



ICRC

Fourth Expert Meeting on the Notion of Direct Participation in Hostilities

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Summary Report

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and the TMC Asser Institute

This report was drafted by Nils Melzer, Legal Adviser of the ICRC, in a personal capacity and does not express or intend to 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. Equally, all statements referred to in this report, whether nominally attributed or not, were made in the personal capacity of each expert and do not express or intend to express the position of any government, organization or other institution.

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Introduction

In the framework of its project on the "Reaffirmation and Development of International Humanitarian Law", the International Committee of the Red Cross (ICRC), in cooperation with the TMC Asser Institute, organized a Fourth Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law". This meeting, which took place on 27 and 28 November 2006 in Geneva, brought together around forty legal experts representing the military, government and academia, as well as international and non-governmental organizations.

The event was part of a process of clarification of the notion of "direct participation in hostilities", which was initiated in 2003 and is intended to conclude in 2007. The process aims to identify defining elements of "direct participation in hostilities" and to establish guidance for the interpretation of that notion in contemporary armed conflicts of both international and non-international character.

In preparation for this Expert Meeting, the organizers submitted to the participants a background document entitled "Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL". As had been agreed with the participating experts at the end of the 2005 Expert Meeting, the aim of this background document was to propose a coherent and comprehensive interpretation of IHL relating to civilian direct participation in hostilities in both international and non-international armed conflict, taking into account the wide variety of views and opinions expressed by the experts participating in the clarification process. Overall, the discussions during the 2006 Expert Meeting provided a wealth of comments and suggestions which will be very useful in revising and improving the Draft Interpretive Guidance in terms of both form and substance.

The aim of the present report is to provide an overview of the discussions held during the Expert Meeting, as well as of the conclusions reached with regard to the further steps to be taken. For easier accessibility, the report summarizes the main interventions made by the experts during the different working sessions under topical headings which follow the thematic order both of the meeting's Agenda (see Annex) and of the Draft Interpretive Guidance.

A. Opening Session

1. Introduction by the Organizers

The organizers explained that the aim of the present Expert Meeting was to discuss the background document entitled "Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities" (hereinafter: "Interpretive Guidance"), and to gather the opinions and views of the participating experts as to the approach chosen, both in terms of form and substance. The basic parameters which had guided the drafting process of the Interpretive Guidance were outlined as follows:

- The aim of the Interpretive Guidance was to interpret existing law in accordance with, and in the light of, the current circumstances in contemporary armed conflict. It did not endeavor to progressively develop the law.
- The Interpretive Guidance addressed the consequences of "direct participation in hostilities" only as far as civilians were concerned.
- The Interpretive Guidance interpreted the notion of "direct participation in hostilities" for the purposes of the conduct of hostilities only and addressed the status of persons in the hands of a party to the conflict only to the extent necessary for that purpose.
- The sources used in drafting the Interpretive Guidance included treaty and customary IHL, the individual expert opinions as reflected in the reports, background documents, expert papers and presentations examined in previous Expert Meetings, as well as the *travaux préparatoires* for treaty IHL, the Commentaries to the treaties, as well as select jurisprudence and national military manuals.
- The Interpretive Guidance did not claim to reflect a unanimous view expressed during the Expert Meetings but, instead, tried to propose a solution that took into account the wide variety of views expressed and interests involved.
- In conceptual terms, the Interpretive Guidance was based on the "limited membership" or "functional" approach, which distinguished between organized and unorganized participation in hostilities and according to which "combatant" members of organized armed groups lost protection against direct attack for as long as they assumed such "combatant" function, whereas ordinary civilians regained full protection in the interval between specific acts of direct participation in hostilities.

The organizers also recalled that the Interpretive Guidance was intended to serve as a basis for discussion at the Expert Meeting and, at this point, should not be regarded as a

consolidated institutional position of the ICRC. In view of the high degree of academic complexity of the Interpretive Guidance it was also recognized that, after the conclusion of the expert process, it would probably be necessary to produce a simpler and more operational document, which would be more easily understood by military commanders.

2. General Approach, Methodology, Structure and Form of the Guidance

Most experts congratulated the organizers on the high quality of the Interpretive Guidance, commending the comprehensiveness of the legal analysis, the accurate reflection of the discussions held during the Expert Meetings, as well as the structure, form and methodology chosen. While many experts expressed their general support for the approach chosen and basic conclusions reached in the Interpretive Guidance, they also pointed out that the “devil” was in the details, and that there were still many specific aspects and questions to be resolved or clarified. The general perception appeared to be that the Interpretive Guidance represented a significant step forward in the process of clarifying the notion of “direct participation in hostilities” and that it had the potential of leading to a satisfying final product to the extent that the diversity of views was adequately reflected in the footnotes to the commentary. It was also pointed out that the work of this expert group was likely to be taken very seriously, precisely because of the extraordinary diversity of backgrounds and the high level of expertise it incorporated. Therefore, the final Interpretive Guidance would certainly be used as a practical tool of enormous value. With regard to the question of whether the Interpretive Guidance would benefit from an additional section providing concrete examples of conduct amounting to direct participation in hostilities, many experts expressed caution, as they feared that these examples might subsequently be used detached from their context, and without a proper understanding of the Interpretive Guidance.

Some experts also made more specific remarks on the Interpretive Guidance as a whole. For instance, one expert had the general impression that the Interpretive Guidance was conditioned on the applicability of the Additional Protocols and questioned to what extent states that were not party to these Protocols would come to the same conclusions. It was also suggested that the final Interpretive Guidance should contain a disclaimer clarifying that its considerations were made without prejudice to the established rules of the law of naval warfare. Some experts found that the case law referred to in the Interpretive Guidance was very limited and that much more reference could have been made to the jurisprudence of

institutions such as the International Criminal Tribunals and the European Court of Human Rights.

3. Need for a Simplified Version of the Interpretive Guidance

Several experts cautioned that the Interpretive Guidance was drafted at a high and complex academic level and that non-experts would find it difficult to read. These experts welcomed the idea of the eventual drafting of an additional, simplified version of the Interpretive Guidance, that could serve military commanders in the field and that states could use as a basis for the drafting of instructions or rules of engagement for operational forces. It was also emphasized that battlefield practice should be factored into drafting the full version of the Interpretive Guidance, so that the resulting text would be not only legally correct, but also operationally useful.

4. Need to Address Human Rights Law

Some experts were critical of the fact that the Interpretive Guidance focused only on interpreting IHL and did not address human rights law. As both of these normative frameworks applied in situations in which civilians directly participated in hostilities, they expressed the fear that the exclusive application of IHL, as well as the strict distinction made in the Interpretive Guidance between the conduct of hostilities and law enforcement situations, could lead to unacceptable results (e.g. that unarmed and defenseless civilians involved in harmful activities within the territorial control of a state party to an armed conflict could be targeted without an attempt at arrest). It was pointed out that human rights bodies had repeatedly applied human rights law to the conduct of hostilities in situations of armed conflict, such as the case of *Isayeva, Yusupova, Basayeva v. Russia* before the European Court of Human Rights and the *De Guerrero v. Colombia* case before the UN Human Rights Committee. One expert also held that, in accordance with Article 31 of the Vienna Convention on the Law of Treaties, treaty IHL should be interpreted in the light of “any relevant rules of international law applicable in the relations between the parties”, including international human rights law.

Another expert cautioned, however, that the above-mentioned portion of the text of Article 31 of the Vienna Convention is located at the very end of the provision, and that much more importance was to be given to agreements or instruments relating to the treaty itself, as well

as to subsequent agreements or practice regarding its interpretation or application. Yet another expert pointed out that an Interpretive Guidance on the notion of "direct participation in hostilities" under IHL could not realistically be expected to provide precise criteria for distinguishing between situations of law enforcement and of the conduct of hostilities in all conceivable circumstances. For their part, the organizers recalled that, while "direct participation in hostilities" is a notion of IHL, it did not exclude that human rights law could apply at the same time and could even influence the interpretation of IHL. In their view, the difference in the standards provided by IHL and human rights law should not be overestimated. Existing human rights jurisprudence suggested that the application of human rights law to a case of civilian direct participation in hostilities would not lead to substantially different results in terms of permitted measures of response than would a differentiated application of IHL.

It was finally suggested that a sentence be added to the text of the Final Interpretive Guidance clarifying that, in determining the consequences of civilian direct participation in hostilities, there may be situations where legal frameworks other than IHL, such as human rights law, may also have to be considered.

