



ICRC

D R A F T

**Interpretive Guidance on the Notion of
“Direct Participation in Hostilities”**

Fourth Expert Meeting
on the Notion of "Direct Participation in Hostilities under IHL"
(Geneva, 27 / 28 November 2006)

Co-organized by the International Committee of the Red Cross and the TMC Asser Institute

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Remark: This Interpretive Guidance was drafted on behalf of the organizers by Nils Melzer, Legal Adviser of the ICRC. It is intended to serve as a working document and as a basis for discussion during the Expert Meeting of 27/28 November 2006 and does not necessarily express the institutional position of either the International Committee of the Red Cross or of the TMC Asser Institute on any of the issues examined. Likewise, all statements referred to in this document and in the materials cited therein, whether nominally attributed or not, were made in the personal capacity of each expert and do not necessarily express the position of any government, organization or other institution.

A. Introduction

1. The Issue of Civilian Direct Participation in Hostilities

The primary aim of international humanitarian law (IHL) is to protect the victims of international and non-international armed conflict and to regulate the conduct of hostilities based on a balance between considerations of military necessity and of humanity. As far as the conduct of hostilities is concerned, IHL essentially distinguishes two generic categories of persons, namely combatants, who conduct the hostilities on behalf of the parties to the conflict, and civilians, who are presumed to be peaceful and must be protected against the effects of hostilities. While it is true that, throughout history, the civilian population has always contributed to the general war effort to a greater or lesser degree, such activities typically remained relatively distant from the battlefield and included, for example, the production and provision of armaments, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.

Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields and into civilian population centers, as well as increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the "civilianization" of the armed forces which has introduced large numbers of private contractors, secret service personnel and other civilian government employees into the reality of modern armed conflict. Moreover, in a number of contemporary armed conflicts, military operations have attained an unprecedented level of complexity and involve a great variety of interdependent human and technical resources, including remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems. Overall, the increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, the wide variety of functions and activities performed by civilians in contemporary armed conflict and the complexity of modern means and methods of warfare have caused confusion and uncertainty as to the implementation of the principle of distinction during the conduct of hostilities. These difficulties are further aggravated where armed actors do not distinguish themselves from the civilian population, such as during the conduct of clandestine or covert military operations or when persons act as "farmers by day and fighters by night". As a result, peaceful civilians are more likely to fall victim to erroneous, unnecessary or arbitrary targeting, whereas armed forces - unable to properly identify their

adversary - bear an increased risk of being attacked by persons they cannot distinguish from peaceful civilians.

This trend has emphasized the importance of distinguishing not only between civilians and combatants, and but also between "peaceful" civilians and civilians "directly participating in the hostilities". Under IHL, the notion of "direct participation in hostilities" describes individual conduct which, if carried out by civilians, suspends their protection against the effects of the hostilities. In other words, for the duration of their "direct participation in hostilities", civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of "direct" or "active" participation in hostilities is found in multiple provisions of IHL. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to "direct participation in hostilities". This situation calls for the clarification of the following three questions under IHL applicable in both international and non-international armed conflict:

1. Who is considered a "civilian" for the purpose of the conduct of hostilities?
2. What conduct amounts to "direct participation in hostilities"?
3. What are the precise modalities according to which civilians directly participating in hostilities lose their protection against direct attacks?

2. The ICRC / TMC Asser Clarification Process

In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the TMC Asser Institute, initiated a process of research, reflection and clarification of the notion of "direct participation in hostilities" under IHL. The aim was to identify the constitutive elements of the notion and provide guidance for its interpretation in both international and non-international armed conflict. In doing so, the process focused on clarifying the notion of "direct participation in hostilities" for the purpose of the conduct of hostilities and did not, or only marginally addressed the legal regime applicable in case of capture or detention of persons having directly participated in hostilities.

In the framework of the clarification process, three informal Expert Meetings entitled "Direct Participation in Hostilities under International Humanitarian Law" were organized in The Hague and Geneva. They brought together around forty legal experts from military,

governmental and academic circles, as well as from international and non-governmental organizations, each in a personal capacity. The high level of expertise of the participants provided for constructive and fruitful discussions on some of the most complex legal questions related to the notion of direct participation in hostilities. In preparation for the expert discussions the organizers provided thematic background documents, and a number of individual experts also submitted Expert Papers or gave presentations on specific topics during the Expert Meetings.

The *First Expert Meeting*, held in The Hague on 2 June 2003, set the foundation for the research and led to the unanimous conclusion that the notion of "direct participation in hostilities" required further clarification and that the ICRC should take the lead in this process. The *Second Expert Meeting*, held in The Hague on 25 and 26 October 2004, focused and deepened the discussion based on an extensive Questionnaire which was distributed to the experts before the meeting and which raised a wide range of practical examples and theoretical questions related to the notion of "direct participation in hostilities". The *Third Expert Meeting*, held in Geneva on 23-25 October 2005, addressed some of the most complex legal questions related to the concept of direct participation in hostilities, such as the personal scope of the notion in non-international armed conflict, the temporal scope of the ensuing loss of protection, as well as questions raised by the presence of private contractors and civilian employees in conflict areas. Based on the results of these Expert Meetings, it was agreed that the organizers would prepare and submit a draft Interpretive Guidance on the notion of "direct participation in hostilities" for discussion during the *Fourth Expert Meeting* to be held in Geneva on 27 and 28 November 2006.

3. The Present Interpretive Guidance

The aim of the present document is to present an Interpretive Guidance for the notion of "direct participation in hostilities". The drafting of the present text could not have been possible without the expertise and experience of the experts participating in the ICRC/TMC Asser clarification process. Apart from treaty IHL, the proposed Guidance draws on a variety of sources, including the range of opinions and positions expressed by the participants during the Expert Meetings, the responses received from experts to the 2004 Questionnaire, the specific papers and presentations contributed by individual experts to the Expert Meetings, as well as the various background documents provided by the organizers. A comprehensive overview of the discussions and of the various views expressed is provided in the annual summary reports and in some of the background papers (BP) drafted for each

Expert Meeting. The present document goes beyond mere reporting and endeavors to present a coherent Interpretive Guidance of IHL as far as it relates to the direct participation of civilians in hostilities. It does not necessarily reflect the unanimous view or the majority opinion expressed during the Expert Meetings but, instead, tries to propose a solution which duly takes into account the wide variety of values and interests involved.

The proposed Interpretive Guidance is divided into three main chapters, comprising a total of 10 headings, each commented in an accompanying text: The first substantive chapter (B) determines the concepts of "civilian" under IHL applicable in international (I) and non-international (II) armed conflict and, thereby, the circle of persons who are protected against the effects of hostilities unless and for such time as they directly participate in hostilities. It concludes with a separate section reflecting on the status of private contractors and civilian employees of a party to an armed conflict (III). The second chapter (C) determines the basic concept (IV), as well as the substantive (V) and temporal (VI) scope of the notion of "direct participation in hostilities", focusing in particular on the constitutive elements of concrete acts amounting to "direct participation in hostilities". The third chapter (D) addresses the specific modalities which govern the suspension of civilian protection against the effects of hostilities. In doing so, this chapter discusses the temporal scope of the loss of protection (VII), the precautions and presumptions to be applied in situations of doubt (VIII), the practical relevance of the principles of military necessity and of humanity for the lawfulness of direct attacks against civilians directly participating in hostilities (IX) and the basic consequences of regaining civilian protection (X).

B. Personal Scope: The Concept of "Civilian"

For the purposes of the conduct of hostilities in both international and non-international armed conflict, the primary significance of the definition of "civilian" is that it determines the circle of persons who enjoy immunity from direct attack unless and for such time as they directly participate in hostilities.¹ As a general tendency, the wider the category of "civilian" is conceived, the wider the interpretation given to the notion of "direct participation in hostilities" is likely to be. For example, if the category of civilian includes only persons who either do not directly participate in hostilities at all, or who do so only on a spontaneous, unorganized or sporadic basis, the notion of "direct participation in hostilities" does not have to be extended beyond the execution of specific acts meeting certain criteria. On the other hand, if all organized armed actors not formally incorporated into the regular armed forces of a state are regarded as civilians who may be directly attacked only for such time as they "directly participate in hostilities", the notion of "direct participation in hostilities" must be conceptually adapted to regulate military confrontations of a scope and intensity which cannot be compared to spontaneous, unorganized or merely sporadic acts of civilian violence. Before interpreting the notion of "direct participation in hostilities" itself, it is therefore necessary to clarify the contours of the concept of "civilian" under IHL applicable in both international and non-international armed conflict.

I. The Concept of "Civilian" in International Armed Conflict

In *international* armed conflict, all persons who are neither members of an organized armed force, group or unit under a command responsible to a party to the conflict, nor participants in a *levée en masse*, are "civilians" entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.

¹ Articles 51 [3] AP I; Article 13 [3] AP II; Rule 6 of the ICRC's Customary Law Study (CLS). Where IHL provides persons other than "civilians" with immunity from direct attack, the loss and eventual restoration of that protection is governed by criteria similar to, but not identical with, "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] (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). While civilians can be directly attacked only "for such time as" they directly participate in hostilities, it is not clear whether the corresponding conduct of persons other than civilians merely suspends or permanently terminates immunity against direct attack.

Mutual exclusivity of the concepts of “civilian”, “armed forces” and “levée en masse”:

According to Additional Protocol I (AP I),² civilians in international armed conflict are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.³ While treaty IHL predating Additional Protocol I provides little express guidance as to the definition of “civilian”, the terminology used in the Hague Regulations (H IV R) and the Geneva Conventions (GC I to IV) nevertheless suggests that the concepts of “civilian” on the one hand, and “armed forces”, as well as participants in a *levée en masse* on the other, are mutually exclusive.⁴ Therefore, under all instruments governing international armed conflict, the potential scope of the concept of “civilian” is negatively delimited by the definitions of “armed forces” and of “*levée en masse*”.

Basic concepts of “civilian”, “armed forces” and “levée en masse”: As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.⁵ With regard to the armed forces of the parties to the conflict, there is less unanimity. Although all relevant instruments recognize that the armed forces of the

² As of 1 October 2006, 166 states were party to AP I. At the same time, 194 states were party to GC I to IV.

³ Article 50 [1] AP I. According to Rule 5 CLS, this definition of “civilian” reflects customary IHL in international armed conflict. The categories covered by Article 4 A [1], [2] and [3] GC III are presumably already included in the general definition of “armed forces” under in Article 43 [1] AP I. See also Commentary Article 50 AP I, §§ 1916 f.

⁴ For example, Article 22 [2] of the Brussels Declaration (1874) and Article 29 H IV R (1907) refer to “civilians” in contradistinction to “soldiers”. Similarly, as their titles suggest, the Geneva Conventions (1949) use the generic category of “civilian persons” (GC IV) as complementary to members of the “armed forces” (GC I and GC II). Even though the scope of application of each convention does not exactly correspond to the generic categories mentioned in their respective titles, the categories of “civilian” and “armed forces” are clearly used as mutually exclusive in all four conventions. For example, GC I, GC II and GC IV refer to “civilian” wounded, sick and shipwrecked (Article 22 [5] GC I; Article 35 [4] GC II; Articles 20, 21, 22 GC IV) as opposed to the generic categories protected by GC I and GC II, namely the wounded, sick and shipwrecked of the “armed forces” (titles GC I and GC II). Similarly, Article 57 GC IV refers to “military” wounded and sick as opposed to the generic category protected by GC IV, namely “civilian persons”. Other provisions of the conventions also use the term “civilian” as opposed to “military” (Article 30 [2] GC III: “military or civilian medical unit”; Article 32 GC IV: “civilian or military agents”; Article 144 [1] GC IV: “military and civil instruction”; Article 93 [2] GC III: “civilian clothing”, presumably as opposed to military uniform; Articles 18, 19, 20, 57 GC IV: “civilian hospitals”, presumably as opposed to military hospitals; Article 144 [2] GC IV: “civilian, military, police or other authorities”) or to “combatants and non-combatants” (Article 15 GC IV). Affirmative of the mutual exclusivity between “civilians” and “armed forces” also Commentary Article 50 AP I, § 1914.

⁵ Article 2 H IV R; Article 4 [6] GC III. See also the reference to Article 4 [6] GC III in Article 50 [1] AP I.

parties to the conflict may consist of combatants and non-combatants,⁶ the Hague Regulations and the Geneva Conventions are based on a narrower concept of “armed forces” than Additional Protocol I. More precisely, beyond the armed forces of a party to the conflict as recognized under domestic law, the concept of “armed forces” underlying the Hague Regulations and the Geneva Conventions includes only those “other” militias and volunteer corps which fulfill what are known as the “four requirements” of (a) responsible command; (b) fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) operating in accordance with the laws and customs of war.⁷ Conversely, according to AP I, the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.⁸ The essential difference is that, under AP I, respect for the laws and customs of war, the carrying of distinctive signs and the open carrying of arms remain legal obligations, but are not constitutive elements of “armed forces”.⁹ Therefore, under AP I, armed actors can only be regarded as “civilians”, where they do not operate in support of a party to the conflict, or where they do so on a merely spontaneous, unorganized or sporadic manner without qualifying as a *levée en masse*.

Significance of “belonging to” a party to the conflict: Under treaty law predating Additional Protocol I, members of militia and volunteer corps failing to fulfill one or more of the “four requirements” or to “belong to”¹⁰ a party to the conflict are neither entitled to combatant privilege, nor to POW-status. Regardless of what their status upon capture might be (an issue that is outside the scope of the present document),¹¹ it does not follow from the terms of the Hague Regulations and the Geneva Conventions that any such person would necessarily have to be regarded as a “civilian” during the conduct of hostilities. As long as

⁶ Article 3 H IV R; Article 43 [2] AP I; Articles 24 f. GC I; Articles 36 f. GC II; Article 15 GC IV.

⁷ Article 1 H IV R; Articles 13 [1], [2], [3] and [6] GC I and GC II; Article 4 A [1], [2], [3] and [6] GC III.

⁸ Article 43 [1] AP I; Rule 4 CLS.

⁹ A legal obligation, but not a constitutive element, is also the duty to notify the incorporation of paramilitary or armed law enforcement agencies into the armed forces (Article 43 [3] AP I).

