



ICRC

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

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Background Document Working Sessions II and III

Constitutive Elements of

"Direct Participation in Hostilities" ¹

I.	"Hostilities"	2
1.	Introduction	2
2.	Conventional IHL	2
3.	Expert Opinions	5
4.	Specific Questions	6
II.	"Nexus" Requirement	8
1.	Introduction	8
2.	Expert Opinions	8
3.	Case Law ICTY / ICTR	9
4.	Specific Questions	10
III.	"Causal Proximity" Requirement	11
1.	Introduction	11
2.	Causal Relation to "Actual" or "Expected" Harm?	11
3.	Required Degree of Causal Proximity	12
IV.	"Hostile Intent"	13
1.	Meaning and Concrete Indicators of "Hostile Intent"	13
2.	Relevance of "Hostile Intent" for the Determination of "Direct Participation in Hostilities"	14
3.	Specific Question	15

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. "Hostilities"

1. Introduction

The notion of "direct participation in hostilities" could be regarded as being composed of two elements, namely "hostilities" and "direct participation" therein. In order to better understand the scope of the notion of "direct participation in hostilities" as a whole, due consideration should therefore be given to the content of the term "hostilities". While the notion of "hostilities" was discussed in the Background Document for the First Expert Meeting (2003)² and during the Second Expert Meeting (2004)³ it was felt by some experts that this notion should be further examined.

2. Conventional IHL

2.1. "Hostilities"

Conventional IHL makes extensive use of the notion of "hostilities" without providing a definition. As pointed out in the Background Document for the First Expert Meeting (2003), the overall use of the term "hostilities" in conventional IHL nevertheless suggests that the term "hostilities" essentially refers to defensive or offensive military operations carried out by a belligerent during an armed conflict and, thus, is narrower than the notion of "armed conflict".⁴ This conclusion is supported, *inter alia*, by the fact that only one of three sections of the Hague Regulations on the laws and customs of war deals with "Hostilities".⁵ On the other hand, Section II of the Hague Regulations on "Hostilities" deals not only with the use of violence ("Means of Injuring the Enemy, Siege and Bombardments"), but also with certain unarmed intelligence activities ("Spies").⁶ The term "hostilities" thus seems to be wider than

² For a more extensive introduction on the issue refer to: Background Document, First Expert Meeting on "Direct Participation in Hostilities under IHL" (2003), pp. 4 f.

³ For a summary of the experts' statements in that regard see: Summary Report Second Expert Meeting (2004), p. 24.

⁴ According to Article 2 common GC I to IV, "armed conflict" constitutes the principal situation giving rise to the applicability of the Geneva Conventions and - in the absence of hostilities - can also be brought about by a declaration of war or the occupation of territory without armed resistance.

⁵ See: Title of Section II H. IV R.

⁶ Additionally, Section II H. IV R. on "Hostilities" also deals with the special immunity provided by "Flags of Truce", and with the termination or suspension of hostilities through "Capitulations" and "Armistices".

the concept of "attack" in the sense of "acts of violence against the adversary, whether in offence or in defence".⁷ Indeed, where AP I deals with the conduct or effects of "hostilities", it refers not only to "attacks" in the above sense, but also to "military operations" and "military operations preparatory to attack". Related to this issue, the Commentary 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 hostile acts without using a weapon".⁸

In order to gain a more precise understanding of the term "hostilities", that notion should be properly distinguished from other concepts of conventional IHL that are sometimes used in a similar sense or context, such as "military operations", "activities hostile to the security of the state", "hostile action" and "hostile / harmful act".

2.2. "Military Operations"

According to the Commentary, the concept of "military operation" must be distinguished from "ideological, political or religious campaigns" and "refers to all movements and acts related to hostilities that are undertaken by armed forces" (*emphasis added*).⁹ With reference to two major dictionaries, the Commentary defines "military operations" as a "series of warlike or strategic acts" and, respectively, as "battles and manoeuvres of all kinds, taken as a whole, as carried out by armed forces in a defined area, with a view to gaining a specific objective" (*emphasis added*).¹⁰ Read together, the interpretation of the Commentary appears to suggest that the term "military operation" describes an activity aimed at achieving a specific objective related to the conduct of hostilities or, in other words, a specific military advantage.