5. Restricted Membership Approach and Terminology, Status and Function of „Combatant“

The restricted membership approach underlying the Interpretive Guidance as a whole was generally commended as a balanced combination of legal accuracy, operational viability and common sense, at least as far as situations of non-international armed conflict are concerned.¹ While most experts found that the restricted membership approach was compatible with the spirit and intent of IHL governing non-international armed conflict, some concern was expressed as to the consequences of applying that approach in situations of international armed conflict, primarily because the permanent targetability of combatants in international armed conflict constituted a *lex specialis* norm that could not be extended to civilians directly participating in hostilities. It was also noted that the distinction between direct participation in hostilities occurring on an organized and on an unorganized, sporadic or spontaneous basis still needed some clarification.

¹ But see also the critical comments made by individual experts in the Working Session on Section II of the Interpretive Guidance, *infra*, pp. 20 f.

Several experts recommended that the Interpretive Guidance not use the adjective “combatant” in connection with civilians directly participating in hostilities, as it was important to avoid giving the impression that a civilian, by taking a direct part in hostilities, could somehow acquire combatant status. One expert also explained that the use of the term “combatant” for civilians directly participating in hostilities confused the issues of state-authorization, which entailed combatant privilege, and of direct participation in hostilities, which entailed loss of protection against direct attack. According to this expert, a civilian who was authorized by a government to drive an ammunition truck on its behalf and perhaps to use a personal weapon in self-defense, but not to attack enemy forces or objects, could not be regarded as a combatant because he was not authorized by a party to the conflict to directly participate in hostilities. Conversely, the actual question to be resolved, namely whether a civilian ammunition truck driver could be lawfully targeted, depended on whether that civilian did, in fact, directly participate in hostilities and not on whether he was actually authorized to do so. As an alternative to the term “combatant function”, some experts proposed the term “combat function”.

One expert expressed strong disagreement with the prevailing view expressed in the Interpretive Guidance that civilians can be subdivided into two groups, namely those who do and do not directly participate in hostilities. This expert held that, under customary international law, it was the category of “combatant” that had to be subdivided into members of armed forces on the one hand, and civilians directly participating in hostilities on the other. In the view of this expert, civilians directly participating in hostilities should no longer be regarded as civilians. In response, another expert suggested that most of the disagreements and misunderstandings with regard to the concept of combatancy in international armed conflict were rooted in the conceptual and terminological differences between Additional Protocol I and the Hague Regulations. Under the Hague Regulations, the term “belligerent” referred to a status, whereas the armed forces were divided into “combatants” and “non-combatants” depending on whether their individual function included direct participation in hostilities. In Additional Protocol I, the term “combatant” referred to a status afforded to all members of the armed forces except medical and religious personnel, and everyone else was categorized as a civilian, regardless of individual direct participation in hostilities. The concept of “belligerent” disappeared in the Protocol. In the view of this expert, it would be only logical to now use the term “belligerent” to refer to persons directly participating in hostilities. Whether such belligerence was privileged or unprivileged would in turn depend on the combatant or civilian status of the person in question.

Finally, several experts cautioned that the importance of terminological and status-related questions should not be over-emphasized. After all, the question to be clarified in this

process was not whether a civilian taking a direct part in hostilities retains civilian status or becomes a combatant, but which civilian activities entailed loss of protection against direct attack in accordance with the rule expressed in Article 3 GC I to IV, Article 51 [3] AP I and Article 13 [3] AP II. Other experts shared the view that questions of status were not of primary importance in this process, but emphasized that the question of lawful targeting was only one aspect to be resolved and that it was equally important to ensure the protection of peaceful civilians in the conduct of hostilities. According to one of these experts, when the Diplomatic Conference of 1974 to 1977 endeavored to integrate guerrilla warfare into international humanitarian law, it was not so much the status and the immunity of those directly participating in hostilities that was the main concern but the protection of peaceful civilians. It was suggested that some of the disagreements in this respect could be addressed by including a general disclaimer clarifying that the Interpretive Guidance was not concerned with the issues of status and post-capture detention.

B. Personal Scope

I. Concept of "Civilian" in International Armed Conflict

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section I of the Interpretive Guidance dealing with the concept of "civilian" in international armed conflict with the following introductory remarks:

The basic idea underlying Section I of the Interpretive Guidance was that of the mutually exclusive nature - expressed in all instruments of IHL - between the notions of "armed forces" on the one hand, and "civilians" on the other. While in Additional Protocol I these categories were complementary in the sense that there is no space for a third category - except for the *levée en masse* – treaty law pre-dating Additional Protocol I could perhaps be interpreted more broadly. However, under no instrument is it conceivable that someone could be a member of an armed force of a party to the conflict and a civilian at the same time. Therefore, the definition of civilian proposed in Heading I of the Interpretive Guidance for situations of international armed conflict was initially based on the definition of civilian provided for in Additional Protocol I and was subsequently broadened also to accommodate the definitions of armed forces and the implicit interpretations of the concept of civilian in the Geneva Conventions and the Hague Regulations.

The experts were then invited to express their views on Heading I of the Interpretive Guidance, as well as on the accompanying commentary and footnotes, both in terms of form and substance.

2. General Comments and Suggestions

In view of the difficult conceptual and terminological questions raised by the notion of civilian, a preliminary question was asked: whether the Interpretive Guidance needed to address the concept of civilian at all, and whether it would not be better to focus exclusively on the meaning of the phrase "direct participation in hostilities", which was the main question to be resolved. In response, the organizers recalled that the purpose of discussing the concept of

civilian in international and in non-international armed conflict in the Interpretive Guidance was to clearly determine the circle of persons benefiting from protection against direct attack unless and for such time as they directly participate in hostilities. Finally, a suggestion was made to relegate the discussion of the *levée en masse* to footnotes, as it could generate confusion if left in the main text.

Several experts expressed general support for the approach taken in Section I of the Interpretive Guidance. In their view, members of an organized armed force, group or unit fighting for a party to the conflict may be directly attacked on a continuous basis, whereas all other persons should be regarded as civilians benefiting from protection against direct attack unless and for such time as they directly participated in hostilities. Thus, a distinction can be made between those directly participating in hostilities on an organized or on an unorganized, sporadic or spontaneous basis. Two experts emphasized that, in view of the clear definitions provided in IHL governing international armed conflict, this approach was preferable to saying that civilians directly participating in hostilities were no longer civilians. Another expert found that Section I of the Interpretive Guidance was satisfactory as it provided legal answers and practical guidance for a multitude of operational situations and clearly defined the status of the various actors present in situations of international armed conflict within the framework of the law in force.

One expert proposed that the Interpretive Guidance should not address the issues of armed forces and *levée en masse* and should not assert that every person not falling in these categories - such as, for example, mercenaries - must necessarily be a civilian. Instead, the Interpretive Guidance should be limited to clarifying that persons who are civilians lose protection for such time as they directly participate in hostilities. In the view of this expert, it followed logically from this rule that members of an organized armed force or group, whether independent, transnational or belonging to a party to the conflict, could be subject to direct attack irrespective of their direct participation in hostilities at the time of attack.²

² Accordingly, this expert proposed the following alternative Heading for Section I of the Interpretive Guidance: "The present text is exclusively confined to the conduct of hostilities and it does not relate to post-capture situations. (a) The present text does not apply to members of organized armed forces or to *levées en masse*. (b) All other persons lose any protection from attack that they may have as civilians if, and for such time, as they directly / actively participate in hostilities".

3. The Proposed Concept of Civilian in General

According to one expert, the concept of civilian proposed in the Interpretive Guidance for situations of international armed conflict clearly reflected Additional Protocol I and, therefore, excluded more persons from civilian status and protection than would be the case under the Geneva Conventions. In response, another expert cautioned against over-emphasizing the difference between Additional Protocol I and the Geneva Conventions. After all, during the Diplomatic Conference of 1974 to 1977 the aim of defining the notion of civilian in Article 50 AP I had been to clarify, and not to change, the concepts already inherent in the Geneva Conventions.

Another expert observed that the notion of “civilian” raised similar terminological problems as that of “combatant”, particularly with regard to independent armed groups. For instance, it was difficult to explain why UN Peacekeepers qualified as civilians, although they essentially represented fully armed soldiers operating in a combat zone. In the view of this expert it was important to clarify to what extent the qualification of a person as a civilian could be interpreted to imply an entitlement to protection under GC IV. In response, the organizers pointed out that the notion of “civilian” was not synonymous with that of “protected persons” under GC IV and that entitlement to prisoner of war status was not limited to members of the armed forces. For instance, private contractors accompanying the armed forces were entitled to prisoner of war status even though they normally remain civilians. Likewise, persons protected by GC IV could also include members of the armed forces who, for whatever reason, had lost their entitlement to prisoner of war status. Therefore, the interpretation of the concept of civilian for the purpose of the conduct of hostilities was an issue separate and independent from questions relating to the protection afforded by GC III and GC IV.