¹⁰ The concept of “belonging to” denotes a *de facto* relationship between an armed force and a party to the conflict, which may be officially declared, but may also be expressed through tacit agreement or conclusive behavior. According to Commentary Article 4 GC III, p. 57, “[i]t is essential that there should be a ‘de facto’ relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power. These different cases are based on the experience of the Second World War, and the authors of the Convention wished to make specific provision to cover them”.

¹¹ In the ICRC's view, in international armed conflict, any person failing to qualify for POW-status under Article 4 GC III would remain a “protected person” within the meaning of GC IV subject the nationality requirements of Article 4 GC IV.

armed forces, groups or units “belong to” a party to the conflict and show a minimum of organization, they remain a functional part of the conduct of hostilities between the opposing parties to the conflict and, therefore, should not be regarded as part of the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly or to conduct their operations in accordance with the laws and customs of war. In essence, the resulting concept of “civilian” corresponds to that adopted in Additional Protocol I.¹² Conversely, groups engaging in organized armed violence against a party to an international armed conflict without “belonging to” another party to that conflict, such as, for instance, “independent”¹³ resistance groups in an occupied territory, certainly cannot be regarded as members of the armed forces of a party to the conflict, whether under the terms of Additional Protocol I or under those of the Hague Regulations and the Geneva Conventions. Therefore, with respect to the particular international conflict in question, such “independent” armed actors would have to be regarded as “civilians” not only under Additional Protocol I, but also under the Hague Regulations and the Geneva Conventions.¹⁴ This does not exclude the possibility that organized armed actors operating within a context of international armed conflict without having at least a *de facto* relationship to a party to that conflict (“belonging to”) could be regarded as parties to a separate non-international armed conflict, as soon as armed violence reaches the threshold of intensity or continuity¹⁵ required for the applicability of Article 3 GC I to IV.¹⁶ The question as to the civilian or military

¹² Article 50 [1] AP I excludes from the category of “civilian” not only individuals falling within the scope of Article 4 [1], [2], [3] and [6] GC III, but also those falling within the scope of Article 43 AP I.

¹³ For the purposes of this document, the term “independent” organized armed groups denotes groups not “belonging to” a party to the conflict within the meaning of Article 4 A. [2] GC III.

¹⁴ To do otherwise would blur the basic dichotomy made in all armed conflicts between the civilian population and the armed forces *of the parties to the conflict* and would contradict the conception of armed conflicts as collective confrontations not between private individuals, but between the respective parties. The question as to duration for which such organized individuals engaging in “independent” armed violence lose protection against direct attack depends on how widely or narrowly the notion of direct participation in hostilities is interpreted (see below, heading IV, pp. 22 f.).

¹⁵ According to the ICTY, the decisive criterion for the qualification of a situation as a non-international armed conflict is the existence of “protracted armed violence” (ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-A, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70), whereas “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” do not reach the required threshold (Article 1 [2] AP II).

¹⁶ During the 2005 Expert Meeting, it was pointed out that, in the absence of a nexus to already existing hostilities, violence used by civilians could only constitute direct participation in hostilities if it reached the threshold of intensity required for a non-international armed conflict (Report DPH 2005, p. 10). See also Commentary Article 4 GC III, p. 57: “Resistance movements must be fighting on behalf of a ‘Party to the conflict’ in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a ‘Party to the conflict’”. The *travaux préparatoires* are silent on the possible parallel existence of an international and a non-international armed conflict. In the ICRC’s view, where GC IV is simultaneously applicable with Article 3 GC I to IV (e.g. “independent” resistance movements in occupied territory), captured members of groups party to a separate non-international armed conflict are protected cumulatively under both Article 3 GC I to IV and GC IV. This conclusion follows from the

categorization of the involved individuals would then have to be determined by reference to IHL governing the conduct of hostilities in non-international armed conflict.¹⁷

Resulting concept of “civilian” in international armed conflict: As far as situations of international armed conflict are concerned, the decisive criterion for the qualification of an armed actor as a “civilian” is that of neither being organized under a command responsible to a party to the international armed conflict nor participating in a *levée en masse*. This generic interpretation of the concept of “civilian” corresponds to the definition of “civilian” adopted in Additional Protocol I. In conclusion, for the purposes of the conduct of hostilities in international armed conflict, all persons who are neither members of an organized armed force, group or unit under a command responsible to a party to the conflict, nor participants in a *levée en masse*, are “civilians” entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.¹⁸

II. The Concept of "Civilian" in Non-International Armed Conflict

In *non-international* armed conflict, all persons who are not members of state armed forces and who do not assume permanent combatant function for a party to the conflict are “civilians” entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.

Mutual exclusivity of the concepts of “civilians” and “armed forces”: Although treaty IHL governing non-international armed conflict does not define the term “civilian”, both state

fact that GC IV extends protection to all individuals who, "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals" and does not permit exceptions beyond those enumerated in Article 4 GC IV. Moreover, Article 8 GC IV establishes that "protected persons may in no circumstances renounce in part or in entirety the rights secured to them" by GC IV, that is to say, not even by becoming a party to a non-international armed conflict.

¹⁷ See below, heading IV, pp. 11 f. Below the threshold of intensity or continuity required for a non-international armed conflict, such organized armed actors may represent pirates, gangsters or other criminal organizations and must be dealt with according to law enforcement standards.

¹⁸ The ICTY defined the notion of “civilians” for situations of international armed conflict as “persons who are not, or no longer, members of the armed forces” (ICTY, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment of 3 March 2000, § 180). Outside the conduct of hostilities, civilians may benefit from the protection of the Third or Fourth Geneva Convention, the First Additional Protocol and customary IHL, depending on the circumstances of each case (Article 4 [4] and [5] GC III; Article 4 [1] to [4] GC IV; Article 75 AP I).

practice and the terminology used in Article 3 GC I to IV and Additional Protocol II (AP II) reveal that “civilians” and the “armed forces” of the parties to the conflict are mutually exclusive concepts also in non-international armed conflict.¹⁹ Article 3 GC I to IV provides that “each Party to the conflict” shall afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”.²⁰ Thus, both state and non-state parties to non-international armed conflicts have “armed forces”, which presumably are distinct from the civilian population.²¹ This passage also clarifies that members of such armed forces, in contradistinction to other persons, are considered as “taking no active part in the hostilities” only once they disengage from their function or are placed *hors de combat* - mere suspension of combat is insufficient. In very general terms, Article 3 GC I to IV can be said to imply a concept of “civilian” comprising essentially those persons “who do not bear arms” on behalf of a party to the conflict.²² While Additional Protocol II has a significantly narrower scope of application and uses a different terminology than Article 3 GC I to IV, the generic categorization of persons is the same in both instruments.²³ During the Diplomatic Conference of 1974 to 1977, draft Article 25 [1] AP II defined the notion of “civilian” as including “anyone who is not a member of the armed forces or of an organized armed group”.²⁴ Although this article was subsequently discarded along with almost all other provisions relating to the conduct of hostilities in a last minute effort to “simplify” the Protocol, the proposed concept of “civilian” remains reflected in the final text. Thus, according to the Protocol, “armed forces”, “dissident armed forces” and “other organized armed groups” have the function and ability “to carry out sustained and concerted military operations”,²⁵ whereas the “civilian population and individual

¹⁹ State practice in situations of non-international armed conflict confirms that members of state armed forces are not considered to be civilians (CLS, Commentary Rule 5, Vol. I, p.19).

²⁰ Article 3 GC I to IV (emphasis added).

²¹ See Commentary Article 3 GC III, p. 37: “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ - conflicts, in short, which are in many respects similar to an international war [...]”. See also: Commentary Article 3 GC II, p. 33; Commentary Article 3 GC IV, p. 36; Report DPH 2005, pp. 43 f.

²² See also Commentary Article 3 GC IV, p. 40: “As we have already mentioned, Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians - that is to people who do not bear arms” (emphasis added).

²³ For the high threshold of application of AP II, see Article 1 [1] AP II.

²⁴ Article 25 [1] of Draft AP II was adopted by consensus in the Third Committee on 4 April 1975 (O.R., Vol. XV, p. 320, CDDH/215/Rev.1). See also the ICRC’s Commentary (October 1973) on the original version of Article 25 [1] of the Draft of AP II submitted to the Diplomatic Conference of 1974 to 1977: “[...] sont considérés comme civils tous les êtres humains qui se trouvent sur le territoire d’une Partie contractante où se déroule un conflit armé au sens de l’article premier et qui ne font pas partie des forces armées ou groupes armés” [emphasis added].

²⁵ Article 1 [1] AP II.

civilians shall enjoy general protection against the dangers arising from military operations” carried out by these forces “unless and for such time as they take a direct part in hostilities”.²⁶

Basic concepts of “armed forces” and “civilians”: Under Additional Protocol II, the notion of “armed forces” is restricted to governmental (i.e. state) armed forces, whereas the armed forces of non-state parties are referred to as “dissident armed forces” or other “organized armed groups”. Accordingly, the notion of “armed forces” in Article 3 GC I to IV includes all three categories juxtaposed in Article 1 [1] AP II, namely “armed forces”, “dissident armed forces” and “organized armed groups” under responsible command.²⁷ In principle, therefore, the concept of “civilian” in non-international armed conflict comprises anyone who is not a member of the armed forces of a party to the conflict (Article 3 GC I to IV) or, expressed in the terminology of AP II, who is not a member of the armed forces, dissident armed forces or other organized armed group of a party to the conflict. Similar to situations of international armed conflict, the concrete scope of the notion of civilian in non-international armed conflict is negatively delimited by the definitions given to the concepts of “armed forces” and, respectively, of “organized armed groups” (including “dissident armed forces”).

Governmental armed forces: As far as governmental armed forces are concerned, there is no reason to assume that states parties to both Additional Protocols desired distinct definitions for situations of international and non-international armed conflict. As the *travaux préparatoires* to Additional Protocol II indicate, the notion of “armed forces” of a High Contracting Party in Article 1 [1] AP II was intended to be broad and functional enough to include armed actors which do not necessarily qualify as “armed forces” under domestic law, such as members of the national guard, customs, police forces or any similar force, provided that they do, in fact, assume the function of armed forces for the state party to the conflict.²⁸ In other words, comparable to the functional notion of “armed forces” adopted in Additional Protocol I, the concept of governmental armed forces underlying Additional Protocol II includes not only the armed forces as constituted under domestic law, but also other armed

²⁶ Article 13 [1] and [3] AP I. See also the respective contexts in which the Protocol refers to “civilians” (Articles 13, 14, 17 AP II) and the “civilian population” (title Part IV AP II; Articles 5 [1] (b) and (e), 13, 14, 15, 17 and 18 AP II).

²⁷ Article 25 [1] of Draft AP II.

²⁸ See Commentary Article 1 AP II, § 4462: “The term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, ‘regular armed forces’, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)”, referring to O.R., Vol. X, p. 94, CDDH/I/238/Rev. 1. See also the reference to direct attacks against police forces in Report DPH 2005, p. 11

groups or units that are in fact organized under a command responsible to the involved state.²⁹

Organized armed groups: The greatest difficulty arises with regard to the definition of the armed forces of non-state parties to the conflict, particularly of “organized armed groups” other than dissident armed forces.³⁰ The concept of governmental armed forces, at least as far as “regular” armed forces are concerned, is generally based on formal “membership” in permanent uniformed units. In principle, for the purposes of the conduct of hostilities, all members of such units (except medical and religious personnel and those *hors de combat*) are legitimate military objectives. This generalized membership approach cannot be transposed to organized armed groups, where “membership” is rarely based on a formal act of integration and is not, or not consistently, expressed through uniforms, fixed distinctive signs and identification cards or disks. In view of the wide variety of cultural, political and military contexts in which organized armed groups operate, “membership” in such groups 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.³¹ In practice, the informal and often clandestine structures of most organized armed groups make it impossible to distinguish between “non-combatant members” and “civilians” accompanying or otherwise supporting such groups.³²

If any members of organized armed groups can be identified with some measure of reliability, it is those assuming combatant function, that is to say, those who assume a permanent role within an organized armed group, which involves their direct participation in hostilities on a regular basis (“combatant members”).³³ Such combatant function cannot be assumed on a

²⁹ See also Bothe et al., *New Rules for Victims of Armed Conflicts*, p. 672, holding that the terms “organized” and “under responsible command” in Article 1 [1] AP II “inferentially [...] recognize the essential conditions prescribed under art. 43 of Protocol I: that the armed force be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command”.

³⁰ The notion of “dissident armed forces” simply refers to part of the state armed forces, which have become a non-state party to the conflict by turning against the government (Commentary Article 1 AP II, § 4460).

³¹ BP 2005 Armed Groups (IV-V), p. 15.

³² Depending on the concrete circumstances, both categories of persons may include, for example, cooks, secretaries, administrative, medical and religious personnel, as well as representatives and supporters of the group's political wing.

³³ “Combatant membership” in an organized armed group denotes the *de facto* assumption of “combatant function” during the conduct of hostilities and does not suggest, and must not be confused with, *de jure* entitlement to “combatant privilege”. While persons assuming combatant function for a party to the conflict are not necessarily entitled to combatant privilege, not all persons entitled to combatant privilege necessarily assume actual combatant function. More precisely, formal combatant privilege, that is to say, the “right” to directly participate in hostilities with immunity from domestic prosecution, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse*

spontaneous, unorganized or sporadic basis, but requires the permanent integration of the concerned individual into an organized force, group or unit under a command responsible to a party to the conflict. Additionally, the function assumed by the concerned individual must be objectively designed to involve the execution of specific acts amounting to "direct participation in hostilities" on a regular basis.³⁴ Depending on the circumstances, combatant function may be openly expressed through the carrying of uniforms, distinctive signs or weapons, but may also be identified based on conclusive behavior, namely where a person repeatedly takes a direct part in hostilities on behalf of an organized armed group in circumstances indicating that such conduct constitutes a permanent function rather than a spontaneous, sporadic, exceptional or otherwise temporary role assumed, for example, for the duration of a particular operation.

