



ICRC

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

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Background Document Working Sessions IV and V

**"Direct Participation in Hostilities"
and Membership in Organized Armed Groups¹**

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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. Thematic Overview

1. Aim of the Discussion

The aim of the present Working Sessions is to consider the particular questions raised by the involvement of "organized armed groups" in situations of non-international armed conflict and, if found relevant, also in international armed conflict. In particular, experts should carefully evaluate the theoretical merits and the practical viability of the different forms of "membership approach" within the parameters of conventional and customary IHL applicable in the respective situations.

2. Non-International Armed Conflict

It is typical for situations of non-international armed conflict that the hostilities are carried out not only by state armed forces but also - or even exclusively - by "organized armed groups".² IHL governing non-international armed conflict is not clear, however, as to the legal consequences of "membership" in such groups for the conduct of hostilities.

- Ø In particular, IHL applicable in non-international armed conflict does not clarify whether members of organized armed groups should be regarded as "civilians" subject to direct attack only for such time as they "directly participate in the hostilities" or whether they may be directly attacked according to the same principles as members of state armed forces, that is to say, irrespective of their "direct participation in hostilities".
- Ø If they are to be regarded as "civilians", it should be determined whether, in non-international armed conflict, the notion of "direct participation in hostilities" should be interpreted more extensively with regard to members of "organized armed groups" than with respect to other civilians. In particular, it should be clarified whether "membership" in an organized armed group could as such be equated with continuous "direct participation in hostilities".

3. International Armed Conflict

Recent international armed conflicts have also seen the involvement of organized armed groups not belonging to a state party to the conflict and therefore not qualifying as "combatants".³

- Ø It should therefore be clarified whether, in international armed conflict, the notion of "direct participation in hostilities" should be interpreted more extensively with regard to members of such "organized armed groups" than with respect to other civilians and whether, in particular, "membership" in an organized armed group could as such be equated with continuous "direct participation in hostilities".

² "**Organized armed groups**": For the purposes of this Background Document, the term "organized armed groups" describes armed groups other than state armed forces that constitute or belong to a party to a non-international armed conflict.

³ See Articles 43 [3] AP I; 4 A [2] GC III and 1 [1] H. IV R.

II. Legal Consequences of Membership in "Organized Armed Groups" in Non-International Armed Conflict

1. Are Members of Organized Armed Groups "Civilians"?

While in international armed conflict the notions of "civilian"⁴ and "armed forces"⁵ are expressly defined, the relevant treaty texts applicable in non-international armed conflict refer to the notions of "civilians",⁶ "armed forces"⁷ and "organized armed groups"⁸ without defining them. In terms of customary law, state practice merely confirms that the notion of "civilian" does not include "state armed forces". Practice is not clear, however, as to whether the notion of "civilian" includes or excludes members of "organized armed groups".⁹ For the purposes of this Background Document, the term "organized armed groups" will be restricted to groups other than state armed forces that constitute or belong to a party to a non-international armed conflict.

In non-international armed conflict, the question whether or not a person is a "civilian" has no bearing on the treatment that person is entitled to once he or she falls into the hands of a party to the conflict.¹⁰ However, the clarification of the question whether or not members of such "organized armed groups" should be regarded as "civilians" is of utmost practical relevance for the conduct of hostilities. More specifically, the lawfulness of direct attacks against "civilians" depends on their "direct participation in hostilities",¹¹ whereas the lawfulness of attacks against other persons does not.¹² Thus, the definition of "civilian" is intrinsically linked with the concept of "direct participation in hostilities".¹³

⁴ Article 50 [1] AP I.

⁵ Article 43 [1] AP I.

⁶ Articles 13; 14; 17 AP II.

⁷ Article 3 [1] common GC I to IV; Articles 1 [1]; 4 [3] AP II.

⁸ Articles 1 [1]; 4 [3] AP II.

⁹ ICRC Customary Law Study (hereinafter: CLS), Vol. I, p. 19.

¹⁰ See Article 3 common GC I to IV, which establishes a minimum standard regarding the treatment of all "persons" (and not only of "civilians") once they are in the hands of a party to a non-international armed conflict. See also Article 4 [1] AP II.

¹¹ Article 13 [3] AP II and Rule 6 CLS.

¹² Where IHL provides persons other than "civilians" with special protection against direct attack, whether in international or non-international armed conflict, the loss and eventual restoration of that protection is governed by criteria other than "direct participation in hostilities". For example, medical, religious and civil defense personnel of the armed forces lose their protection in case of "hostile" or "harmful" acts outside their privileged function (Articles 21 GC I, 11 [2] AP II and 67 [1] lit. e AP I, Rule 25 CLS). Combatants *hors de combat* lose their protection if they commit a "hostile act" or "attempt to escape" (Article 41 [2] AP I).