One expert, while agreeing with the Interpretive Guidance that the categories of combatants and civilians were mutually exclusive under all IHL treaties, pointed out that “mutually exclusive” did not necessarily mean “contiguous”. If the Interpretive Guidance was to exclude the possibility of a third category alongside combatants and civilians in situations of international armed conflict, then the notion of direct participation in hostilities would have to be defined so as to adequately address the practical problem caused by the classification (at least in certain circumstances) of mercenaries, terrorists, ammunition truck drivers and independent or transnational armed groups as civilians. In response, the organizers recalled that the Interpretive Guidance did not define the category of “civilian” as including all those not entitled to combatant status but, instead, as including all those not qualifying as members of an organized armed force, group or unit fighting on behalf of a party to the conflict, regardless of their formal qualification as combatants under IHL or as members of the armed

forces under national law. Therefore, to the extent that mercenaries or other armed actors were fighting for a party to the conflict on an organized basis, the Interpretive Guidance did not require their classification as civilians. The organizers also pointed out that abandoning the approach proposed in the Interpretive Guidance would mean that certain categories of persons, although not qualifying as members of an organized armed force, group or unit of a party to the conflict, could be directly attacked even though they were not, at the time, directly participating in hostilities.

Another expert criticized the view expressed in the Interpretive Guidance that organized armed groups belonging to a party to the conflict should not be regarded as civilians merely because they failed to fulfill one of the “four conditions” required for combatant status. According to this expert, this approach entailed that captured members of such groups could be interned without limitation until the end of hostilities. Therefore, it was better to regard such persons as civilians continuously directly participating in hostilities for the entire duration of their membership in the group in question. This would allow the application of the functional membership approach in international armed conflict without raising problems of status.

This argument was rejected by another expert who supported the view expressed in the Interpretive Guidance. According to this expert, to regard the groups in question as civilians would give them an unrealistic advantage during the conduct of hostilities, since they could not longer be directly attacked on a continuous basis but only during their direct participation in hostilities. The same expert doubted, however, that the approach taken by the Interpretive Guidance could be applied to mercenaries. After all, Additional Protocol I expressly excluded mercenaries from combatant status and, thereby, implied that they must be regarded as civilians, although this result was counterintuitive and probably contrary to actual practice. In response, yet another expert emphasized that, during the Diplomatic Conference of 1974 to 1977, the aim of introducing loss of status and protection for mercenaries had been to delegitimize their use by the parties to a conflict and certainly not to afford them the advantages of civilian protection. It was also recalled that the question as to the lawfulness of direct attacks against mercenaries was already resolved by the very definition in Article 47 [2] (b) AP I, according to which a mercenary was defined as a person who actually directly participated in hostilities. Therefore, the question of lawful targeting was much more important in the case of private contractors who did not fulfill the constitutive elements of mercenaries, than for actual mercenaries. One expert asked whether it might be necessary or useful to include a disclaimer stating that spies and mercenaries were not addressed in the Interpretive Guidance.

4. Organized Armed Groups “Belonging To” a Party to the Conflict

Several experts held that, in determining whether a specific person could be directly attacked regardless of his or her direct participation in hostilities, the question of status was of utmost importance and could not be ignored in the Interpretive Guidance. In the view of one expert, this question was particularly important in situations similar to non-international armed conflict, such as occupation or intervention by invitation, where it was often necessary to determine the criteria according to which a gang of bandits, against which the security forces would otherwise operate in a law enforcement mode, could become subject to attack under the rules on the conduct of hostilities. According to this expert, the decisive criterion was indeed whether the group in question actually "belonged to" a party to the conflict. Similarly, another expert emphasized that the question of whether "other militias and voluntary corps" within the meaning of Article 4 A [2] GC III qualified as civilians or as combatants depended, first and foremost, on whether they operated under the authority of a party to a conflict. Absent this critical precondition, which made them "belong to" a party to the conflict, armed groups would have to be regarded as private civilian groups without entitlement to combatant and prisoner of war status, regardless of whether or not they fulfilled the additional "four conditions" required in that provision. According to this expert, this aspect was not made clear enough in the Interpretive Guidance and should be integrated into the discussion on the basic concept of armed forces and the notion of "belonging to" for situations of international armed conflict. Yet another expert, while agreeing with the previous speakers in principle, cautioned that the notion of "belonging to" must not be misconstrued to require a formal authorization by a party to the conflict. Instead, a very informal link between the concerned militia or group and the state could be sufficient. Several experts suggested that the question of whether an armed group "belonged to" a party to an international armed conflict, that is to say, whether it operated under the authority or with the acquiescence of that party, should be determined based on the Draft Articles on State Responsibility. In case of legal attributability to a state party, members of such armed groups should be excluded from the category of civilians and be considered legitimate military targets on a continuous basis. It was also recalled that, in practice, it was not always possible to determine with certainty whether a person was a member of an armed group belonging to a party to the conflict and that, in case of doubt, the basic principle expressed in Article 50 AP I required a presumption of civilian status.

5. “Independent” Organized Armed Groups

Several experts pointed out that the clarification of the notion of “belonging to” a party to the conflict was particularly important in view of the increasing presence in situations of international armed conflict of organized armed groups who were conducting hostilities without clearly “belonging to” any party to the conflict and who, according to the Interpretive Guidance, could possibly become an independent party to a parallel non-international armed conflict (hereinafter: “independent” armed groups). In the view of these experts, armed groups could not become permanent military targets if they were not under a command responsible to a party to the conflict.

However, another expert noted with concern that, according to the Interpretive Guidance, such independent armed groups operating in international armed conflicts had to be regarded as civilians subject to the rule of “direct participation in hostilities”, unless they were considered to be independent parties to a separate non-international armed conflict occurring in parallel to the surrounding international armed conflict. Consequently, if this “double-qualification” (i.e. of parallel international and non-international armed conflict) was made, combatant members of independent armed groups could be targeted continuously. Conversely, if this “double-qualification” was not made, even combatant members of independent armed groups would have to be regarded as civilians exposed to direct attack only for such time as they carried out specific acts amounting to direct participation in hostilities. In the view of this expert, while this solution was accurate from a theoretical perspective, it nevertheless remained counterintuitive and did not necessarily reflect the reality of how the armed forces would define this conflict. Therefore, this expert suggested re-examining whether the element of “belonging to” a party to the conflict should be decisive in the determination of whether combatant members of independent organized armed groups could be considered “continuous” lawful targets in situations of international armed conflict. Alternatively, the decisive criterion could be that the group in question operated within the hostilities and in relation to the armed conflict that is going on without necessarily belonging to one of the parties. Another expert insisted that the relevant question was not that of “belonging to” a party, but what types of organizations could be regarded as valid parties to non-international and international armed conflicts. While certain aspects of this problem could perhaps be described in the Interpretive Guidance, it would be unrealistic to expect this document to comprehensively resolve an additional question of such complexity.

In response, the organizers recalled that, in practice, many armed conflicts in central Africa and elsewhere had both an international and a non-international aspect in that states were fighting against states, while at the same time also confronting independent armed groups in

their own territory or in the territory of neighboring states. The organizers further emphasized that, from a legal perspective, regardless of how a context is analyzed politically, IHL clearly distinguished two kinds of armed conflict depending on whether the opposing parties were only states or also included non-state actors. As a matter of law, a confrontation between a state and an independent non-state group could not be qualified as an international armed conflict. Furthermore, under IHL governing international armed conflict, an armed group not belonging to a state party to the conflict could not qualify as the armed forces of a party and, therefore, had to be qualified as civilians, which meant that they benefited from protection against direct attack unless and for such time as they directly participated in hostilities. It was only in situations of non-international armed conflict that groups not belonging to a state could become the armed forces of a party to the conflict and, thereby, could lose protection against direct attack on a continuous basis. Where organized groups carried out acts of violence independently of a party to a conflict, they could hardly be regarded as “taking part” in the hostilities occurring between those parties. Their conduct should therefore be analyzed separately from these hostilities.

