



ICRC

Expert Meeting on the Notion of "Direct Participation in Hostilities under IHL"  
(Geneva, 23 to 25 October 2005)

Background Document Working Sessions VI and VII

**Temporal Scope of**

**"Direct Participation in Hostilities"<sup>1</sup>**

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<sup>1</sup> **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. The Basic Approaches

One of the most important issues to be clarified in relation to the notion of "direct participation in hostilities" is the temporal scope of the ensuing loss of protection, that is to say, the question from what moment on and for how long a civilian can be directly attacked due to his or her direct participation in the hostilities. In this regard, the discussions held during the Expert Meetings in 2003 and 2004 and the responses received to the Questionnaire (2004) have essentially yielded three different approaches, which for the purposes of this Background Document could be termed the "Specific Acts Approach", the "Affirmative Disengagement Approach" and the "Membership Approach":

- **"Specific Acts" Approach:** According to the first approach, "direct participation in hostilities" and the ensuing loss of protection against attack begins and ends in parallel with the beginning and the end of specific acts amounting to "direct participation in hostilities".<sup>2</sup>
- **"Affirmative Disengagement" Approach:** According to the second approach, the loss of protection against direct attacks begins with the first act amounting to "direct participation in hostilities" and ends with an act of "affirmative disengagement". In between, a civilian is presumed to be continuously engaged in "direct participation in hostilities".<sup>3</sup> An alternative theoretical approach with the same practical effect suggests that, with the first act amounting to "direct participation in hostilities", a civilian ceases to be a "civilian" and becomes an (unprivileged) "combatant" subject to direct attack (see also definition of "civilian" in Background Paper for Working Sessions IV and V, Section 3.1., p. 7).<sup>4</sup>
- **"Membership Approach":** The third approach essentially combines the first and second approaches. It distinguishes between unorganized civilians and members of organized armed groups and subjects unorganized civilians to the "Specific Acts Approach"

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<sup>2</sup> Summary Report 2003, p. 7; Background Paper 2004, pp. 34 f.; Summary Report 2004, pp. 22 f.

<sup>3</sup> Background Paper 2004, p. 35; Summary Report 2004, p. 22.

<sup>4</sup> Summary Report 2003, p. 7; Background Paper 2004, p. 35.

(above), whereas members of organized armed groups lose civilian protection against direct attacks for the entire duration of their membership and until their "affirmative disengagement" from the group in question ("Affirmative Disengagement Approach" above).<sup>5</sup>

The "Membership Approach" having been discussed already in Working Sessions IV to VI, it is the primary purpose of Working Sessions VII and VIII to evaluate the theoretical merits and practical viability of the "Specific Acts Approach" and the "Affirmative Disengagement Approach" under IHL applicable in both international and non-international armed conflict.

## **2. "Preparatory Measures"**

In a second step, the discussion should identify criteria for the distinction of preparatory measures that qualify as "direct participation in hostilities" from preparatory measures that do not lead to a loss of protection against direct attacks. While these criteria may not necessarily be temporal, they determine at what point in time a person actually loses civilian protection against direct attacks and are therefore relevant for the temporal scope of "direct participation in hostilities".

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

Finally, the discussion should also determine more precisely whether the notion of "direct participation in hostilities" also extends to the "deployment to" and the "return from" military engagements and, if yes, when the "deployment to" military engagements begins and, respectively, when the "return from" such engagements ends.

## **4. Relevant Premises Inherent in Conventional IHL**

In addressing these questions, this Background Paper will be based on two premises inherent in conventional IHL for both international and non-international armed conflict, addressed in the next section, namely the temporal identity between the duration of "direct participation in hostilities" and the duration of the ensuing "loss of protection against direct attack", as well as the consequent inevitability of the legal mechanism of the "revolving door" of civilian protection. In other words, the duration of the loss of protection against direct attack directly depends on the beginning and end of "direct participation in hostilities".

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<sup>5</sup> Summary Report 2003, p. 7; Background Paper 2004, p. 36; Summary Report 2004, pp. 22 f.

## II. Premises Inherent in Conventional IHL

### 1. Temporal Identity of "Direct Participation in Hostilities" and "Loss of Protection from Direct Attack"

According to conventional IHL governing both international and non-international armed conflict, civilians shall enjoy protection against direct attack *"unless and for such time as"* they take a direct part in hostilities.<sup>6</sup> This phrase clarifies that the suspension of civilian protection against direct attack lasts exactly as long as, and cannot begin before or extend beyond, the corresponding civilian engagement in direct participation in hostilities. Conventional IHL thus categorically excludes direct attacks against civilians "before" or "after" their engagement in direct participation in hostilities and, in that period, the use of lethal force against civilians is governed exclusively by the law enforcement paradigm.