Resulting concept of "civilian" in non-international armed conflict: In the final analysis, if erroneous and arbitrary use of force against peaceful civilians is to be avoided in operational practice, the distinction between non-state "armed forces" (Article 3 GC I to IV) or "organized armed groups" (Article 1 [1] AP II) on the one hand, and "civilians" or the "civilian population" on the other cannot be based on an abstract notion of "membership", which vaguely indicates that a person supports or belongs to a group involved in the conduct of hostilities.³⁵ Instead, these concepts should be restricted to persons who are, in fact, assuming "combatant function" for a non-state party to the conflict.³⁶ Strictly speaking, the notion of "organized armed group" should therefore not be equated with a "party" to the

(Articles 1 and 2 H IV R; Article 43 [1] AP I). Although all privileged combatants may have a "right" to directly participate in hostilities, they do not necessarily have a "function" requiring them to do so (e.g. cooks, administrative personnel). Conversely, individuals who, in fact, assume combatant function outside the privileged categories of persons (e.g. mercenaries), as well as in non-international armed conflict, are not entitled to combatant privilege under IHL.

³⁴ See also the extensive discussion on the practical problems related to a general "membership approach" in Report DPH 2005, pp. 53 ff.

³⁵ During the Expert Meetings, the so-called "membership approach", which would permit direct attacks against all members of non-state armed groups at all times, regardless of their individual function within the group, was generally regarded as unacceptable (Report DPH 2005, pp. 49, 63 ff.). However, there also was virtually unanimous agreement that members of the fighting forces of non-state parties to a conflict should not be protected according to the same conditions and modalities as civilians directly participating in hostilities on an unorganized, sporadic or spontaneous basis (Report DPH 2005, pp. 43 f., 48, 49).

³⁶ During the Expert Meetings, the general tendency was to follow a "functional approach", according to which persons cease to be "civilians" within the meaning of IHL for as long as they assume the equivalent of *combatant function* on behalf of a non-state party to a non-international armed conflict (Report DPH 2005, pp. 43, 44, 49, 63 and, as a whole, Expert Paper (2004) by Prof. M. Bothe). It was therefore held that *combatant members* of non-state armed groups can be directly attacked according to the same rules and principles as members of state armed forces, that is to say, essentially at any time and regardless of their personal conduct at the time of the attack (Report DPH 2005, pp. 43 f., 48 ff., 49, 63 ff., 82 f.). Arguably, where armed groups or units belong to a state party to the conflict, but are not organized based on uniformed or otherwise objectively recognizable membership comparable to that of regular armed forces, they should also be subject to the functional approach.

conflict, but should be restricted to organized armed actors assuming "combatant function" for that party as opposed, for example, to the political wing or other non-combatant members of an insurgency.³⁷ In this context, "combatant function" denotes the assumption of a permanent role within an organized armed force, group or unit under command responsible to a party to the conflict, evidenced by concrete and objectively verifiable facts, which requires the concerned person to engage in acts amounting to direct participation in hostilities on a regular basis.³⁸ In conclusion, for the purposes of the conduct of hostilities in non-international armed conflict, all persons who are not members of governmental or dissident armed forces and who do not assume permanent combatant function for a party to the conflict, are "civilians" entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.

Alternative approach - combatant function as "continuous" direct participation in hostilities:³⁹ The exclusion of organized armed actors from the category of "civilian" entails that they do not benefit from civilian protection against the effects of hostilities and, in principle, remain exposed to direct attack at all times.⁴⁰ Arguably, from a theoretical perspective, the same result could also be achieved by extending the notion of "direct participation in hostilities" beyond specific acts. More precisely, by interpreting the permanent assumption of combatant function for a party to the conflict as a *continuous form of "direct participation in hostilities"*, combatant members of organized armed groups would formally remain civilians, without however enjoying the protection afforded to civilians against the effects of hostilities. This approach would create "parties" to non-international armed conflicts, whose entire armed forces are part of the civilian population. This not only contradicts the wording and logic of Article 3 GC I to IV and Additional Protocol II, but more generally discards the conceptual distinction made by IHL between the civilian population and the armed forces of the respective parties to a conflict. According to this approach, some civilians (i.e. those without combatant function) would regain protection against direct attack between specific acts amounting to "direct participation in hostilities", while other civilians (i.e.

³⁷ Although Article 1 AP II refers to armed conflicts between governmental armed forces and dissident armed forces or other organized armed groups, the actual "parties" to such a conflict are, of course, the involved High Contracting Party and the opposing non-state party (and not their respective combatant forces).

³⁸ During the Expert Meetings, the category of "combatant members" of non-state armed groups was held to include all individuals who permanently assume a function within such a group, which includes regular direct participation in hostilities on behalf of a party to a non-international armed conflict (Report DPH 2005, pp. 49, 64 f., 82).

³⁹ The concept of "continuous" direct participation in hostilities as compared to the so-called "specific-acts" approach is further discussed below, heading IV, pp. 22 ff.

⁴⁰ Of course, apart from the principle of distinction, the lawfulness of direct attacks also depends on compliance with other rules on the conduct of hostilities.

those with combatant function) would be subject to direct attack on a continuous basis and based on a very different concept of "direct participation in hostilities" - a situation and terminology, which is likely to invite confusion, uncertainty and arbitrariness as to the applicable standards in concrete cases.⁴¹ Overall, it therefore seems more convincing to hold that members of organized armed groups cease to be civilians for as long as they assume combatant function for a party to the conflict.⁴²

III. Private Contractors and Civilian Employees

Private contractors and civilian employees of a party to an armed conflict who qualify as "civilians" under the applicable rules of international humanitarian law are entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.

General observations: In the past decade, parties to both international and non-international armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions that were traditionally performed by military personnel. Generally speaking, whether private contractors and civilian employees remain "civilians" and whether they "directly participate in hostilities" depends on the same criteria as would apply to any other civilian described in the preceding sections.⁴³ However, the special role of such personnel requires that these determinations be made with particular care and with due

⁴¹ Although this approach was mentioned during the Expert Meetings (BP DPH 2004, p. 36; BP DPH 2005, WS IV-V, p. 10; Report DPH 2005, pp. 44, 48), it received only feeble support and was criticized as blurring the distinction made by IHL between "conduct" and "status" as a basis for targeting decisions. It was emphasized that only combatants could be attacked based on the collective criterion of their "status", whereas direct attacks against civilians must always be based on their individual "conduct" at the time of the attack (Report DPH 2005, p. 50).

⁴² As has been shown, this approach corresponds to the prevailing opinion of the participants in the Expert Meetings, to the conclusions reached in the Expert Paper of Professor Michael Bothe (2004 Expert Meeting), and is also in line with the text and logic of Article 3 GC I to IV, Articles 1 and 13 AP II and Draft Article 25 [1] AP II. Finally, the Commentary to Article 13 AP II clearly applies distinct standards to "armed forces or armed groups" and "civilians" when it states: "Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian" (Commentary Article 13 AP II, § 4789).

⁴³ See above, heading I, pp. 7 f. (international armed conflict) and heading II, pp. 11 f. (non-international armed conflict).

consideration for the geographic and organizational closeness of many private contractors and civilian employees to the armed forces and hostilities in general. The great majority of private contractors and civilian employees currently active in contexts of armed conflict certainly cannot be regarded as members of the armed forces of a party to the conflict and assume functions that clearly do not amount to "direct participation in hostilities".⁴⁴ Therefore, as a general rule, private contractors and civilian employees come within the definition of "civilian" and, in international armed conflict, may be entitled to prisoner of war status in the event of capture, provided that they qualify as civilians "accompanying the armed forces" under Article 4 [4] GC III or as civilian crew members of the merchant marine or civil aircraft of a party to the conflict under Article 4 [5] GC III.⁴⁵ Although civilians are entitled to protection against the effects of hostilities, the geographical and organizational closeness of many private contractors and civilian employees to the armed forces and the hostilities may increase the risk of incidental death or injury among such personnel.

International armed conflict: Civilians, including those "accompanying the armed forces" within the meaning of Article 4 [4] GC III and those described in Article 4 [5] GC III, were never meant to directly participate in hostilities on behalf of a party to the conflict.⁴⁶ Private contractors and civilian employees do not cease to be "civilians" simply because they accompany the armed forces or because they assume functions unrelated to the hostilities that would traditionally have been performed by military personnel. Therefore, where they engage in direct participation in hostilities spontaneously, on their own initiative and without the authorization of the state party to the conflict, they remain civilians and lose their protection against direct attacks for such time as their direct participation lasts.⁴⁷ In contradistinction to ordinary civilians, they are entitled to POW-status upon capture but, nevertheless, lack combatant privilege and may be prosecuted and punished under the domestic law of the capturing state for the mere fact of having directly participated in

⁴⁴ This was also the prevailing opinion during the Expert Meetings (Report DPH 2005, p. 74). However, in practice, it may be extremely difficult to determine the civilian or military nature of the activities carried out by private contractors. For example, it may be difficult to distinguish between the defense of military objectives against attacks by the adversary (direct participation in hostilities) and the protection of the same objectives against crime or violence that may be facilitated by the conflict but is not part of the conduct of hostilities (law enforcement). In case of doubt, the general rules on precautions and presumptions should apply (see heading VIII, pp. 43 f.).

⁴⁵ Report DPH 2005, p. 80.

⁴⁶ Of all the categories of persons enumerated in Article 4 [1] to [6] GC III, only those described in Articles 4 [4] and 4 [5] GC III are included in the definition of "civilian" (Article 50 [1] AP I). As such, they are excluded from the categories entitled to combatant status, namely members of the "armed forces" and participants in a levée en masse (Article 43 [1] and [2] AP I; Articles 1 and 2 H IV R) and, therefore, do not have a "right" to directly participate in hostilities on behalf of a party to the conflict with immunity from domestic prosecution.

⁴⁷ Report DPH 2005, p. 82.

hostilities.⁴⁸ A different conclusion must be reached with regard to private contractors and civilian employees who, although not necessarily qualifying as "armed forces" under national law, *de facto* assume a permanent function on behalf of a party to the conflict which involves their direct participation in hostilities on a regular basis. Under IHL governing the conduct of hostilities in international armed conflict, such personnel could be regarded as members of an organized armed force, group or unit under a command responsible to a party to the conflict and, therefore, for the purposes of the principle of distinction, would not qualify as "civilians".⁴⁹ While it is conceivable that private contractors and civilian employees qualify as "mercenaries", the high threshold required under Article 47 AP I entails that corresponding cases are likely to remain rare.⁵⁰

Non-international armed conflict: The observations made with regard to private contractors and civilian employees in situations of international armed conflict apply, *mutatis mutandis*, also to situations of non-international armed conflict. Thus, for the purposes of the principle of distinction in non-international armed conflict, private contractors and civilian employees who are not members of state armed forces and who do not assume permanent combatant function for a party to the conflict must be regarded "civilians" entitled to protection against the effects of hostilities unless and for such time as they directly participate in hostilities.⁵¹

⁴⁸ See below, heading X, pp. 48 f.

⁴⁹ During the Expert Meetings, there was some divergence of opinion as to whether private contractors and civilian employees who are expressly or tacitly authorized by a state to directly participate in hostilities on its behalf could remain civilians subject to the rule on direct participation in hostilities or whether they would have to be regarded as members of that state's armed forces (Report DPH 2003, pp. 4 f.; Report DPH 2004, pp. 11 ff.; Report DPH 2005, pp. 74 ff. and 80 f.; BP DPH 2005, WS VIII-IX, p. 17). A few experts contended that membership in state armed forces was regulated primarily in domestic law and required a formal act of incorporation (Report DPH 2004, p. 11; Expert Paper, Prof. M. Schmitt (2004), pp. 8 ff.; Report DPH 2005, p. 80). However, the prevailing view was that, for the purposes of the conduct of hostilities, private contractors authorized by a state to take a direct part in hostilities on its behalf would have to be regarded as members of its armed forces within the meaning of IHL (Report DPH 2005, pp. 75 ff. and 80 f.; Report DPH 2004, pp. 12, 14). It was also pointed out that, the definitions of "armed forces" under IHL and in the respective domestic legislations were not necessarily identical and did not necessarily have the same purpose (Report DPH 2005, p. 75). Moreover, it was noted that, traditionally, direct participation in hostilities with the authority of a state has always been regarded as a legitimate part of "public war" and exempt from domestic prosecution. This was illustrated not only by the modern combatant privilege, but already by the historical *Letters of Marque and Reprisal* issued by states before the abolition of privateering in the Declaration of Paris in 1856 (Report DPH 2005, p. 76; BP DPH 2005, WS VIII-IX, p. 17).

⁵⁰ Report DPH 2005, pp. 79 ff.

⁵¹ On the concept of "civilian" under IHL governing non-international armed conflict, see above, pp. 11 ff. With regard to the factual notion of "combatant function", see above, FN 36-38 and accompanying text. During the Expert Meetings, it was held that, in determining whether private contractors were fighting on behalf of an organized armed group, a similar test could be used to that applicable to states under the law of state responsibility. If private contractors directly participated in hostilities and if, in doing so, they acted "on the instructions" and "under the direction or control" of an organized armed group, then they could be regarded as conducting hostilities on behalf of that group (Report DPH

Conclusion: Whether private contractors and civilian employees remain “civilians” and whether they “directly participate in hostilities” depends on the general criteria established by IHL governing international and non-international armed conflict. However, the geographic and organizational closeness of such personnel to the armed forces and to the hostilities in general require that such determination be made with particular care. The qualification of private contractors and civilian employees as “civilians”, members of the “armed forces” or of “organized armed groups” within the meaning of IHL does not exclude that domestic law might regulate their status differently for purposes other than the conduct of hostilities.⁵² Private contractors and civilian employees who remain civilians benefit from protection against the effects of hostilities unless and for such time as they directly participate in hostilities.

2005, pp. 81 f.). There also appeared to be general agreement that, in principle and despite their predominantly financial motivation, a private military company could not only constitute an “organized armed group”, but also an independent “party” to a non-international armed conflict (Report DPH 2005, pp. 81 f.).