With regard to the relationship between the notions "military operations" and "hostilities" it should be noted that, in conventional IHL, these two terms are used in a very similar manner. For example, Articles 36 ff. H. IV R. on armistices appear to refer to "military operations" and "hostilities" interchangeably. This raises the question as to whether these two concepts can be distinguished at all or whether they should be regarded as synonymous.

⁷ Article 49 [1] AP I.

⁸ ICRC Commentary Article 51 AP I, § 1943.

⁹ ICRC Commentary Article 48 AP I, § 1875. See also ICRC Commentary Article 51 AP I, § 1936.

¹⁰ ICRC Commentary Article 48 AP I, § 1875, FN 13, referring to *The Shorter Oxford Dictionary*, 1973, p. 1452 and, respectively, to *Grand Dictionnaire encyclopédique Larousse*, 1984, Vol. 7, p. 7592: "ensemble des combats et des manoeuvres de toute sorte exécutés par des forces militaires dans une région déterminée en vue d'atteindre un objectif précis" (English translation above by the ICRC).

2.3. "Activities Hostile to the Security of the State"

The notion of "activities hostile to the security of the state" appears to be wider than the term "hostilities". It is referred to in the Fourth Geneva Convention, which does not primarily deal with the conduct of "hostilities", but with measures that can be taken against persons that are already in the hands of a party to the conflict.¹¹ While the conduct of "hostilities" by such persons against the state would certainly be regarded as an "activity hostile to the security of the state", the reverse is not necessarily true. Thus, certain acts of political resistance or of civil disobedience, for example, could possibly be viewed as "hostile to the security of the state" without necessarily qualifying as "direct participation in the hostilities".

2.4. "Hostile Action"

Where conventional IHL governing international armed conflict refers to "hostile action" it uses the term as an apparent synonym to (offensive) "attacks". This may be illustrated by the following examples:

"Parties to the conflict shall take the necessary steps, in so far as military considerations permit, to make the distinctive emblems indicating medical units and establishments clearly visible to the enemy land, air or naval forces, in order to obviate the possibility of any hostile action".¹²

"[...] installations erected for the sole purpose of defending the protected works or installations [i.e. containing dangerous forces] from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations."¹³

From a purely textual perspective, the difference between "hostilities" and "hostile action" appears to be that "hostilities" describes the armed confrontation between all involved parties while "hostile action" refers to the conduct of hostilities by one of the parties, possibly even with a focus on a specific (offensive) military operation. It should therefore be discussed whether the term "hostile action" is synonymous to the notion of "attack" or, alternatively, to "hostilities" or whether "hostile action" has a third, independent, meaning.

¹¹ See Article 5 [1] and [2] GC IV.

¹² Article 42 [2] GC I, second sentence. Practically identical also Article 18 [4] GC IV.

¹³ Article 56 [5] AP I, second sentence.

2.5. "Hostile Act" / "Harmful Act"

Finally, where conventional IHL governing international armed conflict refers to "hostile act" and "harmful act" these terms describe acts which terminate the special protection against direct attack afforded to persons other than civilians, namely medical, religious and civil defense personnel of the armed forces and combatants *hors de combat*.¹⁴ During ongoing hostilities, an attempt by captured personnel to escape or to communicate with their own armed forces may be sufficient to that effect.¹⁵ The use of these terms in conventional IHL suggests, however, that "hostile" or "harmful act" is not synonymous with "direct participation in hostilities". For instance, Article 67 [1] AP I states:

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.

This raises the question of how the notions of "hostile" or "harmful act" relate to the notion of "direct participation in hostilities".