¹³ This correlation is identical in both international and non-international armed conflict.

2. Legal Consequences of the Respective Approaches

In clarifying whether or not members of "organized armed groups" in non-international armed conflict should be regarded as "civilians", the experts are requested to consider the theoretical and practical consequences that the approaches outlined below would entail for the conduct of hostilities, the protection of the civilian population and, possibly, for the interpretation of the notion of "direct participation in hostilities". The following non-exhaustive outline of the possible consequences of each approach aims to facilitate the continuation of the discussion on the issue that took place at the 2004 Expert Meeting based on the Questionnaire, the experts' responses thereto and the expert paper presented by Professor Michael Bothe.¹⁴

2.1. Members of Organized Armed Groups are not "Civilians"

a) Balance between "Organized Armed Groups" and State Armed Forces

If civilians who become members of organized armed groups are no longer regarded as "civilians" they can no longer benefit from the so called "revolving door" of civilian protection. Instead, they may be directly attacked at any time according to the same principles as members of the armed forces, that is to say, independently from direct participation in hostilities. As far as the conduct of hostilities is concerned, this approach would thus apply the same standards to "governmental armed forces" and "organized armed groups". This option could be described as one form of a "membership approach" (see below Section II).

b) Diverging Notions of "Civilian" for International and Non-International Armed Conflict

If members of organized armed groups in non-international armed conflict are excluded from the notion of "civilian", that notion would arguably become narrower in non-international than in international armed conflict, where the conventional notion of "civilian" would also have to include members of organized armed groups failing to fulfill the requirements for combatant privilege.¹⁵ This difference in the definition of "civilian" may cause confusion as to the criteria allowing direct attacks against those persons who would qualify as "civilians" in international but not in non-international armed conflict, particularly where situations of international armed conflict are subsequently transformed into situations of non-international armed conflict and vice versa or where international and non-international armed conflicts occur simultaneously within the same geographical and political context and involve the same actors.

¹⁴ See: Summary Report on Second Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law" (The Hague, 25 – 26 October 2004), pp. 15 ff. and Expert Paper by Professor Michael Bothe on "Direct Participation in Hostilities in Non-International Armed Conflict".

¹⁵ Conventional and customary IHL for international armed conflict determines that any person who is not a member of the armed forces of a party to the conflict or a participant in a *levée en masse* is a "civilian" (Article 50 [1] AP I; CLS Rule 5.). In other words, in situations of international armed conflict, any person other than members of the armed forces or participants in a *levée en masse* is protected against direct attacks unless and for such time as he or she is engaged in "direct participation in hostilities".

c) Narrow Interpretation of "Direct Participation in Hostilities"?

If members of organized armed groups are "civilians" then the notion of "direct participation in hostilities" must be interpreted to include the activities of organized armed groups and not only the hostilities undertaken by unorganized civilians. Conversely, if members of "organized armed groups" are not considered "civilians", this would probably result in a more narrow interpretation of the notion of "direct participation in hostilities", particularly in temporal terms.

2.2. Members of Organized Armed Groups remain "Civilians"

a) Imbalance between "Organized Armed Groups" and State Armed Forces

If members of organized armed groups in non-international armed conflict remain "civilians", they lose their protection against direct attack only for such time as they are engaged in "direct participation in hostilities" and regain protection whenever they cease to do so. Members of the armed forces, on the other hand, can be attacked irrespective of whether they are directly participating in the hostilities. This approach allows organized armed groups to benefit from the so called "revolving door" of civilian protection on the same terms as unorganized civilians who only sporadically engage in the hostilities and thereby creates a considerable imbalance between organized armed groups and state armed forces.

b) More Extensive Interpretation of "Direct Participation in Hostilities"?

If members of organized armed groups in non-international armed conflict remain "civilians", the notion of "direct participation in hostilities" would not only have to cover hostilities on the part of unorganized civilians, but also the activities of organized armed groups. Thus, the result would probably be a more extensive interpretation of the notion of "direct participation in hostilities" than if members of "organized armed groups" are not regarded as "civilians".

c) Other Legal Consequences to "Membership" in Organized Armed Groups?