The first premise inherent in conventional IHL is thus the temporal identity between the duration of "direct participation in hostilities" and the duration of the ensuing "loss of protection against direct attack". In other words, determining the "temporal scope" of the loss of protection against direct attack due to direct participation in hostilities actually means clarifying the beginning and end of "direct participation in hostilities" itself.

### 2. Theoretical Inevitability of the "Revolving Door" Phenomenon

The conventional phrase of *"unless and for such time as"* necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so called "revolving door" of protection). Therefore, the second basic premise inherent in conventional IHL is the theoretical inevitability of the phenomenon of the "revolving door" of civilian protection.

The speed at which the "door revolves" and, thereby, the practical relevance of this legal mechanism for the conduct of hostilities will thus ultimately depend on the temporal scope given to the notion of "direct participation in hostilities". It is in this framework that the theoretical merits and practical viability of the "Specific Acts Approach", the "Affirmative Disengagement Approach" and the "Membership Approach" should be evaluated.

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<sup>6</sup> Articles 51 [3] AP I; 13 [3] AP II. The ICRC's Customary Law Study (CLS) considers the rule to be of customary nature for both international and non-international armed conflict (see: Rule 6 CLS).

### III. "Specific Acts" Approach

#### 1. The Concept

According to the "Specific Acts Approach", "direct participation in hostilities" and the ensuing loss of protection against attack begins and ends in parallel with the beginning and the end of specific acts amounting to "direct participation in hostilities".<sup>7</sup> This approach depends primarily on reliable criteria for the qualification of specific acts as "direct participation in hostilities".

#### 2. Theoretical Merits

From a theoretical perspective, a "revolving door" mechanism suspending and restoring civilian protection against direct attack in parallel to the beginning and end of specific acts of "direct participation of hostilities" does not appear to contradict conventional IHL governing international and non-international armed conflict. The main theoretical difficulty of this approach would lie in the identification of abstract criteria allowing the qualification of a specific act as "direct participation in hostilities" in both material and temporal terms.

#### 3. Practical Viability

According to the "Specific Acts Approach", the determination of "direct participation in hostilities" would generally be based on objectively verifiable behavior rather than on theoretical concepts such as "membership" (membership approach). Furthermore, the suspension of a civilian's protection against direct attack would in each case last only as long as the corresponding specific act of "direct participation in hostilities" and regaining protection would not depend on an act of "affirmative disengagement" (affirmative disengagement approach). Clearly, even the "Specific Acts Approach" cannot guarantee that error and misjudgment will not happen in practice. Nevertheless, compared to other approaches, the "Specific Acts Approach" appears to be most likely to reduce the probability of situations of

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<sup>7</sup> Summary Report 2003, p. 7; Background Paper 2004, pp. 34 f.; Summary Report 2004, pp. 22 f.

doubt and, thereby, to minimize the risk of erroneous or abusive attacks against "peaceful civilians".<sup>8</sup>

On the other hand, this approach entails that a civilian can repeatedly lose and regain protection against direct attack within a short period of time, a situation that may make it very difficult for the adversary to conduct effective military operations. This result may be inevitable and relatively unproblematic where "direct participation in hostilities" of civilians occurs on an unorganized basis only. However, this approach may cause a serious operational imbalance where state armed forces are confronted with well trained and equipped "organized armed groups", especially where such groups exercise territorial control and wear uniforms or other distinctive signs in a similar manner as state armed forces.

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<sup>8</sup> **"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.

## IV. "Affirmative Disengagement" Approach

**Remark:** As has been pointed out in the Thematic Overview, there are essentially two variations of the "Affirmative Disengagement Approach", which differ in terms of theoretical basis but have the same practical consequences. Therefore, while the theoretical merits of the respective variations should be evaluated separately, this distinction will not be necessary with regard to the practical viability of the "Affirmative Disengagement Approach".

### **Variation 1: Presumption of "Direct Participation in Hostilities"**

#### **1.1. The Concept**

According to this approach, "direct participation in hostilities" begins with the first act amounting to "direct participation in hostilities" and ends with an act of "affirmative disengagement". Every civilian who has at some point "directly participated in the hostilities" would from then on be presumed do so on a continuous basis and would therefore be subject to direct attack for the entire duration of the conflict. The protection against direct attack would be restored only once the civilian in question falls *hors de combat* by capture, wounds etc. or affirmatively declares his or her disengagement from "direct participation in hostilities". This variation of the "Affirmative Disengagement Approach" would operate based on the "presumed intentions" of a civilian much more than on "objectively verifiable behavior" and would thus be likely to increase the risks of misjudgment and erroneous attack.