3. Expert Opinions

3.1. Discussion of the Term "Hostilities" (2004)

During the discussion on the notion of "hostilities" during the 2004 Expert Meeting, a number of proposals were made with regard to the definition of that term¹⁶:

- "Hostilities" are acts that directly cause harmful consequences to the adversary.
- "Hostilities" are hostile activities directed at injuring or neutralizing the personnel or equipment of the adversary in the context of an armed conflict.
- "Hostilities" mean the application of force or otherwise disadvantaging the opponent militarily, including intelligence activities.
- "Hostilities" comprise a wider variety of measures than just the infliction of harm on enemy personnel or property.
- "Hostilities" is neither synonymous with "armed conflict" nor with "attack" but includes also unarmed contributions to such an armed attack.

¹⁴ Articles. 21 GC I, 41 [2], 42 [2] and 67 [1] lit. e AP I; 11 [2] AP II and Rule 25 CLS.

¹⁵ Article 41 [2] AP I; ICRC Commentary Article 41 AP I, § 1622.

¹⁶ For a summary of the experts' statements in that regard see: Summary Report Second Expert Meeting (2004), p. 24.

- The term "hostilities" (used for armed conflict) can be equated with the traditional term "acts of war" (used for formal war). "Acts of war" include unarmed combat, intelligence gathering and many other activities that do not cause damage to personnel or equipment.
- It was cautioned, however that the term "hostilities" would be interpreted exceedingly broadly were it to include every activity undertaken in relation to the hostilities.
- It was also emphasized that, even if "hostilities" could be equated with "acts of war", the notion of "direct participation in hostilities" still requires not only some sort of "involvement" or "contribution", but "direct participation" in such acts of war.

3.2. Threshold Requirement

It should be noted that, in their responses to the Questionnaire, as well as during the discussions held at the 2004 Expert Meeting, the experts tended to agree that, in order for an act to qualify as "direct participation in hostilities", the harm expected to result from it for the adversary would have to reach a certain threshold. However, with only one expert requiring that the expected harm had to consist of "physical death, injury or destruction", the overall assessment of that threshold remained sketchy in qualitative and quantitative terms and should be further explored.

4. Specific Questions

- Ø "Military Operations": Can the notions of "hostilities" and of "military operations" be distinguished or should they be regarded as synonymous?
- Ø "Attack": How could the notion of "attack" (Article 49 [1] AP I) be distinguished from the term "hostilities"?
- Ø "Act Hostile to the Security of the State": How could an act "hostile to the security of the state" (Article 5 GC IV) be distinguished from "direct participation in the hostilities"?
- Ø "Hostile Action": Is the term "hostile action" synonymous to "attack" or, alternatively, to "hostilities" or does it have a third, independent, meaning?
- Ø "Hostile / Harmful Act": How do the notions of "hostile act" or "harmful act" relate to the notion of "direct participation in hostilities"?

- Ø "Threshold Requirement": Generally, in order for an act to qualify as "hostilities", does the harm expected to result from it for the adversary have to reach a certain quantitative or qualitative threshold (e.g. death, injury or destruction)?

- Ø Aim to achieve "Military Advantage": Is it sufficient for the qualification of an act as "hostilities" that it aims to achieve a military advantage for a party to the conflict? If yes, would any such act qualify as "hostilities"?

- Ø After careful evaluation of the above questions, what are the constitutive or distinctive elements that define the concept of "hostilities" under IHL?

II. "Nexus" Requirement

1. Introduction

Based on the responses received to the Questionnaire and the discussions held and the 2004 Expert Meeting there appears to be general agreement among the experts that, in order to qualify as "direct participation in hostilities", an act must have a "nexus" to a situation of armed conflict.¹⁷ This means that no activity lacking the required "nexus" - however prejudicial to the security of a party to the conflict – can entail the loss of civilian protection against direct attack.¹⁸ On the other hand, the "nexus" of an act to the armed conflict in and of itself is not sufficient for a qualification as "direct participation in hostilities". Thus, the "nexus" requirement is only one of several constitutive elements of the notion of "direct participation in hostilities".