If "membership" in an organized armed group does not exclude a person from being a "civilian", does it have any other legal consequences that may be relevant for the conduct of hostilities in non-international armed conflict? For instance:

- ***Interpretation of "Membership" per se as "Direct Participation in Hostilities"***: Would IHL applicable in non-international armed conflict theoretically permit the interpretation of "membership" in an organized armed group as a continuous form of "direct participation in hostilities, thus entailing the loss of protection against direct attack for the entire duration of the "membership"? Would not the fact that members of "organized armed groups" remain

"civilians" require that they benefit from the same level of protection as civilians who are not members of organized armed groups?

- ***Interpretation of "Membership" as an Indicator of "Direct Participation in Hostilities":***
Alternatively, could "membership" in an organized armed group be regarded as a strong - but in itself insufficient - indicator that the conduct of a civilian constitutes direct participation in hostilities? In other words, in case of actual doubt as to whether a person's conduct constitutes "direct participation in hostilities", could a member of an armed group be presumed to be so participating while other civilians would be presumed not to have lost their protection against direct attacks?
- ***Other Interpretations and Presumptions etc.?***

3. Possible Interpretations of "Civilian" in Non-International Armed Conflict¹⁶

3.1. First Interpretation¹⁷

"Civilians" are persons who are neither members of state armed forces nor of organized armed groups and who do not otherwise directly participate in hostilities.

- Ø **Particular Consequence:** According to this approach, any civilian engaging in an act of direct participation is no longer considered a "civilian".
- Ø **Potential Problems:** From a theoretical perspective, this approach would contradict Article 13 [3] AP II, which expressly protects civilians from direct attack "unless and for such time as" they are actually engaged in direct participation in hostilities, and thus implies that civilians directly participating in hostilities remain "civilians" even though their protection against direct attack has been suspended. In practice, this approach would allow direct attacks against any person who has at some point directly participated in hostilities irrespective of whether his or

¹⁶ **Remark:** The following overview of possible interpretations of the notion of "civilian" in non-international armed conflict intends to facilitate the discussion and does not claim to be comprehensive or exhaustive. Each interpretation is accompanied by a brief characterization of its particular consequence compared to other approaches, followed by examples of problems possibly related to it. These comments are made from the personal viewpoint of the author of this Background Document and are not intended to limit the discussion or preconceive its outcome in any way.

¹⁷ See, e.g., San Remo Draft Manual (Tentative Text, July 2004), §§ 106 and 107: "Civilians" are all those who are not fighters (§ 107). "Fighters" include all persons belonging to armed forces or armed groups of a party to the conflict (except medical and religious personnel), or taking an active part in hostilities (§ 106).

her conduct still constitutes an objectively verifiable threat and would, in addition, be likely to increase the risk of erroneous attack against peaceful civilians.

Furthermore, this approach presupposes a "membership approach" and would require a generally accepted definition of the concepts of "organized armed group" and "membership" and, possibly, a distinction between "combatant" and "non-combatant" members of an organized armed group. Moreover, this approach would raise the practical difficulties caused by any "membership approach" (see Section III. below).

3.2. Second Interpretation¹⁸

"Civilians" are all persons who are neither members of state armed forces nor of organized armed groups.

- ∅ **Particular Consequence:** This approach maintains the balance between state armed forces and organized armed groups while protecting the "peaceful civilian population".¹⁹ Membership in an organized armed group leads to loss of civilian protection against direct attack for the entire duration of the membership ("membership approach"), whereas unorganized direct participation in hostilities by a civilian entails a merely temporary suspension of protection against direct attack ("revolving door of protection").
- ∅ **Potential Problem:** Just as the first interpretation (Section 3.1. above), this approach implies a "membership approach" and would require a generally accepted interpretation of the concepts of "organized armed group" and "membership" and, possibly, a distinction between "combatant" and "non-combatant" members of an organized armed group. Moreover, this approach would raise the practical difficulties caused by any "membership approach" (see Section III. below).

3.3. Third Interpretation

"Civilians" are all persons (including members of dissident armed forces and organized armed groups) who are not members of state armed forces.

¹⁸ See, e.g. final draft Article 25 [1] ICRC Draft AP II of 1977. See also: Expert Paper by Professor Michael Bothe on "Direct Participation in Hostilities in Non-International Armed Conflict" (Expert Meeting, 2004).

¹⁹ **"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.