⁵² The purpose of the distinction between “civilians” and members of the “armed forces” is not necessarily identical under domestic and international law. Depending on the applicable national legislation, membership in the armed forces may have varying administrative, disciplinary, jurisdictional and other consequences, which are irrelevant for the implementation of the principle of distinction in the conduct of hostilities. Conversely, under IHL, the primary consequences of membership in the armed forces are the exclusion from the category of “civilian” and, in international armed conflict, the “right” to directly participate in hostilities on behalf of a party to the conflict (combatant privilege). Therefore, the definitions of “armed forces” and “civilians” under the various domestic legislations are unlikely to be identical or to completely match the corresponding IHL concepts. Where these notions are defined for the purpose of the conduct of hostilities, the relevant normative framework must be IHL.

C. Substantive Scope: "Direct Participation in Hostilities"

International treaty law provides no express definition of "direct participation in hostilities", nor can a clear interpretation of the notion be derived from state practice or international jurisprudence. The meaning of the notion of "direct participation in hostilities" must therefore be determined in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the notion within IHL.⁵³ Where international treaty law refers to the notion of "hostilities", it is intrinsically linked to situations of war and, today, international or non-international armed conflict.⁵⁴ Therefore, the concept of "direct participation in hostilities" cannot refer to conduct occurring outside situations of international or non-international armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature.⁵⁵ Moreover, even in situations of armed conflict, not all conduct necessarily constitutes part of the hostilities.⁵⁶ It is the purpose of the present chapter to identify the elements and criteria that determine the substantive scope of conduct amounting to direct participation in hostilities.

⁵³ Article 31 [1] Vienna Treaty Convention.

⁵⁴ The notion of "hostilities" is frequently used in treaties regulating situations of "war" and, more recently, situations of international and non-international "armed conflicts", for example in the following contexts: "opening of hostilities", "conduct of hostilities", "acts of hostility", persons "(not) taking part in hostilities", "effects of hostilities", "suspension of hostilities", "end of hostilities". See, *inter alia*, H III: Title and Article 1; H IV R: Title section II; GC I to IV: Article 3 [1]; GC I: Article 17; GC II: Article 33; GC III: Title section II and Articles 21 [3], 67, 118, 119; GC IV: Articles 49 [2], 130, 133, 134, 135; AP I: Articles 33, 34, 40, 43 [2], 45, 47, 51 [3], 59, 60 and title part IV, section I; AP II: Articles 4 and 13 [3]; ERW Protocol: Articles 3 [1] to [3] and 4.

⁵⁵ According to Article 1 [2] AP II, such situations do not constitute "armed conflicts".

⁵⁶ This is illustrated by the fact that a situation of "armed conflict" within the meaning of Article 2 GC I to IV can be created without the occurrence of hostilities, for example through a declaration of war or the occupation of territory without armed resistance. Furthermore, considerable parts of the law of armed conflict deal with issues other than the conduct of hostilities: only one of three sections of the Hague Regulations on the laws and customs of war and only two of seven substantive sections of the First Additional Protocol are specifically concerned with the regulation of the conduct of hostilities. See Titles of Section II H. IV R. (Hostilities); Part III Section I AP I (Methods and Means of Warfare) and Part IV Section I AP I (General Protection against Effects of Hostilities). See also Report DPH 2005, pp. 13, 18 f.

IV. Direct Participation in Hostilities as a Specific Act

The notion of “direct participation in hostilities” refers to specific acts carried out by individuals in relation to the conduct of hostilities between parties to an armed conflict.

From a conceptual perspective, the composite term "direct participation in hostilities" consists of two elements, namely that of "hostilities" and that of "direct participation" therein.⁵⁷ While the concept of “hostilities” refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,⁵⁸ the concept of “participation in” hostilities refers to the (individual) involvement of a particular person in the hostilities.⁵⁹ Depending on the quality and degree of individual involvement, a person’s participation in hostilities may be described as either “direct” or “indirect”. The notion of "direct participation in hostilities" has evolved from the phrase "taking no active part in the hostilities" used in Article 3 GC I to IV.⁶⁰ Today, the terms of "direct" and "active" participation in hostilities can be regarded as describing the same quality and degree of individual participation in hostilities in both international and non-international armed conflict.⁶¹

⁵⁷ Report DPH 2005, p. 17; BP DPH 2005, WS II-III, p. 2.

⁵⁸ See Articles 22 H IV R (Section II on “Hostilities”) and Article 35 [1] AP I (Section I on “Methods and Means of Warfare”). Conventional law does not establish uniform terminology for conduct governed by the law of hostilities but speaks, apart from “hostilities”, also of "warfare" (Title Part III, Section I AP I on "Methods and Means of Warfare"), "military operations" (Article 53 GC IV; Article 51 [1] AP I; Article 13 [1] AP II), or simply "operations" (Article 48 AP I).

⁵⁹ See Article 43 [2] AP I, Article 45 [1] and [3] AP I, Article 51 [3] AP I, Article 67 [1] (e) AP I, Article 13 [3] AP II.

⁶⁰ The variations in the wording used in the individual treaty provisions are of a purely semantic nature and do not indicate any difference in substance. See Article 51 [3] AP I and Article 13 [3] AP II (“take a direct part in hostilities”); Article 43 [2] AP I and Article 67 [1] (e) AP I (“participate directly in hostilities”).

⁶¹ Concerning the terms "direct" and "active", the International Criminal Tribunal for Rwanda (ICTR) concluded: “these phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous” (ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, decision of 2 September 1998, § 629). It may be argued that the Preparatory Committee for the Establishment of an International Criminal Court implied a certain distinction between these notions in the specific context of the recruitment of children when it asserted that: “The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat”. Nevertheless, during the Expert Meetings, the notions of "active" and "direct" were generally regarded as synonymous. One expert suggested that the term “active” was preferable to the term “direct”, because it made more clear that, where a civilian in question did not actively carry out the act in question, the qualification of his or her conduct as direct participation in hostilities became a matter of mere intention, such as an attempt or a plan, which cannot be sufficient to entail loss of civilian immunity against direct attack (Report DPH 2005, p. 29). Other experts preferred the term “direct”, most notably because it corresponds to the express wording of Article 51 [3] AP I and Article 13 [3] AP II (Report DPH 2005, p. 29). Most experts also agreed that the legal criteria for the qualification of an act as direct participation in hostilities are the same in international

From a practical perspective, the concepts of “hostilities” and of “direct participation” therein cannot be dissociated, i.e. the collective concept of “hostilities” corresponds to the sum total of all “hostile acts” carried out by individuals “directly participating” in hostilities.⁶² Hence, “direct participation in hostilities” does not refer to the abstract affiliation of an individual to a party to the conflict or its armed forces, but corresponds to concrete acts carried out by individuals in relation to ongoing military confrontations between the involved parties. In treaty IHL, individual conduct constituting part of the “hostilities” is described as “direct participation in hostilities”, regardless of whether the acting individual is a civilian or a combatant.⁶³ Thus, whether individuals directly participate in hostilities on a merely spontaneous, unorganized or sporadic basis or whether they do so as part of a permanent function within an organized armed force or group may be decisive for the question of whether they are “civilians”, but has no influence on the concrete scope of conduct which qualifies as “direct participation in hostilities”. In other words, whether or not individuals may be directly attacked on a continuous basis or only for such time as they carry out concrete acts amounting to direct participation in hostilities depends on their qualification as “civilians”

and non-international armed conflict (BP DPH 2004, p. 30; Report DPH 2004, pp. 15 ff.; Report DPH 2005, p. 13). As the notion of “direct participation in hostilities” is used synonymously in treaty law applicable in international and non-international armed conflict, there is no reason to assume that it should be interpreted differently in each context. This does not exclude that some of the consequences, particularly with regard to immunity from prosecution for having directly participated in hostilities, may be regulated differently for the various categories of persons involved in international and non-international armed conflicts.

⁶² Thus, for the present purposes, the notion of “hostile act” refers to a specific act qualifying as direct participation in hostilities. See, for example, Commentary Article 51 AP I, § 1943: “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”. Verri, *Dictionary LOAC*, p. 57, defines hostilities as: “acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience”, and Salmon, *Dictionnaire de droit international public*, p. 550 (hostilités): “Ensemble des actes offensifs ou défensifs et des opérations militaires accomplis par un belligérant dans le cadre d'un conflit armé”. See also the use of “hostile act” in Articles 41 [2] and 42 [2] AP I. During the Expert Meetings, the meaning of the notion of hostilities was discussed extensively. In general terms, it was suggested that the ordinary meaning of the notion of “hostilities” simply implied conduct that was “hostile” and essentially corresponded to the ensemble of hostile acts or all acts harmful to the adversary. The conduct in question had to be directed at the enemy or, at least, had to be related to actions against the enemy. There had to be some sort of an adversary relationship with the enemy. Hostilities included not only defensive or offensive operations, but essentially any armed contact or any armed engagement with opposing troops (Report DPH 2005, p. 22). More concretely, two widely supported proposals interpreted the notion of hostilities to comprise “all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal” or “all military activities directed against the enemy in an armed conflict” (Report DPH 2005, pp. 22 f.). For an overview of the discussion on “hostilities”, see Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 18 ff.

⁶³ Article 43 [2] AP I; Article 51 [3] AP I; Article 13 [3] AP II.

and not on substantively different categories of "direct participation in hostilities".⁶⁴ Consequently, the substantive scope of the notion of "direct participation in hostilities" is restricted to specific acts carried out by individuals and constituting part of the collective hostilities conducted by parties to the conflict.

Alternative approach - combatant function as "continuous" direct participation in hostilities: The viability of equating "direct participation in hostilities" with specific acts ("specific acts" approach) depends on a concept of "civilian" that excludes organized armed actors of a party to the conflict. However, the "specific acts" approach becomes problematic where organized armed actors who *de facto* assume the role of the armed forces of a party to the conflict are regarded as "civilians" and, therefore, must be protected against direct attack unless and for such time as they directly participate in hostilities. In that case, the "specific acts" approach would not allow the conduct of military operations against members of organized armed groups who are not at the time carrying out an act amounting to direct participation in hostilities. In theory, this problem could be resolved by interpreting the permanent assumption of combatant function for a party to the conflict as a *continuous form of "direct participation in hostilities"*. This interpretation would entail that combatant members of organized armed groups would formally remain civilians, without however enjoying the protection afforded to civilians against the effects of hostilities until they disengage from their combatant function.

While this approach would allow combatant members of organized armed groups to be regarded as legitimate military objectives without excluding them from the category of "civilian", it would also create armed actors which conduct organized and coordinated hostilities on behalf of a party to a conflict while remaining part of the civilian population. This not only contradicts the wording and logic of treaty IHL governing both international and non-international armed conflict, but more generally discards the conceptual distinction made by IHL between the civilian population and the armed forces of the respective parties to a conflict. According to this approach, some civilians (i.e. those without combatant function) would regain protection against direct attack between specific acts amounting to "direct participation in hostilities", while other civilians (i.e. those with combatant function) would be subject to direct attack on a continuous basis and based on a very different concept of "direct participation in hostilities" - a situation and terminology, which is likely to invite confusion,

⁶⁴ On the qualification of individuals as "civilians", see above, pp. 7 ff. On the different temporal scopes of the suspension or, respectively, loss of protection depending on whether or not the person directly participating in hostilities is a "civilian", see below, pp. 40 ff.

uncertainty and arbitrariness as to the applicable standards in concrete cases.⁶⁵ Overall, it therefore seems more convincing to hold that, for the purposes of the principle of distinction, persons assuming permanent combatant function for a party to an international or non-international armed conflict cease to be civilians for as long as they assume such function.⁶⁶ This allows restricting the category of "civilian" to persons who do not directly participate in hostilities or do so on a spontaneous, unorganized or sporadic basis. It also allows the notion of "direct participation in hostilities" to be interpreted as referring to concrete acts rather than to the assumption of a function.⁶⁷

V. Constitutive Elements of Direct Participation in Hostilities

In order for a specific act carried out by an individual to qualify as "direct participation in hostilities",

- Ø the act in question must be likely to adversely affect the military operations or military capacity of a party to the conflict or, alternatively, to inflict death, injury or destruction on persons or objects not under the effective control of the acting individual, and**
- Ø there must be a direct causal link between the act in question, or a concrete and coordinated military operation of which it constitutes an integral part, and the aforementioned consequences, and**
- Ø the act in question must be specifically designed to bring about the aforementioned consequences in support of a party to the conflict and to the detriment of another.**

⁶⁵ Although this approach was mentioned during the Expert Meetings (BP DPH 2004, p. 36; BP DPH 2005, WS IV-V, p. 10; Report DPH 2005, pp. 44, 48), it received only feeble support and was criticized as blurring the distinction made by IHL between "conduct" and "status" as a basis for targeting decisions. It was emphasized that only combatants could be attacked based on the collective criterion of their "status", whereas direct attacks against civilians must always be based on their individual "conduct" at the time of the attack (Report DPH 2005, p. 50).

⁶⁶ Conversely, where civilians engage in organized armed violence without supporting one of the parties to the conflict, they can hardly be regarded as "participating" in pre-existing hostilities between the involved parties. It must therefore be determined whether the intensity of violence reaches the threshold which is required for a non-international armed conflict. If answered in the negative, the civilian conduct in question would have to be dealt with according to law enforcement standards.

⁶⁷ Regarding the concept of "continuous" direct participation in hostilities, see also the discussion and references provided above, FN 40-42 and accompanying text.

In analytical terms, specific acts qualifying as "direct participation in hostilities" must meet three cumulative requirements, namely (1) a "threshold requirement" regarding the harm likely to result from the act, (2) a requirement of "causal proximity" between the act and the expected harm, and (3) a requirement of "belligerent nexus" between the act and the hostilities taking place between the parties to the conflict.

1. Threshold of Expected Harm

In order to qualify as "direct participation in hostilities", a specific act carried out by an individual must be likely to adversely affect the military operations or military capacity of a party to the conflict or, alternatively, to inflict death, injury or destruction on persons or objects not under the effective control of the acting individual.