The ICTY and the ICTR have required that an act must have a "nexus" to an armed conflict, in order to qualify as a "war crime" and have developed certain criteria in that regard. The focus of the present discussion is not the qualification of an act as a "war crime" but as "direct participation in hostilities". Nevertheless, this raises the question of whether the "nexus" requirement for the qualification of an act as "direct participation in hostilities" (conduct of hostilities) is identical with the "nexus" requirement for the qualification of an act as a "war crime" (international criminal law).

2. Expert Opinions

The 2004 Questionnaire had raised the question of whether the qualification of an act as "direct participation in hostilities" required a "nexus" to a situation of armed conflict and, if yes, how such a "nexus" could be defined. The responses given by the experts to the Questionnaire, as well as the brief discussion of the issue at the 2004 Expert Meeting, generally confirmed that a "nexus" was required for the qualification of an act as "direct participation in hostilities". Listed below is a summary of elements that were said to be indicative of the "nexus" of an act to a situation of armed conflict:

¹⁷ For a summary of the experts' statements in that regard see: Background Document Second Expert Meeting (2004), pp. 25 f.; Summary Report Second Expert Meeting (2004), p. 25.

¹⁸ Of course, this does not exclude the permissibility of the resort to lethal force against civilians under the law enforcement paradigm.

- The conduct took place “in the context of and was associated with” or was “directly connected to an armed conflict”.
- The act takes place in the framework of armed hostilities and intends to obtain a military advantage for a party to the conflict or has a direct impact on ongoing or imminent military operations or otherwise contributes to the war effort.
- Conversely, the "nexus" is missing when an act solely aims to satisfy a private interest.
- The same act, such as stealing military equipment in a situation of armed conflict, could either constitute "direct participation in hostilities" or a simple law enforcement issue under domestic law depending on whether the intent behind the act was to use the equipment during hostilities or merely, for instance, to sell the items on the black market for private gain.
- One expert stated that, as situations of armed conflict cannot easily be compared, a "nexus" should not be defined based on a precise criterion, but be based on several indicators allowing the determination of a "sufficient nexus" or an "insufficient nexus".

It should be emphasized that the 2004 Questionnaire did not raise the separate question - and that the experts did not specifically opine on - whether the qualification of an act as "direct participation in hostilities" requires just a nexus to a situation of "armed conflict" or whether it requires a nexus to the actual "hostilities" occurring in relation to the armed conflict. It would be helpful if the 2005 Expert Meeting addressed this issue.

3. Case Law ICTY / ICTR

Although the discussion of the nexus requirement by the ICTY and the ICTR clearly concerned the qualification of an act as a "war crime", and not as "direct participation in hostilities", some of their deliberations may prove useful as background information for the present Working Session.

In the *Kunarac* case, the ICTY Appeals Chamber stated:

[...] the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict (*emphasis added*).¹⁹

¹⁹ ICTY, *Kunarac* (Appeal), Judgement of 12 June 2002, § 57.

[...] The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict (*emphasis added*).²⁰

And in the Rutaganda Case, the ICTR Appeals Chamber clarified:

First, the expression "under the guise of the armed conflict" does not mean simply "at the same time as an armed conflict" and/or "in any circumstances created in part by the armed conflict". For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute. By contrast, the accused in Kunarac, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, as paragraph 59 of the Kunarac Appeal Judgement indicates, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant.²¹

4. Specific Questions

- Ø Does an act qualifying as "direct participation in hostilities" require a "nexus" to an armed conflict in general or, more narrowly, to the "hostilities" occurring in relation to the armed conflict?
- Ø Does the "nexus" element of "direct participation in hostilities" require that such "direct participation" occur with the aim of actually supporting the military campaign of one of the parties to the conflict?
- Ø Does the notion of "direct participation in hostilities" exclude conduct that merely takes advantage of the instability created by an armed conflict for the pursuance of an individual's or group's political or economic goals, without supporting or favoring any of the "parties" (e.g. gangsters, pirates, mafia)?