- ∅ **Particular Consequence:** By including into the concept of "civilian" all persons except members of state armed forces, this approach adopts the same definition of "civilian" that applies in international armed conflict.²⁰
- ∅ **Potential Problem:** By regarding members of organized armed groups as "civilians" this approach may invite abuse of the "revolving door" of protection and is likely to create an imbalance between governmental forces and armed opposition groups involved in a non-international armed conflict. Attempting to avoid this by interpreting membership *per se* as a continuous form of direct participation in hostilities ("membership approach") would lead to the same problems that are characteristic of any "membership approach". In other words, just as with the first and second interpretations (Sections 3.1. and 3.2. above), this approach would require a generally accepted interpretation of the concepts of "organized armed group" and "membership" and, possibly, a distinction between "combatant" and "non-combatant" members of an organized armed group. Moreover, it would also raise the practical difficulties caused by any "membership approach" (see Section III. below).

3.4. Fourth Interpretation

While not a definition of "civilian", it could be argued based on Article 3 common GC I to IV that all persons, including members of governmental armed forces and organized armed groups, are protected against direct attack unless and for such time as they are engaged in "direct participation in hostilities".

- ∅ **Particular Consequence:** This approach applies the principle of distinction in non-international armed conflict exclusively based on individual conduct. For the purposes of the conduct of hostilities, it renders the distinction between "civilians", "armed forces" and "organized armed groups" meaningless, as no person can be lawfully attacked unless and for such time as he or she is engaged in "direct participation in hostilities".
- ∅ **Potential Problem:** From a theoretical perspective, interpreting Article 3 GC I to IV as a rule regulating the conduct of hostilities contradicts the predominant understanding that this article refers exclusively to the treatment of persons in the hands of a party to the non-international armed conflict. Even if Article 3 GC I to IV applied also to the conduct of hostilities, this approach would still be contrary to state practice with regard to governmental armed forces, to the limitation of Article 13 [3] AP II to civilians, as well as to a textual reading of Article 3 GC I to IV, which protects members of armed forces only once they have actually "laid down" their arms. Finally, in practice, this approach would provide more protection to those involved in the hostilities than is likely to be respected.

²⁰ See Article 50 [1] AP I, and CLS Rule 5.

4. Specific Questions

Based on the overview provided in Section II, 1 and 2 above, the discussion should address the following questions:

- Ø Should members of organized armed groups in non-international armed conflict be regarded as "civilians" subject to direct attack only for such time as they "directly participate in the hostilities"?
- Ø Alternatively, should members of organized armed groups in non-international armed conflict no longer be regarded as "civilians", but as being subject to direct attack according to the same principles as members of state armed forces, that is to say, irrespective of their "direct participation in hostilities" ("membership approach"²¹)?
- Ø If members of organized armed groups are to be regarded as "civilians" should the notion of "direct participation in hostilities" in non-international armed conflict be interpreted more extensively with regard to members of "organized armed groups" than with respect to other civilians? In particular, could "membership" in an organized armed group theoretically be equated with continuous "direct participation in hostilities" (variation of the "membership approach"²²)?

²¹ See Section III below.

²² See Section III below.

III. Merits and Viability of a "Membership Approach" in Non-International Armed Conflict

1. The Concept of the "Membership Approach"

For the purposes of this Background Paper the term "membership approach" essentially implies that, during the conduct of hostilities, "membership" in an organized armed group entails the loss of civilian protection against direct attack.²³ From a theoretical perspective, as far as non-international armed conflict is concerned, a "membership approach" could be based on either of the following two arguments:

- Members of organized armed groups fall outside the category of "civilians" and therefore no longer benefit from civilian protection against direct attack.
- Members of organized armed groups remain civilians but lose protection against direct attack for the entire duration of membership because membership *as such* constitutes a continuous form of direct participation in hostilities.

In practice, both variations of the "membership approach" lead to the same result, namely that - for the purposes of the conduct of hostilities - members of organized armed groups are excluded from the general protection afforded to the civilian population for the entire duration of their membership and are exposed to direct attacks according to the same principles as members of state armed forces. Thus, arguably, the "membership approach" restores the balance between state armed forces and organized armed groups and restricts the phenomenon of the "revolving door" of protection to unorganized civilians.

It must however be emphasized that the "membership approach" leads to a situation where persons liable to direct attack and those entitled to protection against direct attack are no longer necessarily distinguished based on visibly recognizable conduct and may thus lead to disproportionate risks for peaceful civilians.

²³ In its *Tadic Case*, the ICTY Trial Chamber indicated a "membership approach" when it stated: "...an individual who cannot be considered a traditional "non-combatant" because he is actively involved in the conduct of hostilities *by membership* in some form of resistance group..." (ICTY, *Tadic Case*, Trial Chamber, 7 May 1997, § 639 (emphasis added)).