#### **1.2. Theoretical Merits**

This approach would raise several questions as to its theoretical compatibility with IHL applicable in international and non-international armed conflict, most notably:

- Could this approach be reconciled with the wording of Articles 51 [3] AP I and 13 [3] AP II affording civilians protection against direct attack *"unless and for such time as they take a direct part in hostilities"*?
- Is it conceivable to interpret "direct participation in hostilities" as referring to an expressed or presumed "intention" rather than to "actual behavior"?
- Would a "presumption of loss of protection" such as suggested by this approach not contradict the general rule of civilian protection against direct attacks, which is fundamental to IHL governing both international and non-international armed conflict?

## **Variation 2: "Unprivileged Combatancy"**

### **2.1. The Concept**

According to the second variation of the "Affirmative Disengagement Approach" any civilian who has at some point engaged in "direct participation in hostilities" *ipso facto* ceases to be a "civilian" and thereby no longer qualifies for civilian protection against direct attack. Instead, he or she becomes an (unprivileged) "combatant" subject to direct attack until his or her "affirmative disengagement".

### **2.2. Theoretical Merits**

This approach would raise additional questions as to its theoretical compatibility with IHL applicable in international and non-international armed conflict, such as:

- Could this approach be reconciled with the wording of Articles 51 [3] AP I and 13 [3] AP II affording civilians protection against direct attack "*unless and for such time as they take a direct part in hostilities*"?
- How could this approach be reconciled with the definition of "civilian" in international armed conflict (Article 50 [1] AP I)?
- How could this approach be reconciled with the fact that conventional IHL for international and non-international armed conflict deprives civilians directly participating in the hostilities only of the protection afforded by "this Section or "Part"<sup>9</sup> of the respective Additional Protocol, but does not exclude them from the category of "civilian" as such?

## **3. Practical Viability of "Affirmative Disengagement"**

Both alternatives of the "Affirmative Disengagement Approach" would permit direct attacks against individuals in situations where the principle of distinction cannot be applied based on objectively verifiable behavior. Both alternatives would thus raise the same questions of practical viability of the "Affirmative Disengagement Approach", such as:

- What exactly does "affirmative disengagement" require of individual civilians, particularly in contexts where close contact with the adversary is difficult or impossible (e.g. aerial warfare)?

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<sup>9</sup> Articles 51 [3] AP I and 13 [3] AP II.



- How could civilians realistically "affirmatively disengage" where they are required to "directly participate in the hostilities" by alternating parties to the conflict depending e.g. on whose troops happen to pass through their village?
- How could an approach applying the principle of distinction based upon individual declarations and intentions be reliably implemented on a scale of hundreds or thousands of civilians "directly participating in hostilities"?
- How would declarations of "affirmative disengagement" have to be processed on the receiving end in order to ensure that the civilians in question will not subsequently be directly attacked by troops uninformed of their "disengagement"?
- What would be done in case of doubt whether a civilian has previously engaged in "direct participation in hostilities" and, if yes, whether he has "affirmatively disengaged"?

## V. Preparatory Measures

### 1. Introduction

The least controversial of those activities that are commonly qualified as "direct participation in hostilities" are undoubtedly those amounting to actual combat or "attacks", that is to say, to "acts of violence against the adversary, whether in offence or in defence".<sup>10</sup> It is less clear to what extent measures "preparatory" to future "attacks" may already qualify as "direct participation in hostilities".

### 2. Expert Responses to the Questionnaire

In this respect, in their responses to the Questionnaire prior to the 2004 Expert Meeting, the majority of experts tended towards the opinion that "immediate" preparatory measures constituted a form of "direct participation in hostilities", while opinions regarding "general" preparatory measures were divided, resulting in no clear majority.<sup>11</sup> Although the discussions did not result in any precise definition of "general" and "immediate" preparatory measures, the responses nevertheless suggest that a distinction must be made between preparatory measures that qualify as "direct participation in hostilities" and preparatory measures that do not. While the criteria for this distinction may not necessarily be temporal, they determine at what point in time a person actually loses civilian protection against direct attacks and are therefore relevant for the temporal scope of "direct participation in hostilities".

### 3. Specific Questions

Conventional IHL governing the conduct of hostilities in international armed conflict refers to preparatory measures in the above sense as "military operation[s] preparatory to an attack".<sup>12</sup> Thus, the activities in question should be of a distinctly "military" nature and should be "preparatory" to a specific attack as opposed to measures preparing acts other than "attacks". *Inter alia*, the following questions may be considered:

<sup>10</sup> See the definition of "attacks" in Article 49 AP I.

<sup>11</sup> See Background Paper (2004), pp. 7, 10, 13, 21. The Questionnaire submitted to the experts prior to the 2004 Expert Meeting distinguished between "general" and "immediate" preparatory measures to activities such as the "application of means of destruction or injury" (I, 1.3.), "establishment and exercise of control over personnel and objects used by the adversary" (I, 2.4.), "intelligence activities" (I, 3.4.) and "acts against protected persons or objects" (I, 6.4.).