While one expert regretted that the Interpretive Guidance did not directly address the issue of transnational organized armed groups, such as Al Qaeda, and requested that this issue be at least mentioned in the form of examples, another expert found that the approach taken in the Interpretive Guidance with regard to independent armed groups was particularly useful precisely because it allowed to adequately address the new phenomenon of transnational armed groups. In this context, another expert also recalled that, in *Hamdan vs. Rumsfeld*, the US Supreme Court had recently determined that the Geneva Conventions applied to conflicts between sovereign governments, whereas the conflict between the US government and organizations such as Al Qaeda was governed by Article 3 GC I to IV. In the opinion of one expert, this decision had to be read in conjunction with the judgment of the International Court of Justice in the *Nicaragua Case*, according to which Article 3 GC I to IV provided the minimum standard applicable to both international and non-international armed conflicts. Another expert doubted, however, whether the view of the US Supreme Court accurately reflected the reference in Article 3 GC I to IV to “a conflict occurring in the territory of one of the High Contracting Parties [emphasis added]”. In response, the organizers pointed out that the reference in question did not necessarily have to be read as restricting the concept of non-international armed conflict to conflicts occurring on the territory of a “single” state but, with a slightly different emphasis, was probably better understood as emphasizing that Article 3 GC I to IV applied only to conflicts occurring on territory which belonged to a High Contracting Party as opposed to a state not party to the Geneva Conventions. From the perspective of the 1949 negotiations, when Article 3 GC I to IV was still a novelty rather than a customary minimum standard applicable in all armed conflicts, it

was probably more important to confine the applicability of this provision to the territory of states which had actually ratified the Conventions than to restrict the concept of conflicts “not of an international character” to confrontations occurring within a single state only.

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

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section II of the Interpretive Guidance dealing with the concept of "civilian" in non-international armed conflict with the following introductory remarks:

It seemed to be generally accepted within the expert group that, in situations of international armed conflict, the lawfulness of direct attacks against members of organized armed forces, groups or units belonging to a party to the conflict did not depend on their direct participation in hostilities at the time of attack. Conversely, the lawfulness of direct attacks against all other persons – here termed civilians - depended precisely on their direct participation in hostilities at the time of attack. The aim of Section II of the Interpretive Guidance was to illustrate that, despite certain terminological and conceptual differences, the same principle applied also in non-international armed conflicts.

Thus, the Interpretive Guidance proposed a functional or restricted membership approach, which distinguished between direct participation in hostilities occurring on an organized and, respectively, on an unorganized, sporadic or spontaneous basis, and required a link between an armed group and a party to the conflict. In other words, as soon as a person was part of an organized armed force, group or unit fighting on behalf of a party to a non-international armed conflict, this person could be directly attacked regardless of his or her direct participation in hostilities in the moment of attack. Conversely, similar to international armed conflict, the category of civilian in non-international armed conflict included all those persons who were not part of an organized armed force, group or unit belonging to a party to the conflict.

A slight distinction was made in the Interpretive Guidance between formal membership in the uniformed armed forces of a government on the one hand, and informal membership in non-state armed groups on the other, as the latter was much more difficult to identify and to distinguish, for example, from mere support activities by civilians accompanying armed groups. This required adopting a general membership approach for governmental armed forces and a slightly narrower, functional or restricted membership approach for organized armed groups, with the consequence that only persons assuming a permanent combatant function for such groups lost their protection on a continuous basis.

From a theoretical perspective, the continuous loss of protection of combatant members of non-state armed groups could be based on either of two approaches. It could either be argued that combatant members of non-state armed groups were not civilians in the first place, which was the approach favored by the Interpretive Guidance, because it clearly distinguished between the civilian population and the armed forces of the respective parties to the conflict. Alternatively, it could be held that such combatant members of non-state groups remained civilians continuously engaged in direct participation in hostilities and, therefore, subject to direct attack for as long as they assumed their combatant function.

The participating experts were invited to express their views with regard to the form and substance of Heading II of the Interpretive Guidance, as well as of the accompanying commentary and footnotes. They were also requested to reflect on whether it would be necessary and feasible to refine the criteria provided for the practical identification of combatant function.

2. General Comments and Suggestions

Most experts commended the functional approach proposed in Section II of the Interpretive Guidance as an operable and legally accurate balance that adequately addressed the reality of non-international armed conflict while maintaining the fundamental concepts underlying IHL.³ Several experts, nevertheless, criticized individual aspects of the approach and, in one case, rejected it.

One expert strongly rejected the statement that combatant members of organized armed groups were not civilians. In the view of this expert, the Geneva Conventions and the Additional Protocols merely provided that civilians lost their protection against direct attacks

³ See also the relevant statements made during the Opening Session, *supra*, p. 9 f.

for such time as they directly participated in hostilities. Consequently, according to this expert, while the Interpretive Guidance could interpret the treaty texts to some extent, it was not possible to create a new category of "irregular" combatant who could be attacked at any time without receiving the benefits of combatant status, as such a category was neither sustained by the treaty text nor intended by the drafters. Extrapolating a definition of membership in an organized armed group from Article 1 AP II was not acceptable because this provision merely established the scope of Additional Protocol II, which is defined by the ability of an armed group to exercise territorial control and to conduct sustained and concerted operations of conventional warfare. The high level of control required on the part of non-state actors proved that Additional Protocol II was intended to apply to situations quite different from guerilla warfare for which, according to this expert, the rule of direct participation in hostilities had been primarily designed. In view of the difficulties of defining reliable criteria for the targeting of individuals in a civilian environment, this expert held that the surrounding civilians would be gravely endangered by the introduction of a permanent "combatant function" for persons without formal combatant status. In conclusion, this expert rejected any extension of the notion of direct participation in hostilities beyond specific acts and recommended that great care be taken that whatever solution was proposed be generally acceptable and not representative of just one point of view.

In reaction to this view, another expert insisted that there could be no non-international armed conflict if there were not at least two opposing armed groups fighting each other and that, as in any armed conflict, a distinction had to be made between several categories of persons. First, there were the members of the armed forces or groups of the parties to the conflict who could be targeted at any time. Second, there were the civilians who could not be targeted at all. And third, there were civilians who directly participated in hostilities and who could be targeted for such time as they directly participated. While this expert conceded that a general membership approach would perhaps have to be restricted, i.e. based on an individual's function within the group in question, the existence of the category of "fighter" that could be directly attacked regardless of direct participation in hostilities was a reality also in non-international armed conflict. However, the membership or functional approach applied to members of armed groups only. As far as civilians who were not members of such groups were concerned, treaty IHL was very clear as to the fact that they remained civilians and could not even temporarily be regarded as combatants.

One expert questioned whether, instead of applying the functional membership approach to all situations of non-international armed conflict, the approach should perhaps depend on a situational analysis. In other words, in a situation where an organized armed group had become powerful enough to actually control a certain area, the government could not

realistically be asked to base its military operations to regain control over that area on an assessment of the functions and conduct of every individual member of that group. On the other hand, where the government operated against organized armed groups and suspected guerrilla sympathizers within areas under its own control, it would be inadmissible to simply show up at their homes and shoot them at point blank range. There simply was no military necessity for such an approach. Finally, in situations where nobody really controlled an area, it would perhaps be appropriate to apply an individual function approach. Another expert, while not opposing the functional approach as such, expressed concern that the Interpretive Guidance excluded functional combatants from the category of civilians. According to this expert, this entailed that functional combatants, once captured, could be interned without limitation or review until the end of hostilities. Therefore, it was better to regard such persons as civilians continuously directly participating in hostilities for the entire time they performed a fighting function. In response, another expert insisted, however, that members of an organized armed group could not be regarded as civilians. She held that, if they were regarded as civilians, they may also have to be taken into account in the proportionality test in operations where they were not directly attacked but were at risk of incidental death or injury. It was also suggested that it would be worth clarifying the Interpretive Guidance's approach with regard to armed actors in failed states, where small clans and groups of bandits were engaging in armed violence on a permanent basis without necessarily qualifying as organized armed groups belonging to a party to the conflict.

One expert held that, while the concept of direct participation in hostilities itself would have to be interpreted synonymously in both international and non-international armed conflict, the notion of "armed forces of the parties to the conflict" should be defined more generously in non-international armed conflicts because of the wider variety of groups that were involved in the conduct of hostilities. In identifying organized armed groups, whose members could be directly attacked regardless of their direct participation in hostilities at the time of attack, a distinction would have to be made between military and political functions assumed for a party to the conflict. For example, according to this expert, the Irish Republican Army (IRA) in Northern Ireland would have to be regarded as an organized armed group, making its members legitimate military targets, whereas the Sinn Fein party supporting the IRA was a political party, whose members remained protected against direct attack and were subject to law enforcement measures only. Similar distinctions could also be made with regard to organizations such as Hamas and Hezbollah. In the view of this expert, as indicated in Article 1 AP II, the decisive criterion for the identification of organized armed groups was the question of whether the group conducted "sustained and concerted military operations". All

other persons could only be directly attacked for such time as they were directly participating in hostilities.⁴

3. Terminological Considerations

a) “Combatant” Function

In continuation of the discussion on the same topic, which had taken place already during the Opening Session, some experts who otherwise agreed with the basic concept of the functional or restricted membership approach reiterated their objection to the use of the term “combatant” to describe the fighting function of members of organized armed groups.⁵ In their view, the term “combatant” was prone to cause confusion and did not belong to a discussion on non-international armed conflict. Instead, it was suggested to use alternative language, such as “combat”, “military” or “fighting” function, and to explain in the commentary what exactly was meant by that terminology. According to one expert, if the term “combatant” was to be maintained in the Interpretive Guidance, it would have to be clarified whether it was used according to the logic of the Hague Regulations, where the term “belligerent” indicated a function, or the logic of Protocol I, where the term “combatant” referred to a status. In the latter case, being a member of the armed forces and, in non-international armed conflict, of an organized armed group would be sufficient to entail continuous loss of protection, and there would be no need for the additional assumption of a fighting function. Even if the logic of the Hague Regulations was followed and members of armed groups were divided by their function into combatants and non-combatants, the non-combatant cooks, bottle washers, logisticians, and even lawyers would in practice most probably also be expected to assume combatant function whenever such support was required. In such situations, it was far from clear whether a person whose activities included, for instance, fighting for three nights a week and being the cook the other four days assumed a “combatant function” and, if so, whether this combatant function would have to be considered “permanent” within the meaning of the Interpretive Guidance.

