population.

Causing harm to the civilian population by interfering with a civilian computer network was held not to constitute DPH by a majority of 10 experts against 4 "yes" and 5 "n/a".

Note:

- One expert emphasized, however, that such interference had to be part of sustained and coordinated operations and had to additionally result in physical harm or damage in order to qualify as DPH.
- Another expert noted that if the act does not interfere with the armed conflict it is not DPH, but would be subject to criminal law.
- One abstaining expert stated that the responses would depend on the situation, namely on who is the perpetrator and what is the reason for the act. The same expert pointed out that deadly force may also be used in law enforcement, regardless of whether the perpetrator was engaged in DPH.

6.4. Behaviour related to acts against protected persons or objects.

Similar to sections 1.3., 2.4. and 3.4. above, this subsection generated considerable controversy. *Abstentions*: The questions in this subsection concerned only those examples which had been considered to constitute DPH in the preceding subsections (i.e. "yes" answers). The relatively high number of abstentions in this subsection is thus probably explained by the relatively high proportion of "no" answers received in the preceding subsections.

Note:

- Threatening to engage in an act constituting DPH was considered not to be DPH by 6 experts against 3 "yes" and 10 "n/a". One expert supporting the minority opinion stated that a qualification of DPH required the simultaneous manifestation of threat, means and intent.
- The immediate preparation of an act of DPH was found to be DPH by 6 experts (3 "no"; 10 "n/a").
- While deployments to the geographic location where an act constituting DPH is going to take place was considered to constitute DPH by 6 experts (4 "no"; 9 "n/a"), the return from the geographic location where these activities took place opposed equal groups of experts (5 "yes"; 5 "no" and 9 "n/a").
- Finally, general (not immediate) planning or organizing of an act of DPH was considered not to constitute DPH by 6 experts against 3 "yes"; 10 "n/a" (planning) and 4 "yes"; 9 "n/a" (organizing).

C. Report Expert Meeting 2004, Section I / 6**Qualification of acts against protected persons as direct participation in hostilities**

While recognizing the importance of putting a stop to violations of IHL committed against protected persons and objects, an expert nevertheless questioned why it was important to determine whether such acts constituted DPH. In response, another participant pointed out that the qualification of such acts as DPH would allow direct attacks on the perpetrators instead of mere law enforcement operations. While a third expert contended that the mere fact of attacking civilians would not constitute DPH unless such attacks were used as a means of facilitating future military operations, another emphasized that attacks on civilians as "soft targets" were the very nature of modern, asymmetrical warfare and that, as a result, it was difficult to maintain that such attacks did not constitute DPH.

It was felt by at least one expert that the issue was of particular importance, especially in some non-international armed conflicts where the acts described in section 6.2. of the questionnaire were the very purpose of the conflict (i.e. deliberate killing, injury, unlawful deprivation of liberty, or humiliating and degrading treatment of persons protected by IHL). But even in international armed conflict, a state could use an armed group of civilians to commit these acts against other civilians so as to advance its own military objectives. In both cases, such activities should be regarded as DPH. The distinction between ordinary crime and DPH should be made based on the objective intention behind the act, which can be objectively deduced from the way a conflict is being waged.

Another expert added that inter-civilian violence was not only relevant in scenarios of ethnic cleansing as observed in recent armed conflicts, but that it extended to the whole phenomenon of terrorist attacks against civilians and to the recent hostage-taking of numerous civilians by certain insurgent groups. Dealing with these phenomena requires clarifying whether such behaviour constitutes DPH, consequently permitting the direct targeting of the perpetrators.

2. Establishment and Exercise of Control over Military Personnel, Objects and Territory for Reasons related to an Armed Conflict

A. Questionnaire Expert Meeting 2004, Section I / 2

- 2.1. Capturing or otherwise seizing physical control over military personnel of an adversary[]; or their equipment[], or over buildings[] or territory controlled by them[].
- 2.2. Electronically seizing control over remotely guided weapons[], weapons carriers[] or computer networks[] used by the adversary.
- 2.3. Electronically[] or physically[] depriving an adversary of access to his financial assets or resources by seizing control over bank accounts, cash reserves etc.
- 2.4. With regard to the examples above which you considered to constitute "direct participation in hostilities", could the following *related behaviour* also qualify as "direct participation"?
- Threatening to carry out such activities[].
 - Immediate preparation of such activities [].
 - Deployments to [] or return from [] the geographic location where such activities are going to take place or have taken place.
 - General (not immediate) planning[] or organizing[] of such activities (such as the establishment of general policies and capabilities in pursuance of such activities).

B. Background Paper Expert Meeting 2004, Section I / 2

Summary: The second category of examples describes situations where control is established and exercised over military personnel, objects and territory. These situations are further divided into four subsections.

The first two subsections (2.1.; 2.2.), describing the establishment and exercise of control by physical or electronic means over personnel, objects, computer networks and territory used by the adversary, remained relatively uncontroversial. A certain controversy was, however, generated by the described seizing of control over financial assets of the adversary (2.3.), and considerable controversy by other activities (threats, preparation, deployment etc.) *related* to the type of DPH described in the present section (2.4.).