<sup>12</sup> Article 44 [3] AP I.

- Ø **"Military Operation"**: In reference to the discussion of the term "military operations" during Working Sessions II and III,<sup>13</sup> what kind of preparatory activities could or, respectively, could not be regarded as "military operations"? Does a "military operation" have to aim at achieving a specific military advantage?
  
- Ø **"Preparatory to an Attack"**: What does "preparatory to an attack" mean in practical terms? Does a measure "preparatory" to an attack have to be "objectively indispensable" for the execution the prepared attack? Or could any measure "aiming to enable or facilitate" a specific attack be regarded as "preparatory" to that attack?
  
- Ø **Causal Proximity**: Should the distinction between preparatory measures that do / do not qualify as "direct participation in hostilities" be made based on the "causal proximity" between the preparatory measure and the prepared "attack"? Example: With regard to the qualification as "direct participation in hostilities", would it make a difference whether a civilian transports a bomb from the factory to an airfield storage place or whether the same civilian loads the same bomb onto an airplane for deployment against a specific target?
  
- Ø **Temporal Proximity**: Alternatively, should the same distinction be made based on "temporal proximity" between the preparatory measure and the prepared "attack"? Example: With regard to the qualification as "direct participation in hostilities", would it make a difference whether a civilian loads the same bomb onto an air plane several days or just hours before its deployment against a specific target (assuming that all other factors remain the same)?

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<sup>13</sup> See Background Paper for Working Sessions II and III, Section I.2.5.

## VI. "Deployment to..." and "Return from..."

### 1. Introduction

Another question to be clarified is to what extent the notion of "direct participation in hostilities" extends beyond a specific "attack" or other military engagement amounting to "direct participation in hostilities" and includes also the geographical "deployment to" and the "return from" such activity. In their responses to the Questionnaire, a majority of experts considered that "deployment to" the geographic location where direct participation in hostilities is going to take place should qualify as "direct participation in hostilities". Although more hesitant, the majority of experts tended towards the same conclusion with regard to the a "return from" such location.<sup>14</sup>

### 2. Loss of Protection "before" and "after" a Military Engagement

#### 2.1. "Deployment to..."

It appears that, where the actual execution of a specific attack by a civilian requires his or her prior geographical deployment, there is an undeniable military interest in countering such deployment in one way or another, whether by law enforcement or by military measures. From a purely temporal perspective, the justification for the loss of protection against direct attack during "deployment to..." refers to the time before a military engagement and, therefore, is closely linked to the criteria applicable to "preparatory measures" (see Section V above). This raises the following question:

- Ø Does the qualification of "deployment to..." as "direct participation in hostilities" depend on the same criteria as "preparatory measures"?
- Ø If not, what other criteria would apply?

#### 2.2. "Return from..."

Conversely, "return from..." refers to the time after a military engagement when the specific threat caused by that operation has presumably ceased. Since the loss of protection due to "direct participation in hostilities is based on considerations of necessity rather than penal sanction, this raises the following questions:

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<sup>14</sup> See Background Paper (2004), pp. 7 (I, 1.3.); 10 (I, 2.4.); 13 (I, 3.4.); 20 (I, 6.4.).

- Ø Can the loss of protection against direct attack be justified even during the time after a specific military engagement?
- Ø If yes, on what basis other than the concrete threat posed by the preceding attack?

### 3. Content of "Deployment to..." and "Return from..."

In clarifying what "deployment to..." and "return from..." means in practice, the following questions may be considered:

- Ø **Geographical Element:** Is "deployment to..." and "return from..." defined by "geographical displacement" to or from the place where an attack will be, or has been, carried out? If yes, where does it begin and end?
- Ø **Associative and Dissociative Element:** Or is "deployment to..." and "return from..." additionally defined by a dissociative and associative element with regard to peaceful civilian activities? In other words, should "deployment to..." and "return from..." be defined as an action (that might or might not include geographical displacement), indicating that the concerned civilian "leaves behind" (dissociates) or, respectively, "reintegrates into" (associates) his or her "civilian" life, role and functions?
- Ø **Relevance in the Absence of Geographical Displacement:** Can "deployment to..." and "return from..." be relevant for the temporal scope of "direct participation in hostilities" even if the military engagement in question does not require the geographical displacement of the civilian in question? Examples:
  - A civilian carrying out computer network attacks (CNA) from his home computer.
  - Does the "deployment to..." and "return from..." of an unmanned weapons system controlled by a civilian from his home computer constitute "direct participation in hostilities"?
  - In both cases, the civilian probably does not lose protection while writing family messages or playing computer games on his home computer, but presumably does so as soon as he or she takes any action that is immediately preparatory to the attack in question. What happens once that attack is over and the civilian returns to sending family messages without physically distancing himself or herself from the computer?