⁴ Accordingly, this expert proposed the following alternative Heading for Section II of the Interpretive Guidance: “In non-international armed conflicts, the expression ‘organized armed forces’ includes any armed group carrying out sustained and concerted military operations”.

⁵ See also the discussion during the Opening Session on the term, status and function of “combatant”, *supra*, p. 9.

b) “Permanent” Combatant Function

Many experts expressed concern about the use of the adjective “permanent” in order to qualify the combatant function required to justify continuous loss of protection against direct attack. According to these experts, the ordinary meaning of the word “permanent” did not correspond to the flexible and informal realities of non-international armed conflict, which the Interpretive Guidance tried to accommodate. It was recalled that part-time involvement of fighting personnel was typical for insurgencies and that the term “permanent” could wrongly be interpreted to suggest that combatant function continued after the general end of hostilities. Clearly, however, nothing in IHL excluded the disengagement of functional combatants in the course of hostilities. Several experts therefore advocated deleting the word “permanent” from Heading II of the Interpretive Guidance and having the commentary explain what exactly was meant by the notion of “combatant function”. In response, the organizers recalled that the intention in using the word “permanent” in the Interpretive Guidance was to avoid that a civilian, who may repeatedly or regularly be pressed into performing temporary combat activities for passing troops or insurgents, end up being continuously deprived of civilian protection against attack. Recognizing that this problem was a widespread reality and had been observed in contexts such as Guatemala, Bosnia, Nepal or Liberia, several experts recommended that the term “permanent” be replaced by more suitable alternative language, which should convey the idea of duration without insisting on permanence. A simple omission was rejected by many experts because an unqualified “combatant function” approach would in practice lead to the application of an unrestricted “membership” approach, or even of an “affirmative disengagement” approach according to which a single act of combat turned any civilian into a permanent military objective. Experts proposed alternative terms such as “continuous”, “regular”, or a combination of both “continuous” and “regular”, in order to indicate that the function in question was both ongoing and periodic. It was agreed that the terminology chosen would have to express a certain degree of long-term continuity in assuming combatant function.

c) “Membership in”, “Belonging to” or “Combatant Function”

Some experts suggested that, at least in some situations, the concept of “belonging to” used in Article 4 GC III could provide a more solid basis for determining an individual’s affiliation with an armed group than the unclear concept of “membership” and the problematic notion of “combatant function”. In response, the organizers pointed out that the concept of “belonging to” in Article 4 GC III referred to the link between an organized armed group or militia to a party to a conflict, an issue which could be resolved based on the Draft Articles on State

Responsibility. However, in the context of determining the affiliation of an individual to an armed group, the phrase “belonging to” appeared to widen the scope far beyond “combatant function”. One expert also questioned whether there really was a substantial difference between determining whether a person was a “member of” an organized armed group as opposed to whether her or she “belonged to” or assumed a “combatant function” for that group. Ultimately, the actual question to be resolved was whether and in what circumstances a particular person could be directly attacked even though he or she was not, at the time, directly participating in hostilities, and the response to that question would always have to be based on the same facts. The organizers also recalled that various terms and approaches had already been found and discarded in the course of the clarification process and that it was important not to keep shifting the discussion from “membership” to “function” and from “function” to “belonging to” without coming up with clear criteria by which these concepts could be identified in practice.

4. General Discussion on the Practical Determination of Individual Function

Many experts commended the functional approach proposed by the Interpretive Guidance as a good concept, but were concerned about the difficulty of defining and identifying “permanent combatant function” in practice. While an individual soldier could probably recognize a civilian standing in front of him with a rifle as a legitimate target based on the functional approach, it was not clear how he was supposed to determine whether a person permanently assumed a combatant function within an organized armed group. In response, the organizers and several other experts recalled that the Interpretive Guidance did not directly address the individual soldier on the ground, but that it aimed to provide guidance to legal advisers and others qualified to translate it into concrete instructions and rules of engagement for the armed forces. While the practicability of the chosen criteria was important, the Interpretive Guidance was designed to cover all conceivable kinds of non-international armed conflict and could not be expected to provide the level of simplification and specificity required for application by individual soldiers.

One expert insisted that the criteria proposed by the Interpretive Guidance for the identification of permanent combatant function would be difficult to apply even by higher levels. In his own operational activity this expert had not seen a situation in which a person could have been effectively targeted using the rationale proposed by the Interpretive Guidance, because the required level of intelligence was simply not available. In response, the organizers recalled that possible lack of intelligence was a problem in any situation of

armed conflict, and was not restricted to the difficulty of identifying facts constitutive of combatant function or of direct participation in hostilities. This problem was of practical nature and could not be resolved by the law. The same uncertainties arose when one had to determine whether a regular soldier had fallen *hors de combat* or whether an object constituted a legitimate military objective. Section VIII of the Interpretive Guidance addressed this reality by recalling the precautions and presumptions to be applied in case of doubt.

Other experts expressed concern that, in practice, the obligation to examine the function of every member of an organized armed group prior to launching an attack would be almost equivalent to saying that such members remained civilians and could be attacked only for such time as they individually and directly participated in hostilities. One expert thought that it was more realistic to apply a general membership approach that would take into account the different functions inside an organized group. For instance, where an armed group essentially constituted a non-state army, simple membership should be enough to entail loss of protection for the entire duration of membership. It should be immaterial whether the member in question was involved in specific military operations or merely in general training, transport of ammunition, or purchasing of weapons. Conversely, mere membership should not be sufficient where an armed group also had exclusively civilian components dealing, for example, with charity work.

With regard to the practical difficulties of obtaining sufficient intelligence, several experts emphasized that it was a very different situation whether the operating forces needed intelligence on the activities of an armed group as a whole, than if they needed intelligence with regard to the function or activity of every single member. Thus, several experts argued that it was much easier to determine a person's membership in a group than to identify his or her precise function within the group. For example, while it was normally possible to identify the location of an armed group's camp and to observe its global activities, the identification of each individual and their functions prior to any attack required an extraordinary level of intelligence, which most states could not achieve. In response, the organizers pointed out that the Interpretive Guidance did not suggest that the determination of permanent combatant function required full diary intelligence on every single member of a group. Instead, it was sufficient to have reasonably objective evidence indicating that the person or group of persons to be attacked actually assumed a fighting function for a party to the conflict, which was basically equivalent to membership in the armed forces of a state party.

Some experts were of the opinion that combatant function could not be limited to performing concrete acts amounting to direct participation in hostilities. It was held to be unrealistic to make fine distinctions based on individual function and that, therefore, any person belonging

to a fighting unit, even if involved exclusively in providing services such as cooking or manufacturing or transporting weapons, should be regarded as equivalent to a military person or a person assuming a combatant function and should be a legitimate military target. However, other experts recalled that, if this liberal approach was transposed to the governmental side of the equation, it would entail that a great number of civilians supporting the general war effort, such as workers in the armament industry or ammunitions truck drivers, would become legitimate military objectives regardless of their direct participation in hostilities, an approach that had already been discarded as unacceptable not only by this expert group, but also in the general *opinio juris* and practice of states.

5. Criterion of “Concrete and Objectively Verifiable Facts”

One expert was of the view that the functional membership approach was acceptable for situations of non-international armed conflict, provided that the “concrete and objectively verifiable facts”, which the Interpretive Guidance (p. 16 Interpretive Guidance) required as evidence for the assumption of permanent combat function, were actually available. The same expert suggested that, between the categories distinguished in the Interpretive Guidance, namely objectively identifiable combatant members of organized armed groups on the one hand, and those directly participating in hostilities on a merely spontaneous, sporadic or unorganized basis on the other, there could be other categories, such as armed groups that permanently participated in hostilities without being objectively identifiable or without being organized according to a clear structure. In practice, there often would be no “concrete and objectively verifiable facts” to prove that a particular person was a combatant member of an armed group. Therefore, particularly in the case of armed groups which lacked uniforms, clear structure and organization and could not be compared to state armed forces, it would often be necessary to fall back on the presumption of civilian protection and, thereby, on the specific acts approach.