In order for a specific act to qualify as "direct participation in hostilities", the ensuing "harm" must reach a certain threshold.⁶⁸ This threshold can be reached in *qualitative* or *quantitative* terms. In qualitative terms, the required threshold is reached where a specific act results in harm of a specifically military nature. Where this is not the case, the required threshold can also be satisfied in terms of quantitative gravity, namely where the act in question results in death, injury or destruction, regardless of the military or civilian character of the injured person or damaged object. In practice, the precise quality and quantity of harm caused by a specific act can only be determined once the damage has already been done. However, in operational reality, it must be permissible to base the threshold determination on "likely" harm, that is to say, the harm which the determining person may reasonably expect to result from an act in the concrete circumstances.

Qualitative threshold: Where a specific act may reasonably be expected to cause harm of a specifically *military quality*, the threshold requirement will be satisfied regardless of quantitative considerations.⁶⁹ In this context, the notion of "harm" must be interpreted as encompassing not only death, injury or destruction of military personnel and other legitimate military objectives, but essentially any consequences which may reasonably be expected to

⁶⁸ BP DPH 2004, pp. 27 f.; BP DPH 2005, WS II-III, p. 6.

⁶⁹ During the Expert Meetings, there was general agreement that direct participation in hostilities did not necessarily require the use of armed force and did not necessarily have to cause death, injury or destruction. See Report DPH 2005, p. 14.

adversely affect the military operations or military capacity of a party to the conflict.⁷⁰ Beyond the infliction of death and injury on military personnel and physical or functional damage to military objects, equipment and supplies, the military operations or military capacity of a party to the conflict can also be "adversely affected", for example, by armed or unarmed activities preventing, restricting, interrupting or disturbing deployments, logistical movements and communication, as well as by capturing or otherwise establishing and exercising control over personnel, objects and territory to the detriment of the adversary.⁷¹ More concretely, activities reaching the required threshold of harm would include, for example, denying the adversary the military use of certain objects, equipment and territory,⁷² guarding captured military personnel of the adversary,⁷³ clearing mines placed by the adversary⁷⁴ and certain intelligence operations, such as wiretapping the adversary's high command,⁷⁵ transmitting targeting information during an ongoing attack⁷⁶ or changing the road signs set up by the military police so as to mislead or hamper the military movements of the adversary.⁷⁷ Conversely, civilians attempting to "shield" a military objective by their mere presence as persons protected against direct attack (voluntary human shields) generally would not reach the required threshold of harm. Unless such voluntary "human shields" actively defend the shielded military objective or pose a physical obstacle to military operations directed against that objective, their presence may complicate the proportionality assessment with regard to

⁷⁰ During the 2005 Expert Meeting, this aspect was expressed in a widely supported tentative definition of the notion of hostilities as "all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal" (Report DPH 2005, pp. 22 f., 31). Arguably, the threshold of harm could also be determined by reference to the "military advantage" expected to result from an injurious civilian act for the opponent of the injured party to the conflict (see also Report DPH 2005, p. 10). However, although harm inflicted on the military operations or military capacity of one party to the conflict normally corresponds to a military advantage for the opposing party, the actual threshold determination must be made by the party aiming to prevent (or respond to) the expected harm. Therefore, it appears more convincing and practicable to base the threshold determination on the harm which may reasonably be expected by the injured party than on the advantage which may reasonably be expected by the opposing party.

⁷¹ During the 2005 Expert Meeting, it was made clear that "hostilities" presupposed neither the use of armed force nor the causation of "death, injury or destruction". Thus, computer network attacks (CNA) harming the adversary were clearly regarded as part of the hostilities (Report DPH 2005, p. 14). Regarding the measures of establishment and exercise of control, see Report DPH 2005, pp. 13 ff.; BP 2004, pp. 9 ff.

⁷² Report DPH 2005, pp. 11, 29.

⁷³ During the 2005 Expert Meeting, the prevailing opinion was that guarding captured personnel of the adversary constituted a clear case of direct participation in hostilities (Report DPH 2005, pp. 15 f.).

⁷⁴ Report DPH 2005, p. 31.

⁷⁵ Report DPH 2005, p. 29.

⁷⁶ See Report DPH 2004, p. 5, where the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking forces. The decisive criterion was held to be the importance of the transmitted information for a concrete military operation and, thus, to the direct application of violence.

⁷⁷ See Report DPH 2005, p. 32, where it was pointed out that, depending on the context, such behavior could constitute either direct participation in hostilities or merely a childish trick. Which is the case will therefore primarily depend on the additional presence of a "belligerent nexus".

incidental death and injury that may be expected from an attack against the shielded objective, but it would not as such adversely affect the military operations or military capacity of the attacking party to the conflict.⁷⁸

Quantitative threshold: Where a specific act is unlikely to adversely affect the military operations or military capacity of a party to the conflict, the required threshold of harm can also be reached in quantitative terms, namely through the causation of death, injury or destruction except where such harm is caused in the exercise of effective control over the concerned persons or objects.⁷⁹ While this separate quantitative criterion would be redundant with regard to the infliction of death, injury or destruction on combatant personnel and other legitimate military objectives, it illustrates that attacks do not cease to constitute part of hostilities simply because they are directed specifically against persons and objects protected against direct attack.⁸⁰ For example, in terms of the required threshold of harm, direct attacks against civilian objects, "peaceful" civilians (i.e. civilians who are not at the time directly participating in hostilities), combatants *hors de combat* or medical and religious personnel remain part of the hostilities even if they are unlikely to adversely affect the military operations or the military capacity of a party to the conflict.⁸¹ A specifically military quality of harm is required only where the act in question is unlikely to result in death, injury or destruction or where it does so in exercise of effective control over the concerned persons or objects. For example, while armed attacks against civilian villages or refugee camps likely to cause death, injury or destruction would reach the required threshold of harm, the forcible deportation of the same populations or the taking of peaceful civilians as hostages, although prohibited under IHL, would not.⁸² Furthermore, the execution, torture or physical punishment of prisoners, hostages and other persons in physical custody, the use of lethal force in order to break up violent riots, to prevent looting and rape or to otherwise restore law and order in

⁷⁸ During the Expert Meetings, it was pointed out that, during air warfare, voluntary "human shielding" posed a *legal*, but not a *physical* obstacle to military operations directed against the "shielded" objectives and, therefore, could not amount to direct participation in hostilities. Conversely, during land warfare, voluntary "human shields" could pose an actual physical obstacle to military operations and, therefore, amount to direct participation in hostilities. This was illustrated by the concrete example of a woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her (Report DPH 2004, pp. 6 f.). It was also pointed out that Article 51 [7] AP I indicated that the intentional use of civilians as "human shields" by the parties to the conflict was prohibited, but did not constitute direct participation in hostilities by the exposed civilians. After all, civilians can only "shield" military objectives within the meaning of this provision to the extent that they remain protected against direct attack.

⁷⁹ During the Expert Meetings, it was held that the required threshold of harm would clearly be met where an act can reasonably be expected to cause material damage to objects or persons, namely death, injury or destruction (Report DPH 2005, pp. 30 f.; BP DPH 2004, pp. 5 f., 9 f., 28).

⁸⁰ Report DPH 2004, p. 4; Report DPH 2005, p. 11.

⁸¹ Today, such operations are invariably prohibited under IHL (e.g. Article 48 AP I).

⁸² Report DPH 2005, p. 11.

a conflict area, as well as the punitive or administrative destruction of buildings, agricultural fields and other objects generally would not constitute "direct participation in hostilities", regardless of lawfulness under IHL. Such measures taken against persons and objects under effective control could only reach the required threshold of harm, where such conduct is likely to adversely affect the military operations or military capacity of the adverse party to the conflict.

2. Causal Proximity

In order for a specific act to qualify as "direct participation in hostilities", there must be a direct causal link between the act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, and the aforementioned consequences.

Conduct of hostilities, general war effort and war sustaining activities: The distinction made at an individual level between a person's "direct" and "indirect" participation in hostilities corresponds, at the collective level of the parties to a conflict, to that between the "conduct of hostilities" and other activities that are part of the "war effort" or may be characterized as "war sustaining" activities. Generally speaking, beyond the actual conduct of hostilities, the general "war effort" could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, industrial production and shipment of weapons and military equipment, construction or repair of roads, ports, bridges, railways and other infrastructure other than as part of concrete military operations), while "war sustaining" activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, production of non-military industrial and agricultural goods for domestic consumption or export and trade, financial transactions).⁸³ Clearly, both the general war effort and war sustaining activities will ultimately result in harm to the adversary reaching the required qualitative or quantitative threshold. Some of these activities, such as the provision of finances, food and shelter to the armed forces and the industrial production of weapons, ammunition or other military equipment,

⁸³ During the Expert Meetings, it was pointed out that failure to clearly distinguish between the conduct of hostilities and the general war effort would entail that every civilian somehow contributing to the war effort could ultimately be regarded as directly participating in hostilities, from a housewife collecting tin cans for the metal industry and a farmer growing crops, to a nurse in a maternity ward who could be said to be nourishing future soldiers (Report DPH 2005, p. 21).

may even be indispensable to that end. However, the decisive distinction is that the conduct of hostilities is designed to *directly bring about the materialization of the required harm*, whereas war sustaining activities and the general war effort also include activities that merely *maintain or build up the capacity to do so*.⁸⁴

Individual participation in hostilities and causation of harm: At the individual level of the participating person, the distinction between “direct” and “indirect” participation in hostilities corresponds to that between “direct” and “indirect” causation of harm.⁸⁵ In other words, while any specific act resulting in sufficient harm and having a belligerent nexus qualifies as “participation in hostilities”,⁸⁶ that participation should be regarded as “direct” or “indirect” depending on whether the harm is caused “directly” or “indirectly”.⁸⁷ The constitutive requirement of *causal* proximity must not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, while it has become quite common for parties to a conflict to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps or timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks, the causal relationship between the employment of such means and the ensuing harm remains “direct”. Conversely, for instance, although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link between such support activities and the causation of sufficient harm to the opposing party to a conflict remains “indirect”. Therefore, while temporal or geographic proximity to the resulting harm may indicate that a concrete act amounts to “direct participation in hostilities”, these factors would not be sufficient in the absence of direct causation.⁸⁸

⁸⁴ Report DPH 2005, p. 21. The example was given of a civilian worker in an ammunitions factory who did not actually cause any harm himself but was merely building up the capacity of a party to a conflict to harm its adversary. Therefore, the worker in question was not directly participating in hostilities and retained his personal protection against direct attack. The civilian actually using that ammunition to cause harm to the adversary, however, would be directly participating in hostilities.

⁸⁵ According to the Commentary, Article 51 [3] AP I, § 1944, “[...] ‘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”. During the Expert Meetings, it was emphasized that “direct participation” in hostilities is neither synonymous with “involvement in” or “contribution to” hostilities, nor with “preparing” or “enabling” someone else to directly participate in hostilities, but essentially means that an individual is personally “taking part in the ongoing exercise of harming the enemy” (Report DPH 2004, p. 10) and personally carrying out hostile acts which are “part of” the hostilities (Report DPH 2005, pp. 27, 30, 34).

⁸⁶ See also below, FN 104.

⁸⁷ During the Expert Meetings, the prevailing opinion appeared to be that, in order for a specific act to qualify as “direct participation in hostilities”, there must be a sufficiently close, “uninterrupted” and “more than just remote” causal relation between the act in question and the resulting harm (Report DPH 2005, pp. 30, 34 ff.).

⁸⁸ Report DPH 2005, p. 35.

Interpretation of the standard of "direct" causation: With regard to the required degree of causal proximity between a specific act and its harmful consequences, standards such as "aiding and abetting"⁸⁹ and "indirect" causation⁹⁰ of harm are clearly too wide and would mean that most civilians supporting the general war effort would lose their protection against direct attack despite general recognition that their activities do not amount to direct participation in hostilities.⁹¹ Furthermore, it is neither sufficient nor necessary that the act in question be indispensable for the causation of the required harm ("but for"-causation).⁹² Instead, what is required for the qualification of an act as direct participation in hostilities is a standard of "direct" causation of harm which accommodates the collective nature and complexity of contemporary military operations. For example, attacks carried out by way of unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target on the ground, aircraft crews transmitting navigational data, specialists controlling the actual firing of air-to-ground missiles and an individual exercising overall command over the operation.⁹³ While all of these individuals are an integral part of a concrete operation, and while each of them directly participates in hostilities, only few of them could be said to be carrying out activities which, in and of themselves, "directly" cause harm meeting the required threshold. The standard of direct causation must therefore be interpreted to include individual conduct which causes harm only in conjunction with other acts, such as the identification and marking of targets,⁹⁴ the analysis and transmission of tactical intelligence to attacking forces,⁹⁵ the instruction and assistance given to troops with regard to the execution of a concrete military operation,⁹⁶ and the driving of a truck delivering ammunition to firing positions at the front line.⁹⁷ Conversely, the standard of direct causality must exclude from the ambit of "direct participation in hostilities" any act which merely builds up or maintains the capacity of a party to the conflict to carry out concrete military operations, such as general

⁸⁹ The standard of "aiding and abetting" indicates that the act in question "materially facilitates" the occurrence of harm (BP DPH 2004, p. 27; Report DPH 2005, pp. 28, 34).

⁹⁰ Report DPH 2005, p. 28.

⁹¹ For the relevant statements made in the 2004 and 2005 Expert Meetings see: BP DPH 2004, pp. 27 f.; Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

⁹² "But for"-causation of harm indicates that the harm in question would not occur "but for" the act (Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34).

⁹³ A similar example was provided during the 2005 Expert Meeting (Report DPH 2005, p. 35).

⁹⁴ BP DPH 2004, pp. 13; Report DPH 2004, p. 11, 25; Report DPH 2005, p. 31

⁹⁵ Report DPH 2005, pp. 28, 31. During the 2004 Expert Meeting the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking forces. This was described as the equivalent of a "fire control system" (see above, FN 76).

⁹⁶ Report DPH 2004, p. 10; Report DPH 2005, pp. 33, 35 f.