2. Restriction of the "Revolving Door" to Unorganized Civilians

In situations of both international and non-international armed conflict, civilians benefit from general protection against direct attack "unless and for such time as they take a direct part in hostilities".²⁴ This conventional and customary rule gives rise to the so called "revolving door" of civilian protection, which enables civilians to reintegrate into civilian life and regain full civilian protection against direct attack (but not immunity against prosecution under domestic law) after having directly participated in the hostilities and, thus, to operate as "farmers by day and fighters by night".

The concept of the "revolving door" results in a compromise between the military interest to operate against civilians posing a direct military threat and the humanitarian interest to protect the civilian population from the effects of the hostilities. For the purposes of the conduct of hostilities, this compromise creates a certain imbalance between civilians, who benefit from the "revolving door", and members of state armed forces, who do not. In practice, this imbalance is more easily tolerated as long as "direct participation in hostilities" by civilians remains exceptional in armed conflict. It becomes problematic, however, where the mechanism of the "revolving door" is systematically abused by organized armed groups.

The purpose and principal benefit of applying a "membership approach" during the conduct of hostilities would be to restore the balance between state armed forces and organized armed groups in that respect. This is achieved by restricting the benefit of the "revolving door" of protection to unorganized civilians and, thus, exposing organized armed groups to direct attacks according to the same principles as state armed forces.

3. Definitions and Distinctions

The "membership approach" ties significant legal consequences - namely loss of civilian protection against direct attack - to mere "membership" in an "organized armed group". Thus, the precondition for the application of a "membership approach" would be that the element of doubt as to whether or not a civilian has lost protection against direct attack can be reduced to an absolute minimum. This would certainly require that the underlying concepts of "organized armed group" and "membership" are theoretically definable. Moreover, depending whether the definition of "organized armed group" applies only to fighting personnel or whether it includes both the "political" and "armed" wings of a party to a non-international armed conflict, a further distinction

²⁴ Articles 51 [3] AP I; 13 [3] AP II; Rule 6 CLS.

may have to be made between "combatant"²⁵ and "non-combatant" members of an organized armed group.

Apart from these theoretical distinctions, it must also be possible to reliably identify "organized armed groups" and "membership" in practice, including, if necessary, the distinction between "combatant" or "non-combatant" membership. Unless the "membership" approach were to be limited to the relatively structured and transparent situations of non-international armed conflict such as those foreseen in Article 1 [1] AP II, the necessary definitions and distinctions would have to be devised so that they can also be applied to the chaotic circumstances of disintegrating or failed states. In the reality of such contexts, the criteria for the identification of "organized armed groups", as well as their "armed" and "political wings" will often depend on a variety of local factors. The following non-exhaustive notes may serve to initiate the discussion of these terms.

3.1. The Notion of "Organized Armed Group"

"Organized armed groups" are referred to in conventional IHL governing both non-international²⁶ and international armed conflict.²⁷ However, neither body of law provides a precise definition of "organized armed groups". Rather, most of the requirements to be fulfilled by "organized armed groups" according to the respective treaty texts constitute preconditions either for the applicability of AP II to a particular non-international armed conflict²⁸ or, in international armed conflict, for the entitlement to combatant privilege (AP I)²⁹ or to prisoner of war status (GC III).³⁰ Nevertheless, the following elements, which may or may not be constitutive of an "organized armed group", may serve as a basis for the discussion:

²⁵ IHL governing non-international armed conflict does not provide for "combatant" status. For the purposes of this Background Document, the terms "combatant" and "non-combatant" members of an armed group do not indicate any legal privilege whatsoever but are used in a purely functional sense (i.e. the function of a member includes or excludes direct participation in hostilities). For a functional use of the term "combatant" in situations of non-international armed conflict, see also the Article 8 [2] e) ix Rome Statute ("combatant adversary") and CLS, Rule 1 (combatant)

²⁶ Articles 1 [1]; 4 [3] AP II.

²⁷ See the reference to "organized armed groups" in Article 43 [1] AP I and to "organized resistance movements" in Article 4 GC III.

²⁸ In order for AP II to apply to a non-international armed conflict, Article 1 [1] AP II requires that organized armed groups party to that non-international armed conflict be under responsible command and exercise such territorial control as to enable them to carry out sustained and concerted military operations and to implement AP II.

²⁹ In order for organized armed groups to be recognized as part of the armed forces of a party to an international armed conflict and, thereby, as combatants, Article 43 [1] AP I requires that they be under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party.