2.1. Capturing or otherwise seizing physical control over military personnel of an adversary or their equipment, or over buildings or territory controlled by them.

This subsection did not give rise to any controversy. All of the provided examples were considered to constitute cases of DPH by majorities of between 12 and 17 experts with no more than 1 expert contending the contrary.

Note:

- One expert stated that whether or not the seizing of control over buildings or territory controlled by an adversary constituted DPH depended on the reaction of the adversary.
- Another expert stated that while the forcible seizing of equipment from combatants would constitute DPH, petty larceny of relatively insignificant items or the acquisition or abandoned equipment would not. The same expert contended that the qualification of establishing physical control over buildings as DPH depended on the nature of the buildings. Finally, this expert also asked what exactly was meant by "seizing physical control over territory" as formulated in the question.

2.2. Electronically seizing control over remotely guided weapons, weapons carriers or computer networks used by the adversary.

This subsection did not give rise to any major controversy. All of the provided examples were considered to constitute cases of DPH by 14 or 15 experts with no more than 1 expert contending the contrary.

Note:

- One expert stated that the electronic seizing of control over weapons and weapons carriers constituted DPH only when such control was established in order to subsequently *use* them and not when the aim was merely to *incapacitate* them.
- One expert also contended that the seizing of control over computer networks must result in *death, injury or physical damage* in order to qualify as DPH.
- Another expert emphasized that there was no difference between electronic and other methods of seizing weapons.

2.3. Electronically or physically depriving an adversary of access of his financial assets or resources by seizing control over bank accounts, cash reserves etc.

The answers to these questions reflected a certain controversy. While a majority of 11 experts held that physically or electronically seizing control over the financial assets of the adversary did not constitute DPH, 5 experts contended the contrary and 3 abstained from answering.

Note:

- One expert cautioned that the electronic deprivation of an adversary of his financial assets or resources could only constitute DPH if tied to the critical element of intent.
- Another expert, while considering that the described activities did not constitute DPH, proposed a distinction between ordinary financial resources and e.g., the national mint or gold reserves, for which the response to these questions will be different.

Questions to be discussed:

As the above described activities do not directly cause death, injury or physical damage, what are the criteria qualifying or disqualifying them as DPH?
If such activities do indeed constitute DPH, how can they be distinguished from hostile economic activities that would not constitute DPH?

2.4. Activities *related* to the establishment and exercise of control over personnel and objects used by the adversary.

The answers to the questions of this subsection reflected considerable controversy (see also 1.3. above). Only one of the questions generated relatively clear results, while all others gave rise to more differences of opinion.

Note:

- Threatening to engage in an act of DPH, which 11 experts considered did not *per se* constitute DPH (3 "yes"; 5 "n/a"), was the only example in this subsection that produced relatively clear results. One expert explained his abstaining from answering this particular question by stating that his response depended on the circumstances. Another expert pointed out that while threatening did not constitute DPH, incitement would constitute DPH (see also responses to subsection 5.5. below). Another expert, who favoured qualifying threats as DPH, cautioned that such qualification required that such threats result in reasonable belief of serious injury, death, or destruction of protected objects.

All other questions gave rise to more difference of opinions:

- The immediate preparation of an act of DPH *per se* was considered to constitute DPH by 10 experts (5 "no"; 4 "n/a"). In this context, one expert again raised the question as to the definition of "immediate" preparation. Another expert, who favoured qualifying immediate preparation as DPH, cautioned that such qualification required that the acts in question result in reasonable belief of serious injury, death, or destruction of protected objects.
- While deployment to the geographic location where an act constituting DPH is going to take place was considered to constitute DPH by 11 experts (5 "no"; 3 "n/a"), the return from the geographic location where these activities took place was more contentious, with only 9 experts contending the same (7 "no"; 3 "n/a").
- Finally, general (not immediate) planning of DPH was considered not to constitute DPH by 7 experts (6 "yes"; 6 "n/a"), whereas for the general (not immediate) organizing this ratio changed to 7 "yes"; 6 "no"; 6 "n/a". One expert contended that, while general planning did not constitute DPH if it remained purely theoretical or hypothetical, such planning would constitute DPH if it were subsequently to be carried out. Another expert contended that, as far as planning is concerned, it is necessary to distinguish between abstract/amorphic planning (which does not amount to "direct participation in hostilities") and concrete/detailed planning (which does).

Questions to be discussed: (Same as 1.3. above.)

Does every degree of involvement in the preparation, planning and organization of an act of DPH automatically also constitute DPH or can such involvement be too distant or indirect to justify loss of civilian immunity? Based on what criteria would the decisive distinction have to be made?

Should it make a difference that a person is deploying to or returning from DPH? Why?

Should it make a difference that a person intends to personally participate in DPH? Why?

Ø **Remark:** As this topic was not discussed during the Working Sessions of the Expert Meeting 2004, the report did not contain a corresponding section.