Another expert held that, by requiring that permanent combatant function had to be “evidenced by concrete and objectively verifiable facts”, the Interpretive Guidance put the bar too high. According to this expert, targeting decisions were always taken on the basis of the information reasonably available to the decision-maker at the relevant time, even when such information was not necessarily complete, accurate and objectively verifiable. It was therefore the perception of the decision-maker as to what constituted a threat, and not objectively established facts, which provided the basis for a targeting decision. For example, a soldier observing through binoculars a person who regularly appeared as a lookout in a particular location would perhaps be able to determine that these activities were linked to the

activities of a particular organized armed group, but could not be expected to draw conclusions as to the level or permanency of that person's integration into the fighting structure of the group merely by inference from what he was actually able to observe.

In response, the organizers recalled that the Interpretive Guidance did not require incontrovertible proof of "concrete and objectively verifiable facts" evidencing permanent combatant function, but that the conclusion of the attacker that such facts existed had to be based on what he or she reasonably and honestly believed to be "concrete and objectively verifiable facts", even if that assessment turned out to be erroneous. As outlined in Section VIII of the Interpretive Guidance, in order to avoid erroneous or arbitrary attacks against protected civilians, the attacker was required to take all precautionary measures that were actually feasible in the concrete circumstances and, if reasonable doubt persisted, the person in question was presumed to be protected against direct attacks. Another expert supported this view and pointed out that, in reality, if an individual soldier had no additional source of information or instruction, he would probably base his assessment of permanent combatant function on whether the observed person carried a weapon, uniform or other insignia. Otherwise, if that person simply looked like a civilian, no reasonable soldier would open fire before being honestly convinced that this civilian was directly participating in hostilities.

6. Criterion of "Direct Participation in Hostilities on a Regular Basis"

One expert pointed out that, according to the Interpretive Guidance (pp. 15 f. Interpretive Guidance), combatant function corresponded to a permanent role requiring direct participation in hostilities "on a regular basis" and asked what the consequences of this wording would be in the case of a "sleeper", i.e. a person waiting under cover for instructions to mount a single devastating attack and who had already engaged in certain preparatory activities. According to this expert, the "sleeper" should not benefit from civilian protection during the waiting phase because the practical possibility of mounting an attack was combined with a clear intent to do so and with acts of preparation. While the "sleeper" was perhaps not a formal member of an organization, his affiliation with that organization was nevertheless sufficient for him to constitute a real threat. A prohibition on targeting such persons while they were "sleeping" could endanger the lives of thousands of innocent civilians.

Several experts strongly rejected this view. One of them pointed out that, assuming that the described situation was subject to the rules on the conduct of hostilities, a "sleeper" could be adequately targeted under the specific acts approach as soon as his conduct amounted to direct participation in hostilities. Another expert recalled that there had been a number of "sleepers" in Germany, for example. However, it would have been absolutely inconceivable in these cases for the police or one of the secret services to transmit intelligence information identifying a particular person as a "sleeper" to the armed forces, and for the armed forces to carry out a military operation with the aim of killing that "sleeper" the next time he or she left the house. According to this expert, to seriously consider this kind of approach was a bad example of how one could get carried away in analyzing and responding to the so-called "war against terrorism".

7. "Membership" versus "Individual Function"

One expert observed that, in discussing the conditions under which persons could be lawfully targeted although they were not, at the time, directly participating in hostilities, the Interpretive Guidance proposed two approaches, namely a classic "membership" approach, which it applied in international armed conflict, and an "individual function" approach, which was designed for non-international armed conflict. As the classic membership approach required a rather sophisticated level of organization, where the armed wing of the organization could be clearly distinguished from its other parts, that approach could not be transposed to situations where armed groups were organized in a less recognizable way, which did not allow for such distinctions. In such situations, one could either apply the specific acts approach to all persons or try to identify an alternative criterion, which would maintain the basic concepts and distinctions underlying international armed conflict as far as practically possible, such as the individual function approach proposed in the Interpretive Guidance.

Some experts argued that, in actual state practice, the regular armed forces would normally assume that all members of an opposing armed group were hostile. For example, while governmental armed forces were usually easily distinguishable from private contractors and civilians present in an army camp, it would be practically impossible in a situation of non-international conflict to distinguish between fighting personnel and civilians present in a remote insurgent camp. Therefore, during an attack against an insurgent camp, unless there was information to the contrary, it would probably have to be assumed that all persons present in that camp were legitimate military targets. This approach was held to be particularly pertinent in view of the fact that, where an insurgent camp came under attack,

every cook or other non-combatant person was likely to be instructed and expected to pick up a weapon and to directly participate in hostilities. Nevertheless, it was conceded that, in such situations, it was crucial to conduct operations in accordance with the principle of presumption of protection in cases of doubt. Several other experts rejected this approach, insisting that it was unacceptable to simply assume that all persons present in a military camp, whether governmental or insurgent, were legitimate targets regardless of their direct participation in hostilities. One expert specifically recalled that, during the 2005 Expert Meeting, the majority of the experts had come to the conclusion that the membership approach had to be restricted. It was also pointed out that, where attacks were directed against an entire rebel camp, the correct identification of a military objective and considerations of proportionality with regard to expected incidental civilian deaths were more important than a sophisticated distinction between combatant members and other persons present in the camp.

One expert recalled that IHL governing both international and non-international armed conflict expressly based the principle of distinction on the concept of “membership” in an armed force, group or unit of a party to the conflict and that, in his view, there was nothing in the Geneva Conventions, the Additional Protocols or even in state practice to support an approach based on individual function for situations of non-international armed conflict. According to this expert, such an individual approach had a legal basis only where operations were directed against civilians and where the law required an individual assessment of whether they were, at the time, directly participating in hostilities.

Nevertheless, another expert cautioned that a simple membership approach, while conceptually attractive, was not easy to apply. According to his own experience in counter-insurgency operations, armed groups had three to four distinct layers of insurgents working for them on a full-time or part-time basis. Of course, if sufficient intelligence was available, it was possible to carry out premeditated attacks against particular insurgents such as, for example, the killing by US forces of Al-Zarqawi, the Al Qaeda leader in Iraq, in June 2006. In the absence of sufficient intelligence, however, attacks would in practice be carried out based on the specific acts approach, namely in reaction to, and in interpretation of, the concrete conduct of the targeted persons at the time of the operation. For example, in July 2006, two members of US Special Forces observing a highway in the Iraqi countryside during the nightly curfew spotted two men digging two holes a hundred meters apart. They connected the holes with a wire and offloaded some boxes from a truck, which they proceeded to put into the holes. The snipers, acting under their rules of engagement, opened fire because they concluded that the men were taking a direct part in hostilities. The next morning two improvised explosive devices were found in the holes. In another case, when

soldiers operating in Vietnam killed a thirteen year-old girl who was acting suspiciously alongside a road, it turned out she had been pressed into planting booby traps under threat that her family would be killed if she refused. Although the girl clearly was taking a direct part in hostilities at the time she was killed, she certainly was not a member of the insurgency. Therefore, this expert cautioned that a simplistic membership approach could not adequately address the complex realities of insurgencies.

Yet another expert suggested that a compromise between a general "membership" approach and a generalized "specific acts" approach could be found by requiring the performance of a "regular military function" of a certain duration, as opposed to spontaneous and case-by-case contributions, and combining this requirement with a "reasonable grounds" approach from an *ex ante* perspective as far the required level of intelligence was concerned. Lastly, a discussion between several experts and the organizers led to a compromise proposal, which aimed to capture the wording and intent of the law by combining the "membership" approach, which focused on the function of the group, with the "functional" approach, which focused on the function of the individual. Thus, according to what might be termed a "functional membership" approach, the principal criterion for continuous loss of protection against direct attack would remain "membership" in an organized armed group, whereas the individual "function" assumed on a continuous basis would determine whether or not a particular person could be regarded as a member of the organized armed group.