³⁰ In order to be entitled to prisoner of war status, Article 4 GC III requires that organized resistance movements belong to a party to the international armed conflict and fulfill the four requirements of a) being commanded by a person responsible for his subordinates, b) having a fixed distinctive sign recognizable at a distance, c) carrying arms openly, d) conducting their operations in accordance with the laws and customs of war.

a) "Responsible Command" and "Internal Organization"

According to the Commentary on AP II: "the existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority".³¹ The Commentary on GC III is similar in that it requires that an organized resistance movement should form "a body having a military organization"³² and must be commanded by a "person responsible for his subordinates".³³

- Ø Does this mean that an "organized armed group" should have a minimum of internal organization resulting in a command structure and discipline for the purpose of conducting hostilities?
- Ø Can it thus be concluded that unorganized groups, as well as riots and chaotic collective uprisings, should be excluded from the scope of "organized armed group"?

b) "Armed" Participation in the Hostilities

The phrase "organized armed group" also presupposes "armed" involvement in the hostilities.

- Ø Does this requirement exclude groups that directly participate in the hostilities without the actual application of "armed" force (e.g. unarmed sabotage) from the scope of "organized armed group"?
- Ø In order to qualify as an "organized armed group", does "armed" engagement in the hostilities need to be a primary and continuous purpose of the group?
- Ø Do militant members of a political party who only sporadically take a direct part in the hostilities qualify as an "organized armed group"?

c) Distinction between "Armed" and "Political Wing"

It is a particularity of non-international armed conflict that organized armed groups that do not belong to a state can constitute independent parties to the conflict. It cannot be the purpose of a "membership approach", however, to automatically deprive all representatives of a party to the conflict of protection against direct attack. As on the governmental side, a distinction must also be possible on the non-governmental side between the "party to the conflict" and its "armed forces". For non-governmental parties to a conflict, there are essentially two options:

- Ø Firstly, a distinction could be made between the non-governmental party to a conflict and the "organized armed groups" which constitute its "armed forces".

³¹ Commentary Article 1 [1] AP II § 4463.

³² Commentary Article 4 GC III, p. 58.

³³ Commentary Article 4 GC III, p. 59. Interestingly, according to the commentary, "the leader may be either civilian or military".

Ø Alternatively - if "organized armed groups" are equated with the non-governmental party to a conflict - the distinction would have to be made between the "armed" and the "political wing" or, on the level of individual membership, between "combatant" and "non-combatant" members of the organized armed group in question.

d) Other Constitutive Elements of "Organized Armed Groups"?

- Ø Must they be "identifiable" as groups distinct from the civilian population? How could this be achieved?
- Ø For their qualification as "organized armed groups", does it matter for what duration they are constituted (e.g. for the entire duration of the armed conflict or merely for a specific operation)?
- Ø Are there any other constitutive criteria?

3.2. The Notion of "Membership"

While IHL applicable in both international and non-international armed conflict refers to "organized armed groups" it does not define individual "membership" therein. Clearly, membership in organized armed groups cannot necessarily be determined in the same way as membership in state armed forces, which is normally regulated in domestic law and expressed by means such as uniforms, distinctive signs, emblems and identity cards or disks. Nevertheless, a comparison may prove useful for the determination of minimum standards that may be required for the practical viability of a "membership approach".

a) Membership in State Armed Forces

In international armed conflict, numerous treaty provisions aim to facilitate the practical identification of members of state armed forces during the conduct of hostilities, for instance by establishing the obligation of all combatants to distinguish themselves from the civilian population³⁴ and the obligation of parties to provide distinctive emblems to medical, religious and civil defense personnel.³⁵ While regular armed forces are generally assumed to be obliged to wear uniform, irregular forces, such as militias, volunteer corps and organized resistance movements, must carry a fixed distinctive sign recognizable at a distance and, additionally carry their weapons openly.³⁶ In international armed conflict, the state also has an obligation to notify the adversary whenever it incorporates groups into its armed forces that are not usually part thereof.³⁷ While these practical means of distinction may not actually be constitutive of "membership", they illustrate what means are necessary in practice in order to ensure an acceptable minimum standard of accuracy in the determination of membership in a particular category of persons during the conduct of hostilities.

³⁴ Articles 43 [3] AP I; 4 A [2] GC III and 1 [1] H. IV R.

³⁵ E.g. Articles 40 GC I; 42 GC II, Article 20 and 24 GC IV; Articles 18, 66, 67 and 79 AP I References!