²⁰ ICTY, Kunarac (Appeal), Judgement of 12 June 2002, § 58. Confirmed in: ICTR, Rutaganda (Appeal), Judgement of 26 May 2003, Case No. ICTR-96-3-A, § 570.

²¹ ICTR, Rutaganda (Appeal), Judgement of 26 May 2003, Case No. ICTR-96-3-A, § 569.

III. "Causal Proximity" Requirement

1. Introduction

According to the Commentary on the notion of "direct participation in hostilities":

"... 'direct' participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces" (*emphasis added*).²²

Based on the responses received to the Questionnaire and the discussions held and the 2004 Expert Meeting there appears to be general agreement among the experts that the qualification of an act as "direct participation in hostilities" requires some degree of causal relationship between the act and the ensuing harm or military disadvantage for the adversary.

2. Causal Relation to "Actual" or "Expected" Harm?

With regard to the content of the "causal proximity requirement" experts have pointed out that, in order to be able to stop an attack by civilians, it was the intended harm and not the harm actually caused that should be decisive in qualifying an act as "direct participation in hostilities".²³ Elsewhere, several experts pointed out that, for the purposes of the conduct of hostilities, intent would generally have to be determined from the perspective of the adversary.²⁴

Ø For the purposes of the qualification of an act as "direct participation in hostilities", does the "causality" requirement refer to the causal relation between that act and the harm that could objectively be expected to result from it based on the particular circumstances of each situation or, alternatively between that act and the harm that has actually occurred? Is there a preferable third possibility?

²² ICRC Commentary Article 51 AP I, § 1944.

²³ For a summary of the experts' statements in that regard see: Background Document Second Expert Meeting (2004), pp. 27 f.; Summary Report Second Expert Meeting (2004), p. 25.

²⁴ See: Summary Report Second Expert Meeting (2004), pp. 3 and 24.

3. Required Degree of Causal Proximity

The discussion at the forthcoming Expert Meeting should also try to clarify what degree of causal proximity (between an act and its expected or actual consequences), is required to entail loss of civilian protection against direct attacks. In this regard, neither the relevant responses of the experts to the Questionnaire nor the discussion held during the 2004 Expert Meeting resulted in clear "majorities". More specifically, some experts required "direct causation", whereas several others held that such direct causation was not necessary for the qualification of an act as "direct participation in hostilities". While it was recognized that the criterion of "indirect causation" was too wide, some experts suggested reliance on "but for" causation (i.e. the harm would not occur "but for" the act in question), while others proposed using a criterion similar to "aiding and abetting" (i.e. the act in question "materially facilitates" the occurrence of the expected harm).²⁵

In considering this issue it should be taken into account that most civilian activities (e.g. telecommunication, agriculture, construction of infrastructure, factories, political parties, public transport, energy production and distribution), in combination with other factors, may cause harm to the adversary, support the general war effort or even contribute to the pursuit of hostilities.²⁶ Some of them (such as the industrial production of ammunition) may even be objectively indispensable for the expected harm to occur ("but for" causation) and may also have a clear "nexus" to the armed conflict or, respectively, to the hostilities. However, it is submitted that hardly any of these activities would be regarded as "direct participation in hostilities".²⁷

Therefore, the criteria to be identified should be clear and simple enough to avoid confusion and uncertainty as to how civilians may behave in their everyday lives without endangering their protection against direct attacks. Also, it should be recalled that the element of "causal proximity", despite its potential importance, is not the sole criterion determining whether an act constitutes "direct participation in hostilities", but must be considered in conjunction with other factors, such as "nexus", "threshold of harm caused" and possibly others.

Ø What degree of causal proximity between an act and its (actual or expected) harmful consequences is required for its qualification as "direct participation in hostilities"?

²⁵ For a summary of the experts' statements in that regard see: Background Document Second Expert Meeting (2004), pp. 27 f.; Summary Report Second Expert Meeting (2004), p. 25.