8. Concluding Remarks by the Organizers

At the end of the discussion, the organizers reiterated that Heading II of the Interpretive Guidance aimed to distinguish persons who were the equivalent of the "armed forces" of a party to the conflict within the meaning of Article 3 GC I to IV and who could be attacked for as long as they assumed that function, from all other persons, who were protected against direct attack unless and for such time as they directly participated in hostilities. It was recalled that the clarification process had initially lead to the conclusion that a simple "specific acts" approach was not sufficient in the case of organized armed groups. Subsequently, there had been an attempt to extend the specific acts approach temporally by saying that any person having directly participated in hostilities could regain protection only after "affirmative disengagement" from such participation. However, it was soon recognized that it was impossible to require each civilian, who had at some point directly participated in hostilities, to figuratively "raise the white flag" in order to regain protection. Therefore, the discussion had turned to the concept of "membership", leading to the conclusion that a generalized membership approach was too wide and had to be restricted to those members

who continuously assumed a combatant function, because that category best corresponded to the concept of "armed forces" of a party to the conflict. While there still were certain terminological and conceptual differences, there now seemed to be wide agreement among the experts that the category of persons to be excluded from civilian protection irrespective of their direct participation in hostilities at the time of attack had to be restricted to the equivalent of the "armed forces" of a party to the armed conflict.

III. Private Contractors and Civilian Employees

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section III of the Interpretive Guidance dealing with private contractors and civilian employees with the following introductory remarks:

Section III of the Interpretive Guidance applied the concept of “civilian” identified in Section I (international armed conflict) and Section II (non-international armed conflict) of the Interpretive Guidance in order to determine whether private contractors and civilian employees of a party to the conflict remained civilians entitled to protection against direct attack unless and for such time as they directly participated in hostilities. In essence, this Section argued that, as far as their qualification as civilians was concerned, no special rules applied to private contractors and civilian employees of a party to the conflict.

The participating experts were invited to express their views with regard to the form and substance of Heading III of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

During the discussion of Section III of the Interpretive Guidance on private contractors and civilian employees, no fundamental disagreement was expressed with regard to the basic approach proposed by the Interpretive Guidance. It appeared to be generally accepted that the question of whether private contractors and civilian employees of a party to the conflict remained entitled to civilian protection against direct attack must be determined according to the general principles identified in Sections I (international armed conflict) and II (non-international armed conflict) of the Interpretive Guidance. Nevertheless, the experts made a number of comments and suggestions concerning the way in which the topic was presented in the Interpretive Guidance in general (below), the scope of protection afforded to private contractors and civilian employees (*infra*, Section 3), and on the question of whether their direct participation in hostilities was prohibited or even privileged under IHL (*infra*, Section 4).

As far as the factual background stated in the Interpretive Guidance was concerned, one expert pointed out that, while it was accurate that the number of civilian contractors involved

in situations of armed conflict was increasing, it should be noted that it had been surprisingly high already before. Thus, at some point during the war in Vietnam, the United States had approximately 80,000 civilians working for them in this context. This expert also recalled that the main influx of civilian contractors in the recent war in Iraq occurred during the occupation phase and not in the major combat operations phase.

Another expert was of the opinion that the Interpretive Guidance did not sufficiently reflect the discussions held at the 2005 Expert Meeting on whether private contractors could be regarded as mercenaries. In the Interpretive Guidance, this question was captured only in a single sentence on page 19 which stated that it was conceivable that private contractors and civilian employees could be regarded as mercenaries within the meaning of Article 47 of Additional Protocol I. Given that the issue of mercenaries was important, particularly in the various complex wars taking place in Africa, this expert requested that the relevant part of the Interpretive Guidance be extended accordingly so as to avoid the impression that it accommodated or legitimized the use of private contractors as mercenaries. In response, another expert pointed out that there was currently an ancillary process under way, co-organized by the Swiss government and the ICRC, which addressed the role and status of private military companies and private security companies, as well as other related issues in greater detail than was possible in the present expert process. One expert also supported the limited scope of the discussion on private contractors and civilian employees in the Interpretive Guidance. According to this expert, this topic was important and complex enough for a separate expert process, and it was wise for the present expert group to limit the discussion to what was required for clarifying the notion of direct participation in hostilities.

3. Protection against the Effects of Hostilities or against Direct Attack

In the view of one expert, the text of Heading III of the Interpretive Guidance was good, except for the reference to protection against the “effects of hostilities”. According to this expert, private contractors or civilian employees working on a military base assumed an increased risk for working in or near a legitimate military objective. Therefore, such personnel was not protected against the “effects of hostilities”, as was suggested by Heading III of the Interpretive Guidance, but merely against direct attacks, unless and for such time as they directly participated in hostilities. Another expert agreed with the preceding speaker but proposed that the Interpretive Guidance could be limited to the clarification that private contractors and civilian employees of a party to an armed conflict, although generally not

directly participating in hostilities, assumed special risks due to their function and their proximity to the armed forces.⁶

In response, one expert insisted that it was important for Heading III to address the conditions under which private contractors and civilian employees could be regarded as civilians within the meaning of IHL, particularly in view of the fact they could fall into various categories of persons foreseen under IHL, such as civilians formally authorized to accompany the armed forces within the meaning of Article 4 A. [4] GC III, or members of an organized armed force under a command responsible to a party to the conflict, or even civilians taking a direct part in hostilities without being authorized to do so by any party to the conflict. This expert also pointed out that, although not all contractors and employees had contracts involving the assumption of particular risks resulting from the hostilities, and although most of them were not authorized to directly participate in hostilities, there could be situations where they ended up doing so for a wide variety of reasons. Yet another expert held that, in reality, many private contractors and civilian employees were actually foreigners operating in areas where the fighting was taking place. In the view of this expert, such personnel could be regarded as civilians only if they were unarmed and not involved in the fighting.

4. Prohibition and “Right” to Directly Participate in Hostilities

One expert expressed surprise at the statement in the Interpretive Guidance (page 18) according to which “in contradistinction to ordinary civilians, [civilians accompanying the armed forces] 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 hostilities”. In the view of this expert, as this aspect had not been mentioned in Section II with regard to organized armed groups in non-international armed conflicts, it was unbalanced to do so in Section III on private contractors. To illustrate the dilemma, this expert raised the example of a sniper lying outside an enemy air base and observing the personnel maintaining military aircraft. The sniper would perhaps conclude that the supervisor directing the maintenance of aircraft was a civilian contractor taking a direct part in hostilities and was thus the most important target. On the other hand, if the civilian supervisor were captured, it would be difficult to argue that he should be

⁶ Accordingly, this expert proposed the following alternative text for Heading III of the Interpretive Guidance: “Private contractors and civilian employees of a party to an armed conflict, although not directly participating in hostilities, are running special risks due to the mission carried by them and to their proximity to the armed forces”.

prosecuted and punished for unprivileged combatant activities. Similarly, a contractor driving an ammunition truck could perhaps be targeted because he was driving a military truck but, once captured, would be entitled to prisoner of war status as a civilian accompanying the armed forces. He could hardly be accused of having done something illegal. A third example provided by this expert was the US operation in Grenada in 1983, where US forces fought Cuban contractor civilians working on the Salinas airfield who were armed with anti-aircraft and heavy machine guns. Once captured, the Cuban contractors were given prisoner of war status and were not regarded as unprivileged belligerents. In sum, while this expert agreed that private contractors did not have a “right” to directly participate in hostilities comparable to privileged combatants, such participation was not as such prohibited under IHL.

Another expert was of the opinion that the view expressed in the Interpretive Guidance that civilian contractors who directly participated in hostilities were subject to prosecution under domestic laws raised quite difficult questions, such as which domestic law would apply to the captured Cuban civilian contractors - mentioned by the previous speaker - who had been fighting US troops in Grenadian territory. As US domestic law hardly extended to such a situation, there could be an actual legal “black hole”. Therefore, this expert wished to reiterate his opinion that direct participation in hostilities by an unqualified person should *per se* be regarded as an international offence and a war crime. Yet another expert rejected the idea that civilian contractors accompanying the armed forces within the meaning of Article 4 A [4] GC III should be entitled to prisoner of war status after having directly participated in hostilities. This expert also emphasized that it was extremely important not confuse belligerent activities that were unprivileged under IHL with belligerent activities that were unlawful under domestic law. As pointed out by Baxter in his 1952 British Year Book article, the fact of taking a direct part in hostilities could leave a person without prisoner of war status and combatant privilege, but did not make that person a war criminal.

At the end of the discussion, the organizers recalled that the Interpretive Guidance discussed the lack of a “right” to directly participate in hostilities not only for private contractors and civilian employees, but for any civilian. Thus, Section X of the Interpretive Guidance clearly stated that a civilian who had directly participated in hostilities could be punished, provided that his or her conduct constituted an offence under domestic law. The reason for specifically raising the issue in Section III on private contractors and civilian employees was to explain the special status afforded by IHL to private contractors authorized to accompany the armed forces and to emphasize that their entitlement to prisoner of war status under Article 4 A [4] GC III did not imply a “right” to directly participate in hostilities, such as the one granted privileged combatants.