⁹⁷ BP DPH 2004, p. 28.

recruitment and training of personnel,⁹⁸ the production and transport of armaments and equipment or the provision of general supplies and services needed for military operations (such as electricity, fuel, generators, construction material, finances and financial services).⁹⁹ Equally excluded must be conduct, which causes harm with a merely indirect impact on the military capacity or operations of the adversary, such as depriving the adversary of financial assets.¹⁰⁰ For example, the driving of an ammunition truck from a factory to a port or a general storage place in the conflict zone cannot be regarded as an integral part of a concrete military operation. Although the ammunition truck as such remains a legitimate military objective subject to direct attack, the driving of the truck would not amount to "direct" participation in hostilities and would not deprive a civilian driver of his or her individual protection against direct attack. The consequence of this conclusion is not that the ammunition truck may not be attacked, but that a direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.¹⁰¹ In other words, where a specific act does not on its own directly cause the required harm, the decisive criterion for its qualification as "direct" participation in hostilities must be the degree of integration of that act into a concrete and coordinated tactical operation, which directly causes harm reaching the required quantitative or qualitative threshold.¹⁰² Where the required harm has not yet materialized, the element of causal proximity must be determined by reference to the harm that can reasonably be expected to result from a concrete act.¹⁰³

In the final analysis, while the notion of "direct" participation in hostilities goes beyond the personal application of armed force, it clearly cannot be extended to activities which merely support the general war effort without forming an integral part of concrete military operations. The requirement of direct causation must be regarded as satisfied as soon as either the specific act in question, or a concrete and coordinated military operation of which it constitutes an integral part, may reasonably be expected to "directly" cause harm reaching the required quantitative or qualitative threshold. Conversely, "indirect" participation in hostilities denotes activities that support the conduct of hostilities without being a part thereof. While this criterion allows the inclusion of specific acts that do not on their own directly cause harm to the adversary in the notion of "direct participation in hostilities", it requires that such acts assume an integral logistical, intelligence, command and control or

⁹⁸ Report DPH 2004, p. 10; Report DPH 2005, pp. 35 f.

⁹⁹ BP DPH 2004, pp. 14 f.

¹⁰⁰ BP DPH 2004, pp. 9 f.; Report DPH 2005, pp. 14 f.

¹⁰¹ See also Report DPH 2005, pp. 32 f.

¹⁰² Report DPH 2004, p. 5; Report DPH 2005, pp. 35 f.

¹⁰³ BP DPH 2004, p. 25; Report DPH 2005, p. 33.

similar function within the conduct of a concrete and coordinated military operation, which directly causes the required harm.

3. Belligerent Nexus

In order for a specific act to qualify as “direct participation in hostilities” it must be specifically designed to bring about the aforementioned consequences in support of a party to the conflict and to the detriment of another.

In order to qualify as “direct participation in hostilities”, a specific act must not only directly cause harm of a sufficient qualitative or quantitative threshold, but must also have a "belligerent nexus" to an ongoing armed conflict.¹⁰⁴

Nexus to the armed conflict (general nexus): The act in question must be carried out for reasons closely related to an ongoing international or non-international armed conflict (general nexus).¹⁰⁵ This general nexus requirement was developed in the jurisprudence of the ICTY and the ICTR as a precondition that must be fulfilled in order for an act to be considered a potential war crime.¹⁰⁶ While there is a fundamental difference between the concepts of "war crime" and "hostilities", both share the common element of representing conduct that occurs during, as well as for reasons closely related to a situation of armed conflict. In both cases, the nexus requirement assumes the function of excluding from the concepts of "war crime" and, respectively, "hostilities" conduct that is not regulated by IHL, such as violent crimes, civil unrest or law enforcement activities occurring for reasons unrelated to the surrounding situation of armed conflict. For example, the exchange of fire between police forces and hostage takers during an ordinary bank robbery,¹⁰⁷ murders

¹⁰⁴ During the Expert Meetings, it appeared that, for most experts, the function of the nexus requirement was to enable determination of whether harmful civilian conduct constituted part of “hostilities” (Report DPH 2005, p. 27).

¹⁰⁵ For a summary of the experts' statements in that regard see: BP DPH 2004, pp. 25 f.; Report DPH 2004, p. 25; BP DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 24, 27. The general nexus-requirement was developed in the jurisprudence of the ICTY and the ICTR as a precondition which, along with the existence of an armed conflict, must be fulfilled in order for an act to be considered as a potential war crime. See, most notably, ICTY, *Kunarac Case (Judgment of 12 June 2002)*, § 58; ICTR, *Rutaganda Case*, (Judgment, 26 May 2003), § 570.

¹⁰⁶ See, most notably, ICTY, *Kunarac Case (Judgment of 12 June 2002)*, § 58; ICTR, *Rutaganda Case*, (Judgment, 26 May 2003), § 570.

¹⁰⁷ Report DPH 2005, pp. 9, 11.

carried out for purely private motives,¹⁰⁸ and even the stealing of military equipment for the purpose of selling it on the black market or for purely private use do not have a sufficient nexus to an armed conflict to be considered acts amounting to “direct participation in hostilities”.¹⁰⁹

Nexus to ongoing hostilities (belligerent nexus): While a general nexus to the armed conflict is necessary, it is not sufficient for the qualification of an act as “direct participation in hostilities”. Additionally, the act in question must be specifically designed to directly cause the required harm in support of one party to the conflict and to the detriment of another in the framework of the larger military confrontation taking place between these parties (belligerent nexus).¹¹⁰ In other words, belligerent nexus presupposes a close relation not only to a pre-existing armed conflict, but also to already ongoing hostilities between the parties to that conflict.¹¹¹ Quite obviously, armed violence which is unrelated to hostilities taking place between existing parties to an armed conflict cannot amount to any form of “participation” in such hostilities and, therefore, can only be described as “hostilities” where it reaches the threshold of intensity required for the creation of a separate armed conflict.¹¹²

For example, the military operations of a party to a conflict can be adversely affected by the fact that access roads to a strategically important area are blocked by large groups of civilians fleeing the effects of the hostilities. While the conduct in question directly causes harm to the party to the conflict (direct causation of harm), and while it occurs for reasons

¹⁰⁸ See the following clarification provided by the ICTR in the *Rutaganda Case*, (Judgment, 26 May 2003), § 570: "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".

¹⁰⁹ Report DPH 2004, p. 25.

¹¹⁰ During the Expert Meetings, the belligerent nature of the required nexus was expressed in terms of civilian conduct being carried out "in relation to" ongoing hostilities or military operations (Report, DPH 2004, p. 10; Report, DPH 2005, p. 10), "in support of" the military operations of one party to the conflict (Report DPH 2005, pp. 9 f.), or "directed against" another (Report DPH 2005, pp. 22 f., 34).

¹¹¹ During the Expert Meetings, it was widely agreed that it would be too broad if the nexus element of “direct participation in hostilities” referred to the situation of an armed conflict in general and qualified every act of civilian violence somehow related to that armed conflict as direct participation in hostilities. Instead, it was said to be essential for qualification as direct participation in hostilities that an act be related to actual hostilities, that there be some association with fighting or with military operations occurring in the framework of the hostilities. As the wording of the notion clearly suggested, no conduct lacking a sufficient link or nexus to the hostilities could qualify as "direct participation in" hostilities (Report, DPH 2005, p. 25).

¹¹² Report, DPH 2005, p. 10.

closely related to the armed conflict (general nexus), it is not specifically designed to support one party to the conflict against another (belligerent nexus) and, therefore, cannot be regarded as "direct participation in hostilities". However, should the same civilians block the same roads in order to facilitate the withdrawal of rebel forces by delaying the passage of governmental armed forces (or vice versa), their conduct would be specifically designed to support one party to the conflict by adversely affecting the military operations of another and, therefore, would have the required "belligerent" nexus to the armed conflict. Similarly, violent political demonstrations and riots,¹¹³ as well as abuses against the civilian population cannot be regarded as having a "belligerent" nexus, unless their primary design is to directly cause the required level of harm in support of one party to the conflict and to the detriment of another.¹¹⁴ Likewise, a boy changing road signs in order to cause military vehicles to go in the wrong direction may adversely affect military operations but, in the absence of belligerent nexus, would be carrying out nothing but a childish trick.¹¹⁵ Civilian acts of individual self-defense against unlawful violence, also lack belligerent nexus: for example where peaceful civilians use armed force to defend themselves against looting, rape and murder on the part of marauding soldiers.¹¹⁶ Conversely, in contradistinction to the arrest, internment and guarding of ordinary civilians, which may have a general nexus to the armed conflict, the internment and guarding of captured military personnel in support or on behalf of a party to the conflict is specifically designed to adversely affect the military capacity of the adversary through the retention of captured military personnel and, therefore, has a belligerent nexus.¹¹⁷

Nexus and subjective intent: The requirement of belligerent nexus must be distinguished from criteria such as "subjective intent"¹¹⁸ and "hostile intent".¹¹⁹ Belligerent nexus is an

¹¹³ Report DPH 2005, p. 8.

¹¹⁴ Report DPH 2004, p. 4; Report DPH 2005, pp. 8, 11. See also above, heading IV, *in fine*.

¹¹⁵ Report DPH 2005, p. 32.

¹¹⁶ Report DPH 2003, p. 6; BP DPH 2004, pp. 31 f. If the use by civilians of armed force in self-defense were to constitute "direct participation in hostilities" and entail the loss of civilian protection against direct attack, the very act of self-defense would have the absurd consequence that the previously unlawful attack against the civilian in question would now be legitimized.

¹¹⁷ Report DPH 2005, pp. 15 f.

¹¹⁸ During the 2005 Expert Meeting, the experts agreed that the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for "split second" targeting decisions (Report DPH 2005, pp. 9, 26, 34, 66 f.).

¹¹⁹ During the 2005 Expert Meeting, the experts agreed that "hostile intent" is not a term of IHL, but belongs to the technical terminology of Rules of Engagement (ROE) drafted under national law. ROE in turn constitute command and control instruments of domestic law designed to provide guidance to armed personnel as to their conduct in specific contexts. As such, ROE do not necessarily reflect the content of IHL and certainly cannot be used to define the concept of direct participation in hostilities. For example, particular ROE may for political or operational reasons prohibit the use of lethal force in response to certain activities, although they would constitute direct participation in hostilities under

objective criterion expressing the notion of “directed against the enemy”, which is inherent in the concept of hostilities and indicates that an act is designed as part of larger military confrontations between parties to an armed conflict.¹²⁰ While the belligerent nexus of an act must be identified from the perspective of the individual called to make the determination, it must in all cases be deduced from reasonable, objectively verifiable factors, most notably from the perceptible conduct of the concerned civilian in conjunction with the surrounding context and the concrete circumstances prevailing at the relevant time and place.¹²¹ In practice, the determination of the belligerent nexus of an act to an armed conflict can pose considerable difficulties for the operating forces. For example, in many armed conflicts, gangsters, pirates and mafia operate in a “grey zone” where it is difficult to distinguish the conduct of hostilities from violent crime unrelated to, or merely facilitated by, the existence of a situation of armed conflict. As the determination of belligerent nexus is part of a process that may lead to the conclusion that a person has lost protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting. In situations of doubt, the concerned person must be presumed to be protected against direct attack.¹²² This cautious approach imposed by the principles governing the conduct of hostilities does not exclude the use of armed force for the suppression of inter-civilian violence or ethnic cleansing, or of other forms of serious crime where absolutely necessary to maintain, restore or otherwise impose law and order in the concrete circumstances.¹²³

In sum, the requirement of belligerent nexus excludes from the scope of “direct participation in hostilities” not only acts carried out for private motives or for other reasons unrelated to an armed conflict (general nexus), but also acts which, although having a general nexus to an armed conflict, are not specifically designed to cause the required level of harm in support of one party to the conflict to the detriment of another (belligerent nexus).

IHL. Conversely, ROE may contain rules on the use of lethal force in situations such as self-defense against acts that do not constitute direct participation in hostilities. Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to “hostile intent” for the purpose of defining “direct participation in hostilities”. See Report DPH 2005, p. 37.

¹²⁰ Report DPH 2005, pp. 22 f., 26, 40.

¹²¹ Report DPH 2005, pp. 9 f., 22, 26, 28, 34, 40,

¹²² During the Expert Meetings, the prevailing opinion appeared to be that, in case of reasonable doubt as to whether a civilian constituted a legitimate military target, that person had to be presumed to be protected against direct attack. See Report DPH 2005, pp. 67 f. See also below heading VIII, pp. 43 f.

¹²³ Report DPH 2005, p. 11. In that case, the permissibility of the use of force will be governed by law enforcement standards taking into account both the particular threat to be addressed, as well as the particularly hazardous circumstances prevailing in situations of armed conflict.

VI. Beginning and End of Direct Participation in Hostilities

Concrete measures preparatory to the execution of a specific act of “direct participation in hostilities”, as well as deployment to and return from the location of its execution are part of such specific act.

The notion of "direct participation in hostilities" refers not only to the execution of specific acts meeting the required criteria, but extends also to concrete measures preparatory to the execution of such an act, as well as the immediate deployment to and return from the location of its execution.¹²⁴

Preparatory measures: As far as preparatory measures are concerned, a clear distinction must be made between preparatory measures that qualify as direct participation in hostilities and preparatory measures that do not.¹²⁵ Preparatory measures amounting to direct participation in hostilities are essentially what treaty IHL describes as "military operation[s] preparatory to an attack".¹²⁶ As this phrase suggests, such measures are of distinctly military nature and must be preparatory not to a general campaign or unspecified operations (*general preparation*), but to a concrete and specific act amounting to direct participation in hostilities (*concrete preparation*). It is neither necessary nor sufficient that a preparatory measure occur immediately before or in close geographical proximity to the execution of a specific hostile act, or that it be strictly indispensable for its execution. In accordance with the distinction between “direct” and “indirect” participation in hostilities it could be said that "concrete" preparation *aims to carry out* a concrete act qualifying as direct participation in hostilities, while "general" preparation merely *aims to establish the capacity to do so*, but is not yet focused on a concrete operation.

¹²⁴ 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.). In their responses to the Questionnaire, 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 (BP DPH 2004, pp. 7, 10, 13, 21). See also Report DPH 2005, p. 19. Further, see Commentary Article 43 AP I, § 1679; Commentary Article 51 AP I, § 1943 and Commentary Article 13 AP II, § 4788, recalling that, during the course of the discussions at the Diplomatic Conference of 1974 to 1977, several delegations indicated that “hostilities” included preparations for combat and return from combat.