³⁶ Article 4 A [2] GC III and Article 1 [1] H IV R. Where AP I is applicable - in the exceptional situations mentioned in Article 44 [3] AP I - the duty of distinction may be further restricted to the open carrying of weapons during each military engagement and preparatory measures.

³⁷ Article 43 [3] AP I.

b) Membership in "Organized Armed Groups"

Organized armed groups operate in a wide variety of cultural, political and military contexts. Accordingly, "membership" in such an organized armed group may in one case depend on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions, such as membership in a clan, tribe or family. The actual beginning and end of "membership" in organized armed groups will thus largely depend on the particular context and will not necessarily be recognizable for the adversary.

For the purposes of practical distinction during the conduct of hostilities it is, however, necessary that the adversary rely on some kind of actual expression of such membership. In some contexts of non-international armed conflict, especially where organized armed groups exercise territorial control, their members may function and operate very much like governmental armed forces. Members may wear uniforms or other distinctive signs of international or local character, may be recruited on a full-time basis and spend their daily lives in a predominantly military environment. However, membership can also remain completely clandestine even to family members and the surrounding civilian population. It is probably realistic to assume that, more often than not, organized armed groups will operate as "farmers by day and fighters by night", distinguishing themselves from the peaceful civilian population only during specific military operations or, in the worst case, failing to do so altogether. Accordingly, the information available on the identity, function and location of members of organized armed groups will regularly be incomplete or unreliable, thus increasing not only the operational difficulties for the adversary, but also the risk of erroneous targeting of peaceful civilians. Regardless of the theoretical merits of a "membership approach", these practical problems give rise to the following questions:

- Ø As far as its practical viability is concerned, could the "membership approach" be restricted to "organized armed groups" whose members are objectively distinguishable as such by uniforms, distinctive signs or the open carrying of arms?
- Ø For instance, would it make sense to restrict the "membership approach" to "organized armed groups" that fulfill the "four criteria" established for irregular members of state armed forces in international armed conflict, namely:
 1. command responsible for its subordinates;
 2. fixed distinctive sign recognizable at a distance;
 3. carrying arms openly;
 4. conducting operations in accordance with IHL?³⁸

³⁸ Article 4 A [2] GC III and Article 1 [1] H IV R.

4. Civilian Protection in Situations of Doubt

While the "membership approach" may appear appealing as a theoretical concept, it is far from certain whether it could be applied in practice without resulting in disproportionate risks for peaceful civilians.

4.1. "Membership Approach" Cannot Resolve Situations of Doubt

No "membership approach" can change the fact that, in practice, the distinction between members of organized armed groups and ordinary civilians is often extremely difficult. In most contexts of non-international armed conflict, members of organized armed groups regularly blend into the civilian population or even use civilian appearance to conceal military operations and thereby cause confusion and doubt as to the distinction between persons liable to direct attack and those entitled to civilian protection. It would seem that even the most sophisticated definitions and distinctions would not, in most situations, provide a practical answer to the notorious lack of reliable information on the identity, function and location of members of armed groups. This is a practical problem that creates significant risks for peaceful civilians and armed forces alike and that cannot be solved through theoretical concepts such as the "membership approach".

4.2. Risks of an Unrestrained "Membership Approach"

According to the "membership approach", membership *as such* in an organized armed group would be sufficient to entail loss of civilian protection against direct attack for the duration of that membership. Except for situations where membership in an organized armed group is objectively recognizable by the wearing of uniforms or similar indicators, this would therefore create a situation where persons liable to direct attack and those entitled to protection against direct attack can no longer be distinguished based on visibly recognizable conduct. Instead, direct attacks against persons would increasingly depend on subjective perceptions, mere suspicions or incomplete and unreliable intelligence, thus increasing the risk of erroneous attack against peaceful civilians. In the worst case, unverifiable claims of "membership" could even intentionally be used as a pretext for direct attacks against peaceful civilians. Clearly, this result could not be reconciled with the fundamental obligation of the parties to the conflict to provide general protection to the civilian population and would be unacceptable from a humanitarian point of view. It should therefore be considered whether a general presumption of civilian protection in situations of doubt could render a "membership approach" viable from a practical point of view.

4.3. General Rule of Civilian Protection in Situations of Doubt

Under conventional and customary IHL governing the conduct of hostilities in both international and non-international armed conflict, the general rule states that civilians benefit from protection against direct attack. This protection can be suspended only exceptionally, namely for such time as the civilian in question "directly participates in the hostilities". Logically therefore, in a situation of doubt, the assumption must be that the general rule (protection) applies, and not the exception (loss of protection). Applied to the "membership approach" this suggests that IHL would not permit attacks against individuals based on mere suspicion that they may have become members of an armed group. Instead, in a situation of doubt as to the membership of a civilian in an organized armed group, the civilian in question would have to be considered not to be a member.