²⁶ See also the ICRC's Commentary on the Draft Additional Protocols (October 1973, p. 58).

²⁷ It may be noted that decisive civilian contributions to the war effort can rarely be carried out without the required objects (material, locations, infrastructure etc.). All of these objects constitute military objectives and may be attacked directly in each stage of their development, use and maintenance.

IV. "Hostile Intent"

1. Meaning and Concrete Indicators of "Hostile Intent"

While "hostile intent" is not a term of art under IHL applicable in international or non-international armed conflict, numerous statements concerning this notion were made by the experts in their responses given to the Questionnaire as well as during the discussion at 2004 Expert Meeting.²⁸

Essentially, the term "hostile intent" was said to describe:

- The will to inflict damage on the adversary, irrespective of the threshold.
- The aim to diminish the military capacity of an adversary.
- The intent to negatively impact enemy military operations.

Some experts clarified that "hostile intent" was a matter to be regulated on the level of specific rules of engagement (ROE) and did not belong to the body of rules of general IHL. It was also indicated that "hostile intent" could constitute a criterion justifying the resort to force in self-defense.

In terms of concrete examples, the following elements were said to indicate "hostile intent":

- The carrying of arms.
- Membership in armed groups or other fighting organizations.
- Any violent act aiming to kill or injure, or to capture a person or an object.
- Any act the objective aim of which was to diminish the military capacity of the adversary.

²⁸ For a summary of the experts' statements in that regard see: Background Document Second Expert Meeting (2004), pp. 26 f.; Summary Report Second Expert Meeting (2004), pp. 3 and 24.

2. Relevance of "Hostile Intent" for the Determination of "Direct Participation in Hostilities"

2.1. Theoretical Perspective

Some experts suggested that, from a theoretical perspective, "subjective intent" might be a better criterion for identifying "direct participation in hostilities" than an enumerative list of individual "activities" and "means" that would qualify as "direct participation in hostilities".

2.2. Practical Perspective

Several experts cautioned that, in practice, subjective intent *stricto sensu* could not be a decisive element of an operable definition of "direct participation in hostilities", because the reality of military operations did not allow for a careful determination of subjective motivations of each and every individual. Therefore, in operational reality, lethal force would be used against a civilian based upon the injury objectively expected to result from a particular conduct rather than on a determination of subjective intent. The subjective motivations of the acting civilian could be determined only during a subsequent criminal investigation. Accordingly, "hostile intent" in the context of hostilities must be distinguished from the notion of "intent" (*mens rea*) in criminal proceedings.

According to several experts, for the purposes of the conduct of hostilities, "hostile intent" had to be determined from the perspective of the adversary based on the particular circumstances of each situation. In terms of practical relevance, it was suggested that the element of "hostile intent" could not be disregarded, as it could be decisive in situations of doubt, especially where the civilians resort to activities or means not involving the direct application of violence, such as computer networks attacks (CNA).

2.3. Preliminary Assessment

Overall, many experts hesitated to qualify "hostile intent" as an independent constitutive element of "direct participation in hostilities" *inter alia* due to the practical difficulty of identifying subjective motivations during the conduct of hostilities. Nevertheless, many experts appeared to regard "hostile intent" as a practical indicator for "direct participation in hostilities". It was not discussed whether, on the level of rules of engagement (ROE), "hostile intent" could generally be regarded as indicative of a situation justifying the use of force against the civilian in question.

3. Specific Question

Taking into account the preceding assessment, as well as the suggestions made by several experts with regard to the function of "hostile intent" in situations of self-defense and in the framework of rules of engagement (ROE) the following two questions may be considered:

- Ø Could "hostile intent" (while probably not a constitutive element of "direct participation in hostilities" under IHL) be regarded as a decisive ROE-criterion for the practical identification of situations justifying the use of force against civilians from the perspective of the individual soldier (regardless of whether the specific situation is governed by IHL, human rights law, general international law or domestic law)?