¹²⁵ BP DPH 2005, WS VI-VII, p. 10.

¹²⁶ Article 44 [3] AP I.

For example, the loading by an individual of bombs onto an airplane for direct deployment against a specific objective constitutes a measure preparatory to a concrete military operation and, therefore, qualifies as direct participation in hostilities even if the operation is carried out only the following day and great geographical distance separates the location of the preparatory measure from the targeted objective. Conversely, transporting the same bombs from the factory to an airfield storage place and from there to a transport airplane for shipment to the conflict zone would constitute a general preparatory measure qualifying as mere "indirect" participation in hostilities. Similarly, if carried out with a view to a concrete operation, the equipment, instruction and transport of personnel, the gathering of intelligence and the preparation, transport and positioning of equipment, would constitute "concrete" preparation qualifying as "direct" participation in hostilities. Conversely, "general" preparation would include most cases of purchase, production, smuggling, hiding and transport of weapons, explosives and other equipment, the general recruitment and training of personnel and the provision of financial, administrative or political support to armed actors, as well as other activities merely building up or maintaining the general capacity to carry out unspecified hostile acts.

Deployment and return:¹²⁷ Where the actual execution of a specific act qualifying as direct participation in hostilities (hostile act) requires prior geographic deployment, this deployment constitutes a concrete measure preparatory to that act. Likewise, the geographic "return from" the execution of a concrete hostile act constitutes an integral part of the preceding operation and, as any other military withdrawal, has nothing in common with surrender or otherwise falling *hors de combat*.¹²⁸ A deployment amounting to "direct participation in hostilities" only begins once the deploying individual undertakes a physical displacement with a view to the execution of an already planned, concrete operation. The return from the execution of a specific act ends once the returning individual has physically dissociated from the operation in question, for example by laying down, storing or hiding the weapons used and resuming activities that can no longer objectively be identified as part of that operation.

¹²⁷ In their responses to the Questionnaire submitted prior to the 2004 Expert Meeting, a majority of experts considered that "deployment to" the geographic location where direct participation in hostilities is going to take place should also qualify as "direct participation" and, although more hesitant, tended towards the same conclusion with regard to the "return from" such location. See BP DPH 2004, pp. 7 (I, 1.3.), 10 (I, 2.4.), 13 (I, 3.4.), 20 (I, 6.4.). See also Report DPH 2005, pp. 65 f. Further, see Commentary Article 43 AP I, § 1679; Commentary Article 51 AP I, § 1943 and Commentary Article 13 AP II, § 4788, recalling that, during the course of the discussions at the Diplomatic Conference of 1974 to 1977, several delegations indicated that "hostilities" included preparations for combat and return from combat.

¹²⁸ Report DPH 2005, p. 66.

Whether a particular individual is engaged in "deployment to..." or "return from..." the execution of a specific act qualifying as direct participation in hostilities will depend on a multitude of factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both "deployment to" and "return from" must be carried out as part of the execution of a specific act amounting to direct participation in hostilities. The relevant determination must be based on a reasonable evaluation in view of the objective circumstances prevailing in each case.¹²⁹ Where the execution of a specific hostile act does not require geographic displacement, such as may be the case for computer network attacks (CNA) or for the remote-controlled operation of unmanned weapons systems, the duration of "direct participation" in hostilities will be restricted to the duration of the execution of the specific hostile act including any concrete measures preparatory to that act.

¹²⁹ Report DPH 2005, p. 66.

D. Modalities of the Suspension of Civilian Protection

VII. The "Revolving Door" of Civilian Protection

Civilians lose protection against the effects of hostilities for the duration of each specific act amounting to direct participation in hostilities, whereas persons assuming a permanent combatant function for a party to the conflict lose civilian protection for the duration of such function.

The "revolving door" of civilian protection: According to treaty IHL applicable in both international and non-international armed conflict, civilians enjoy protection against the effects of hostilities "unless and for such time as" they take a direct part in hostilities.¹³⁰ First, this provision makes clear that civilians directly participating in hostilities do not cease to be part of the civilian population, but that their protection against the effects of hostilities is temporarily suspended. Second, the phrase "unless and for such time" clarifies that such suspension of civilian protection lasts exactly as long as, and can neither begin before, nor extend beyond, the corresponding civilian engagement in direct participation in hostilities. Accordingly, in the period "before" or "after" an engagement in direct participation in hostilities, the concerned civilians may not be directly attacked.¹³¹ In view of the temporal identity between the duration of direct participation in hostilities and the duration of the ensuing loss of civilian protection against the effects of hostilities, determining the temporal scope of the suspension of protection is equivalent to determining the beginning and end of concrete conduct which qualifies as "direct participation in hostilities".¹³² Consequently, the phrase "unless and for such time" necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their direct participation in hostilities (so-called "revolving door" of civilian protection). The "revolving door" of civilian protection is not a malfunction of IHL, but constitutes an integral and intended part thereof. Its primary purpose is to protect peaceful civilians from erroneous or arbitrary attacks, but it is also a practical expression of the fundamental principles of military necessity and of humanity.

¹³⁰ Articles 51 [3] AP I; 13 [3] AP II. The ICRC's Customary Law Study considers this rule to have attained customary nature in both international and non-international armed conflict (Rule 6 CLS).

¹³¹ Of course, civilian immunity against direct attack does not exclude the use of force against the civilians in question under law enforcement standards.

¹³² On the beginning and end of "direct participation in hostilities" see above, pp. 37 ff.

Spontaneous, unorganized or sporadic "direct participation in hostilities": The “revolving door” of civilian protection entails that individual civilians can repeatedly lose and regain protection against direct attack within a short period of time. While this mechanism may make it more difficult for the opposing armed forces to respond effectively to civilian direct participation in hostilities, it remains relatively unproblematic as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis. In this case, civilians lose and regain protection against direct attack in parallel with the beginning and end of each specific act amounting to direct participation in hostilities. However, a “revolving door” of protection based on the beginning and end of specific acts becomes very problematic as soon as it is applied to armed actors assuming permanent combatant function for a party to the conflict. It would allow well organized, trained and equipped armed groups to abuse civilian protection by operating as “farmers by day” and “fighters by night”, thus causing an obvious operational imbalance between state armed forces and organized armed groups. Clearly, such a situation would undermine general respect for IHL by the parties to the conflict and, ultimately, would lead to unacceptable risks for the peaceful civilian population. It is therefore important to recognize that the permanent assumption of combatant function is incompatible with a "revolving door" of protection based on the beginning and end of specific acts and requires that the concerned organized armed actors either be excluded from the category of "civilian" or, alternatively, that the permanent assumption of combatant function be regarded as a "continuous" form of direct participation in hostilities.¹³³

Permanent assumption of combatant function: Where civilians leave the realm of merely spontaneous, unorganized or sporadic "direct participation in hostilities" by assuming permanent combatant function for a party to the conflict, the “revolving door” of civilian protection starts operating based on "function" rather than "specific acts". In other words, for as long as civilians assume permanent combatant function for a party to the conflict, they do not constitute "civilians" in the first place or, alternatively, should be excluded from "civilian" protection against the effects of hostilities based on the concept of "continuous direct

¹³³ See also the discussion above, FN 40 – 42 and FN 65 – 67 and accompanying text. During the Expert Meetings, civilians directly participating in hostilities on an unorganized or merely spontaneous, occasional or sporadic basis, as well as *non-combatant members* of organized armed groups were held to regain civilian protection against direct attack between individual military engagements according to the so-called "specific acts" approach (Report DPH 2005, pp. 49, 60 ff., 64 f., 82 ff.). Conversely, *combatant members* of organized armed groups were said to regain protection against direct attack only once they affirmatively disengaged from their combatant function according to the so-called “affirmative disengagement” approach (Report DPH 2005, pp. 62 ff., 65, 82 ff.).

participation in hostilities".¹³⁴ The decisive point is that, in both cases, individuals directly participating in hostilities by assuming a permanent combatant function for a party to the conflict constitute legitimate military objectives for as long as such function is assumed. Conversely, a person directly participating in hostilities while lacking such combatant function can only be directly attacked while carrying out a specific act amounting to direct participation in hostilities.¹³⁵

For example, an individual whose permanent function within an armed group involves the regular planning, preparation, command and control of concrete acts or coordinated operations amounting to "direct participation in hostilities" assumes a combatant function which excludes him or her from civilian protection against the effects of hostilities for as long as he or she assumes this function. Likewise, an individual recruited by an armed group and being trained and equipped for a combat function ceases to benefit from civilian protection against direct attack before he or she carries out a specific act amounting to direct participation in hostilities. Conversely, recruiters and trainers, whose function within an armed group is focused on general training for combatant function and does not require their direct involvement in concrete military operations, remain civilians who may only be directly attacked during specific acts amounting to direct participation in hostilities. Similarly, individuals whose function within the same armed group is focused on purchasing, smuggling, manufacturing, maintaining and transporting weapons, explosives and equipment or to providing information and intelligence other than of a tactical nature must generally be regarded as civilians who may only be directly attacked for such time as their personal conduct constitutes an integral part of a concrete and coordinated operation amounting to direct participation in hostilities.

¹³⁴ On the concept of "civilian" in international and non-international armed conflict, see above, pp. 7 ff. and, on the concept of "continuous direct participation in hostilities", particularly FN 40 – 42 and FN 65– 67 and accompanying text.

¹³⁵ As already indicated (see above, FN 133), during the Expert Meetings, a wider agreement appeared to emerge that a distinction had to be made between unorganized civilians and "non-combatant" members of organized armed groups on the one hand, and "combatant" members of such groups on the other. There was a preference for applying the "specific acts approach" to unorganized civilians and "non-combatant" members of organized armed groups and the "affirmative disengagement approach" to fighting members of such groups. This emerging compromise between the "specific acts" approach and the "affirmative disengagement" approach was described as a "limited membership approach" and found increasing support among the participants (Report DPH 2005, pp. 64 f., 82 ff.). For an overview of the discussions on the "specific acts" approach, the "affirmative disengagement" approach and the "membership" approach, see: Summary Report 2003, p. 7; BP DPH 2004, pp. 34 ff.; Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 59 ff.; 82 ff.

The exclusion from the category of “civilian” or, alternatively, the continuous suspension of civilian protection against the effects of hostilities lasts from the moment an individual formally joins the armed forces or *de facto* begins to assume combatant function and lasts until he or she disengages from the armed forces or combatant function in a manner objectively recognizable to the adversary.¹³⁶ Such “affirmative” disengagement does not necessarily have to be openly declared, but can also be the result of capture, surrender, wounds or sickness, or can be expressed through conclusive behavior, such as a permanent physical distancing from the armed group and reintegration into civilian life or the permanent resumption of civilian activities. Whether a particular individual assumes, or has disengaged from, combatant function depends on objective criteria which may vary depending on the political, cultural and military context. In any case, the determination must be made based on concrete, objectively verifiable facts and on the standards of good faith and reasonableness in the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.¹³⁷

VIII. Precautions and Presumptions in Situations of Doubt

All feasible precautionary measures must be taken in determining whether a civilian has lost protection against the effects of hostilities. In case of reasonable doubt as to whether a civilian is directly participating in hostilities or a person is assuming permanent combatant function for a party to the conflict, he or she must be presumed to remain protected against the effects of hostilities.

Particular risks of situations of doubt: One of the main practical problems caused by civilian participation in hostilities is that of doubt as to the identity of the adversary. For example, armed forces involved in counter-insurgency operations will constantly be confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to reliably distinguish between combatant and non-combatant members of the

¹³⁶ Report DPH 2005, p. 59.

¹³⁷ During the Expert Meetings, it was emphasized that a determination as to whether affirmative disengagement had taken place would depend on the concrete circumstances of the context and could not be defined in advance (Report DPH 2005, p. 63). On the precautions and presumptions to be followed in situations of doubt, see below, heading VIII, pp. 43 f.

insurgency, combatant members “on leave”, civilians spontaneously or sporadically taking a direct part in hostilities and peaceful civilians who may or may not be providing support to the adversary, but who do not directly participate in hostilities. In order to avoid the erroneous or arbitrary targeting of peaceful civilians, there must be clarity as to the precautions and presumptions to be followed in situations of doubt.

The requirement of feasible precautions: Prior to any attack, all feasible precautions have to be taken to assert that targeted persons actually constitute legitimate targets.¹³⁸ Moreover, once an attack has commenced, those responsible for its conduct must do everything feasible to cancel or suspend the attack if it becomes apparent that the target is not a military objective.¹³⁹ Therefore, both before and during any attack, everything feasible must be done to determine whether the civilian in question is engaged in direct participation in hostilities or, respectively, is assuming permanent combatant function for a party to the conflict. If it transpires that neither is the case, everything feasible must be done to refrain from launching, to cancel or suspend the attack. This determination must be made in good faith and in view of all information available in the concrete situation. "Feasible" precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.¹⁴⁰ In practice, a direct attack against a civilian deemed to directly participate in hostilities must be cancelled or suspended not only when a the targeted person was mistakenly regarded as a legitimate military objective, but also when that civilian falls *hors de combat* or otherwise ceases to directly participate in hostilities.¹⁴¹

Presumption of civilian protection: In a generic sense, and for the purposes of the conduct of hostilities, IHL can be said to distinguish between two basic categories of persons: civilians and combatants. A general rule applies to each category, subject to certain exceptions. Combatants are generally regarded as legitimate military objectives, unless they surrender or are otherwise "*hors de combat*", whereas civilians are generally protected against direct attack, unless and for such time as they directly participate in hostilities. For

¹³⁸ Article 57 [2] (a) (i) AP I; Rule 16 CLS.

¹³⁹ Article 57 [2] (b) AP I; Rule 19 CLS.

¹⁴⁰ Article 3 [4] CCW Protocol II (1980); Article 1 [5] CCW Protocol III (1980); Article 3 [10] CCW Amended Protocol II (1996). See also the French text of Article 57 AP I ("faire tout ce qui est pratiquement possible").