5. Specific Questions

Based on the background notes provided above, on the responses given to the questions raised in previous subsections (see: Sections III, 3.1.; 3.2. and II, 4.), the discussion should carefully consider the following questions:

- Ø What are the theoretical merits of the different forms of "membership approach" within the parameters of conventional and customary IHL applicable in non-international armed conflict?

- Ø Would a "membership approach" be viable in practice? If no, why not? If yes, what would be the preconditions?

IV. Potential Relevance of a "Membership Approach" in International Armed Conflict

Where IHL governing international armed conflict refers to "organized armed groups" of a party to the conflict,³⁹ it clarifies the requirements to be fulfilled by such groups in order for their members to be entitled to combatant privilege⁴⁰ or prisoner of war status.⁴¹ Thus, as a general rule, civilians who are fighting on behalf of a party to an international armed conflict by forming organized armed groups under a command responsible to that party will lose their civilian status and become irregular members of the armed forces entitled to "combatant" privilege.⁴² However, in recent situations governed by IHL applicable in international armed conflict, armed groups conducting organized and continuous military operations while lacking the required link to a state party to the conflict have been of considerable importance.⁴³ Clearly, such armed groups fail to qualify as regular or irregular armed forces of a party to the international armed conflict and, therefore, their members should be regarded as "civilians".⁴⁴

At this point it should be reiterated that the discussion of the potential relevance of the "membership approach" in situations of international armed conflict should remain strictly within conventional and customary IHL currently in force. Therefore, a "membership approach" that considers members of organized armed groups neither as "civilians" nor as members of the "armed forces" of a party to the conflict would be contrary to IHL applicable in international armed conflict. However, to the extent that the other variation of the "membership approach", which interprets mere "membership" in an organized armed group as a continuous form of "direct participation in hostilities", was found to be theoretically defensible and practically viable in non-

³⁹ See the reference to "organized armed groups" in Article 43 [1] AP I and to "organized resistance movements" in Article 4 GC III.

⁴⁰ In order for organized armed groups to be recognized as part of the armed forces of a party to an international armed conflict (and, thereby, as combatants), Article 43 [1] AP I requires that they be under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. In international armed conflict, this rule is considered to be of customary nature (see Rule 4 CLS).

⁴¹ In order to be entitled to prisoner of war status, Article 4 GC III requires that organized resistance movements belong to a party to the conflict and fulfill the four requirements of a) being commanded by a person responsible for his subordinates, b) having a fixed distinctive sign recognizable at a distance, c) carrying arms openly, d) conducting their operations in accordance with the laws and customs of war.

⁴² To the extent that Article 43 [1] AP I is applicable or recognized as customary law, organized armed groups are expressly included in the notion of "armed forces" if they are under a command responsible to a party to the conflict. Otherwise "combatant" status of irregular forces is restricted to militia and volunteers corps as well as organized resistance movements fulfilling the four criteria of Article 1 [1] H. IV R.

⁴³ Such as Afghanistan (2001), Iraq (2003/2004) and currently in Israel/Palestine.

⁴⁴ Article 50 [1] AP I. The only exception to this rule are the participants in a *levée en masse*, who are neither regarded as "civilians" nor as members of the "armed forces" but are nevertheless afforded combatant privilege. Since a *levée en masse* by definition lacks organization, this exception is irrelevant for the present discussion of membership in "organized armed groups" (Articles 2 H.IV R.; 4 A [6] GC III; 50 [1] AP I).

international armed conflict, it should be considered whether the same concept could also apply to organized armed groups failing to qualify for membership in the "armed forces" in situations of international armed conflict. This would entail that both in international and non-international armed conflict "membership" in an organized armed group would be interpreted as a continuous form of civilian "direct participation in hostilities", thus resulting in a loss of civilian protection against direct attack for the duration of such membership. It must be emphasized, however, that the "membership approach" would not restrict in any manner whatsoever the rights and protections of persons who have fallen into the hands of a party to the conflict.

Based on the preceding notes, the discussion should in particular address the following question:

- Ø To the extent that a "membership approach" (one that interprets mere "membership" in an organized armed group as a continuous form of "direct participation in hostilities") is found to be theoretically defensible and practically viable in non-international armed conflict, could the same concept also apply to organized armed groups failing to qualify for combatant privilege in situations of international armed conflict?