¹⁴¹ Of course, apart from the determination as to whether a civilian is directly participating in hostilities, the principle of precaution in attack also requires that all feasible precautions be taken to avoid and in any event minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. It also requires them to refrain from launching, to cancel or suspend attacks that are likely to result in excessive "collateral damage" (Articles 57 [2] (a) (ii) and Rule 17 CLS; Article 57 [2] (a) (iii) and Rule 18 CLS; Article 57 [2] (b) AP I and Rule 19 CLS).

each category, the general rule established in the law applies until the requirements for an exception are fulfilled. Consequently, as far as civilians are concerned, the presumption in a situation of doubt must be that they are protected.¹⁴² Therefore, in case of reasonable doubt as to the qualification of civilian conduct as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that such conduct does not constitute direct participation in hostilities.¹⁴³ The presumption of civilian protection must also apply, *a fortiori*, in case of reasonable doubt as to whether an individual's lost civilian protection against the effects of hostilities has been suspended due to his or her assumption of combatant function for a party to the conflict.¹⁴⁴ Of course, this does not exclude the use of armed force against civilians who pose a grave threat to law and order not amounting to direct participation in hostilities. However, in that case, the permissibility of the use of armed force will be governed by the standards of law enforcement and of individual self-defense, taking into account both the concrete threat to be addressed and the surrounding circumstances.¹⁴⁵

IX. Practical Relevance of the Principles of Military Necessity and of Humanity

In response to direct participation of civilians in hostilities, no more death, injury, suffering or destruction may be caused than is both permitted by IHL and reasonably required for the submission of the adversary in the concrete circumstances.

Civilians lose their protection against the effects of the hostilities for the duration of their direct participation in hostilities. This does not mean they fall outside the law, but merely that the use of force against them is no longer governed by the standards of law enforcement, but

¹⁴² During the Expert Meetings, the prevailing opinion appeared to be that, in case of reasonable doubt as to whether a civilian constituted a legitimate military target, that person had to be presumed to be protected against direct attack (Report DPH 2005, pp. 44 f., 67).

¹⁴³ See also above, FN 42, quoting the following section of the Commentary to Article 13 AP II, § 4789: "Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian".

¹⁴⁴ Report DPH 2005, p. 82.

¹⁴⁵ Report DPH 2005, p. 11.

by those on the conduct of hostilities. In contradistinction to law enforcement situations, the lawful use of armed force in the conduct of hostilities neither presupposes that the targeted persons represent an imminent threat nor that they have perpetrated a crime or that the attack in question be "absolutely" necessary.¹⁴⁶ What is required, however, is that the targeted persons constitute legitimate military objectives and that there is a "military" necessity to carry out the attack.

The principle of military necessity is generally recognized as requiring that all military action fulfill the dual requirement of being "lawful under IHL" and "necessary for the submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources".¹⁴⁷ It may be said that, expressed in *permissive* terms, the principle of military necessity justifies all military operations that are both lawful under IHL and reasonably necessary for the submission of the enemy. Expressed in *restrictive* terms, the principle reduces the sum total of lawful military action from that which is permitted under IHL to that which is reasonably necessary for the submission of the enemy in the concrete circumstances. Strictly speaking, the restrictive aspect of the principle of military necessity gives expression to the principle of humanity.¹⁴⁸ Where positive IHL establishes express

¹⁴⁶ BP DPH 2005, WS VI–VII, p. 12; Report DPH 2005, pp. 31, 67. During the Expert Meetings, there was general agreement among the experts that loss of civilian protection from direct attack due to direct participation in hostilities is not a "sanction for bad behavior" and that, similarly, the granting of protection was not a "reward for good behavior" (Report DPH 2005, p. 44). The experts also distinguished direct attacks against civilians directly participating in hostilities from the preventive use of lethal force in situations of self-defense (Report DPH 2003, p. 6; Report DPH 2004, p. 14; Report DPH 2005, pp. 31, 36, 37, 38 and 67).

¹⁴⁷ For contemporary formulations of the principle of military necessity see, for example, NATO: Glossary of Terms and Definitions, p. 2-M-5; United States: US Army Field Manual 27-10 (1956), § 3; US Navy / Marine Corps / Coast Guard, Commander's Handbook on the Law of Naval Operations (1995), § 6.2.5.5.2; United Kingdom: Manual of the Law of Armed Conflict (2004), Sections 2.2. to 2.4.; France: Manuel de Droit des Conflits Armés (2001), pp. 86 f.; Germany: Triservice Manual ZDv 15/2, § 130; Switzerland: Army Regulations 51.007/IV, § 160. The contemporary notion of "military necessity" has been strongly influenced by the following definition provided in Article 14 Lieber Code (1863): "Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war" (emphases added). This definition is complemented by the following concrete examples: Article 15: "Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; [...]. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God" (emphases added). Article 16: "Military necessity does not admit of: cruelty - that is, the infliction of suffering for the sake of suffering or for revenge; maiming or wounding except in fight; [...]; in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult" (emphasis added).

¹⁴⁸ In conjunction, the permissive and restrictive aspects of the principle of military necessity give rise to the generally recognized duty of the parties to any armed conflict to "diminish the evils of war, as far as military requirements permit" (Preamble Hague Convention IV (1907). Similar also: Preamble Hague Convention II (1899)).

prohibitions, these provisions must be regarded as an authoritative determination of the balance between the requirements of military necessity and of humanity. However, where IHL does not expressly prohibit a specific conduct - such as the killing of persons lacking immunity from direct attack - its legitimacy will depend on the actual existence of military necessity in each concrete case.¹⁴⁹

To say that IHL does not provide an unfettered "license to kill" neither suggests that combatants cannot be attacked unless they are actively engaged in military operations, nor prohibits the use of superior military power against legitimate individual or collective targets. The aspect of humanity inherent in the principle of military necessity simply requires that, within the limits established by the specific rules of IHL, no more death, injury or destruction be caused than is reasonably necessary to achieve a lawful objective in the concrete circumstances. This interpretation of the principle of military necessity has been expressed in individual provisions of conventional IHL,¹⁵⁰ in contemporary military manuals¹⁵¹ and has been reaffirmed as a general principle governing the conduct of hostilities in the report on the work of experts preparatory to the Diplomatic Conference of 1974 to 1977 relating to "Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects".¹⁵²

As a result, while the use of force against civilians directly participating in hostilities is clearly not governed by law enforcement standards, direct attacks against legitimate military objectives cannot completely ignore basic notions of humanity. Civilians directly participating in hostilities may be directly attacked for the purpose of being rendered *hors de combat* and may be lawfully killed unless the circumstances are such that there manifestly is no military necessity to do so.¹⁵³ The required standard of necessity is not one of "strict" or "absolute"

¹⁴⁹ Conversely, as far as objects are concerned, the existence of military necessity is an integral part of the definition of military objectives (see the requirement of a "definite military advantage" in Article 52 [2] AP I).

¹⁵⁰ See, most notably, Article 42 GC III, restricting the use of weapons against POWs who have lost their protection against direct attack due to escape (Article 41 [2] AP I). See also the 1868 St. Petersburg Declaration which clarifies that the aim of hostilities is *to disable* adversaries and not *to render their death inevitable*.

¹⁵¹ See the military manuals quoted in FN 147 above.

¹⁵² ICRC, Report on the Work of Experts relating to "Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects" (1973), p. 13 (§ 23): "[...] if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided". Similarly also Pictet, *Development and Principles of IHL*, pp. 75 f.: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil".

¹⁵³ Of course, in the case of civilians, the right to use lethal force in attack ceases as soon as the attacked civilians cease to directly participate in hostilities and, in the case of members of the armed forces, as soon as they surrender or otherwise fall *hors de combat*.

necessity but one of "reasonableness". This conclusion, inherent in the fundamental principles of military necessity and humanity, accommodates legitimate concerns with regard to an unfettered "license to kill" approach without imposing a dogmatic "capture rather than kill" approach.¹⁵⁴

X. Consequences of Regaining Civilian Protection

Persons who have regained civilian protection against the effects of hostilities may no longer be directly attacked, but remain subject to prosecution for violations of domestic and international law they may have committed during such participation.

When civilians cease to directly participate in hostilities, or when persons disengage from combatant function they regain full civilian protection against the effects of hostilities. However, they remain subject to prosecution for violations of domestic and international law they may have committed in the course of direct participation in hostilities.

Lack of immunity from domestic prosecution: IHL foresees an express "right" to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts.¹⁵⁵ The "right" to directly participate in hostilities does not imply a right to carry out acts that would otherwise be prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under national criminal law of the parties to the conflict (the so called "combatant privilege").¹⁵⁶ The absence of a "right" of civilians to directly participate in

¹⁵⁴ During the Expert Meetings, diverging views were expressed about the relevance of the principle of military necessity for the lawfulness of direct attacks against civilians directly participating in hostilities. While one group of experts held that IHL permits the killing of adversaries only to the extent that capture is not possible, others insisted that there was no legal obligation to "capture rather than kill". However, throughout the discussions, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary, nor that a person subject to direct attack can lawfully be killed in a situation where there manifestly is no military necessity to do so. In fact, while each group of experts emphasized a different (namely a *restrictive* and *permissive*) aspect of the principle of military necessity, the respective views are reconcilable and, in conjunction, compatible with the generally recognized interpretation of the principle in contemporary military manuals and in prevailing legal doctrine. See Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 45. f., 56 f., 67.

¹⁵⁵ Article 43 [2] AP I (except medical and religious personnel) and Article 1 H IV R. The combatant privilege is also given to members of a *levée en masse* (Article 2 H IV R).

¹⁵⁶ Conversely, combatant privilege does not prevent prosecution under international or national criminal law in case of conduct contrary to IHL.

hostilities cannot be interpreted to imply a prohibition of civilian direct participation in hostilities under IHL.¹⁵⁷ Direct participation of civilians in hostilities as such is neither prohibited by IHL,¹⁵⁸ nor criminalized under the statutes of any of the previous or current international criminal tribunals and courts.¹⁵⁹ However, as civilians are not entitled to combatant privilege, they do not enjoy immunity from domestic prosecution for “lawful acts of war”, that is to say, for having directly participated in hostilities in accordance with the rules and principles of IHL. Consequently, civilians who have directly participated in hostilities may be prosecuted and punished by their captor to the extent that direct participation in hostilities, or the harm caused in doing so, is penalized under applicable domestic law (e.g. as treason, murder etc.).¹⁶⁰

Obligation to respect international humanitarian law: The case law of the post-Second World War International Military Tribunals (IMT and IMTFE),¹⁶¹ the ICTY and the ICTR consistently asserts that even individual civilians can violate provisions of IHL and commit war crimes. It is not the status of the perpetrator, but the character of the acts and their “nexus” to the conflict that are decisive for their relevance under IHL.¹⁶² In the *Rutaganda Case*, the ICTR held that in the determination of whether individual conduct has a nexus to an armed conflict, “[p]articular care is needed when the accused is a non-combatant”.¹⁶³

¹⁵⁷ The Marten’s Clause was incorporated into the Preamble of the Hague Convention (II) of 1899 after the states participating in the 1899 Peace Conferences were unable to agree on whether civilians taking up arms against an established occupying power should be treated as privileged combatants or as *franc-tireurs* subject to execution. With a view to achieving a generally acceptable compromise, the Marten’s Clause provides that, in cases not regulated by conventional law “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”. The clause has since been reformulated and integrated in numerous international instruments (Preamble H IV R; Article 63 GC I; Article 62 GC II; Article 142 GC III; Article 158 GC IV; Article 1 [2] AP I; Preamble AP II; Preamble CCW). Since then, states have successively extended the combatant privilege to participants in a *levée en masse*, to militias and volunteer corps (since 1949 including organized resistance movements inside and outside occupied territory) and, under AP I, to certain national liberation movements. However, as far as civilians are concerned, IHL neither prohibits their direct participation in hostilities, nor affords them immunity from domestic prosecution.

¹⁵⁸ This view remained unopposed throughout the Expert Meetings. It was also noted that the legality or illegality under domestic or international law is irrelevant for the qualification of an act as direct participation in hostilities (BP 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9).

¹⁵⁹ Neither the statutes of the post Second World War Military Tribunals (IMT and IMTFE), nor the current statutes of the ICTY, the ICTR, the ICC and the SCSL (Special Court for Sierra Leone) penalize civilian direct participation in hostilities as such.

¹⁶⁰ This view was repeatedly confirmed during the Expert Meetings (BP 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9).

¹⁶¹ IMT: International Military Tribunal (Nuremberg Tribunal). IMTFE: International Military Tribunal for the Far East (Tokyo Tribunal).

¹⁶² For the nexus criterion see, *inter alia*, ICTY, Kunarac Case (Judgment of 12 June 2002), §§ 57 ff.; ICTY, Vasiljevic Case (Judgment 29 November 2002), §§ 24 ff.

¹⁶³ ICTR, Rutaganda Case, (Judgment, 26 May 2003), §§ 569 f.

Direct participation of civilians in hostilities is necessarily of a military character and closely related to the surrounding situation of armed conflict. Consequently, there can be no doubt that civilians directly participating in hostilities must respect the rules of IHL on the conduct of hostilities and may be held individually responsible for war crimes just as members of the armed forces of the parties to the conflict. For example, it would constitute a violation of IHL for civilians to engage in hostilities directed against persons and objects protected against direct attack, to deny quarter to adversaries *hors de combat* or to capture, injure or kill an adversary by resort to perfidy. The prohibition of perfidy is of particular interest in view of the fact that civilians directly participating in hostilities often do so without carrying arms openly or otherwise distinguishing themselves from peaceful civilians. Where civilians carry out military operations aiming to capture, injure or kill an adversary and do so without distinguishing themselves from peaceful civilians in order to lead the adversary to believe that they are in fact entitled to civilian protection against direct attack, such conduct would amount to perfidy in violation of treaty and customary IHL.¹⁶⁴

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¹⁶⁴ Article 23 [1] (b) H IV R; Article 37 [1] AP I (international armed conflict); Rule 65 CLS (non-international armed conflict). Under the ICC statute the treacherous killing or wounding of "individuals belonging to the hostile nation or army" (international armed conflict: Article 8 [2] (b) (xi)) or, respectively, of a "combatant adversary" (non-international armed conflict: Article 8 [2] (e) (ix)) is a war crime.