C. Substantive Scope

IV. Direct Participation in Hostilities as a Specific Act

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section IV of the Interpretive Guidance on “Direct Participation in Hostilities as a Specific Act” with the following introductory remarks:

The purpose of Part C of the Interpretive Guidance was to identify criteria for the determination of whether a particular act or conduct amounted to direct participation in hostilities. Section IV of the Interpretive Guidance provided the foundation for Part C in that it determined that the notion of direct participation in hostilities essentially corresponded to a particular category of concrete acts rather than an abstract intent, affiliation or relationship. In conceptual terms, Section IV of the Interpretive Guidance was based on the preliminary observation that the composite term “direct participation in hostilities” consisted of two elements, namely “hostilities” and “direct participation” therein. While “hostilities” referred to the collective resort to means and methods of warfare by the parties to the conflict, “participation in” hostilities referred to the individual involvement of persons in the hostilities. Depending on the quality and degree of such individual involvement, it could be qualified as “direct” or “indirect” participation in hostilities. In treaty IHL, individual conduct constituting part of the “hostilities” was described as “direct participation in hostilities”, regardless of whether the acting individual was a civilian or a combatant. Hence, “direct participation in hostilities” could not refer to the abstract affiliation of an individual to a party to the conflict or its armed forces, but corresponded to concrete acts carried out by individuals in relation to ongoing military confrontations between the involved parties. Based on this assessment, Section IV of the Interpretive Guidance came to the conclusion that the collective concept of “hostilities” corresponded to the sum total of all “hostile acts” carried out by individuals “directly participating” in hostilities. Consequently, individual conduct amounting to direct participation in hostilities had to be identified based on the so-called “specific acts” approach.

The participating experts were invited to express their views with regard to the form and substance of Heading IV of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

Several experts emphasized that the notion of direct participation in hostilities could not be interpreted as synonymous to everything that the adversary did not like, but was essentially equivalent to concrete acts of hostility carried out by fighting personnel. One expert argued that, particularly in the context of guerrilla-warfare, loss of civilian protection from direct attack could not be extended beyond the duration of specific hostile acts except for persons who were entitled to combatant status. With regard specifically to civilians directly participating in hostilities on an organized basis, another expert supported an alternative approach (Sections II.5. and IV.2. Interpretive Guidance), according to which the assumption of a permanent combatant function - while not entailing loss of civilian capacity - was regarded as a continuous form of direct participation in hostilities entailing loss of civilian protection against attack not only during the execution of specific acts, but for as long as such combatant function was actually assumed. According to this expert, this alternative approach would avoid that civilians assuming a permanent combatant function could be interned without review or other limitation. Apart from these views, however, neither the functional approach applied by the Interpretive Guidance to the organized fighting personnel of the parties to the conflict, nor the interpretation of the notion of direct participation in hostilities as referring to specific hostile acts raised any further controversy among the participating experts. Instead, the discussion quickly focused on the concrete constitutive criteria for determining that a specific act amounted to direct participation in hostilities.

V. Constitutive Elements of Direct Participation in Hostilities

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section V of the Interpretive Guidance by introducing the three abstract elements identified in the Interpretive Guidance as cumulatively constitutive of specific acts of direct participation in hostilities:

First, the Interpretive Guidance identified a threshold requirement with regard to the harm resulting from the act in question, which could be fulfilled either in qualitative or in quantitative terms. In qualitative terms, the required threshold of harm would be reached if a specific act was likely to adversely affect the military operations or military capacity of a party to the conflict, a criterion that was taken from the discussion on the notion of “hostilities” during the 2005 Expert Meeting. Where this qualitative threshold referring to the military nature of the harm was not reached, the required threshold of harm could also be fulfilled in quantitative terms, namely by inflicting death, injury or destruction on persons or objects not under the effective control of the acting individual. The purpose of this alternative criterion was to not exclude from the notion of “hostilities” attacks against civilians, residential areas and other protected persons and objects, which would not necessarily negatively affect the military operations or military capacity of the adversary. Conversely, it seemed difficult to speak of direct participation in hostilities where specific acts, such as economic sanctions, neither adversely affected the military operations or military capacity of an adversary, nor inflicted death, injury or destruction and, thereby, fell below the dual threshold of harm proposed in the Interpretive Guidance.

Second, the Interpretive Guidance proposed a requirement of causal proximity between the specific act in question and the harm resulting from it. During previous Expert Meetings, most participants had agreed that “indirect” causation of harm was too wide and would include too many activities, whereas “direct” causation in a strict sense, which would require that each specific act independently and directly caused harm for the adversary, would be too narrow. The compromise proposed by the Interpretive Guidance was to adopt a flexible requirement of direct causation that would be fulfilled not only when a specific act directly caused harm reaching the required threshold, but also when the act was an integral part of a larger operation, which directly caused harm to the adversary.

The third and last of the cumulative elements was what the Interpretive Guidance described as “belligerent nexus”. This composite term was inspired by, but distinct from, the general nexus criterion developed by the ICTY for war crimes. In order to qualify as direct participation in hostilities, it was not sufficient that a specific act have a general nexus to the surrounding situation of armed conflict. For example, when refugees fleeing an area of hostilities end up blocking an access road used by the armed forces, their conduct is clearly closely related to the surrounding situation of armed conflict, and they probably even directly adversely affect the military operations of a party to the conflict. However, it would be unacceptable to qualify the refugees' conduct as direct participation in hostilities and to expose them to direct attack. The required nexus thus had to be of belligerent nature; that is to say, it had to relate the act in question to the hostilities conducted between the respective parties to the conflict. Therefore, the Interpretive Guidance requires that an act of direct participation in hostilities be specifically designed to bring about the required harm in support of a party to the conflict and to the detriment of another.

The participating experts were invited to express their views with regard to the form and substance of Heading V of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

In very general terms, one expert suggested that, in the subsequent revision of the Interpretive Guidance, it would be preferable to avoid strong and categorical formulations such as “must exclude” and to use softer terms such as, perhaps, “often would not have”. Since the purpose of the final document was to provide interpretive guidance in a great variety of situations, it had to be formulated openly enough to accommodate the concrete circumstances prevailing in many different contexts. Another expert also pointed out that, to the extent that no consensus could be achieved on the question of whether a certain activity amounted to direct participation in hostilities, the disagreements or doubts would have to be pointed out in the Interpretive Guidance.

One expert found that the proposed Headings IV and V of the Interpretive Guidance were problematic for several reasons: For instance, the text used the cumulative conjunction “and” instead of the alternative “or”. However, in the view of this expert, if a civilian caused destruction, death, injury in the context of hostilities, it was not necessary to additionally

require that such conduct be designed to achieve a concrete military advantage.⁷ Moreover, in practice, it often occurred that the civilian in question was intercepted or killed him *en route* to perpetrating the hostile act. Therefore, it was important that the Interpretive Guidance addressed the issue of mere attempt, as well as activities such as planning, training and intentional logistical or operational support.⁸ In response, the organizers pointed out that the Interpretive Guidance captured the issue of attempt by requiring that an act be “likely” to cause harm reaching the required threshold, or that it could reasonably “be expected” to do so if not prevented on time. It was precisely in order to clarify that preventive or reactive measures did not have to be postponed until the harm actually materialized that the word “likely” was included in Heading V of the Interpretive Guidance.

3. Threshold of Harm

a) General Comments and Suggestions

One expert held that, since members of organized armed forces and groups belonging to a party to the conflict had already been excluded from civilian protection by virtue of their membership, the purpose of Section V of the Interpretive Guidance had to be limited to establishing criteria for loss of protection of civilians who, at most, directly participated in hostilities on a spontaneous, sporadic or unorganized basis. In view of this assumption, the expert questioned whether the criteria were not too general, with the effect that anyone whose conduct could be interpreted to “adversely affect” the military operations or military capacity of a party to the conflict could be lawfully attacked regardless of considerations of military necessity. This expert also recalled that the Commentary to the Additional Protocols referred to direct participation in hostilities as “acts of violence” and held that to include non-violent conduct in the notion of direct participation in hostilities would automatically deviate from the intent of the drafters as described in the *travaux préparatoires*. Where individual, unorganized civilians were concerned, it would require an extraordinary level of intelligence to determine their intention in advance of an actual act of violence. Therefore, this expert

⁷ On the question of the cumulative or alternative application of requirements see the discussion below, Section C.V.5 (b), “...in Support of a Party to the Conflict and to the Detriment of Another”, pp. 51 f.

⁸ Accordingly, this expert proposed the following text as an alternative for the proposed Headings IV and V of the Interpretive Guidance: “(A) ‘Direct’ or ‘active’ participation in hostilities means the commission of any of the following acts in the context of an armed conflict: (i) Inflicting death, injury or destruction on persons or objects in support of a party to the conflict or to the detriment of another; or (ii) Committing any other act likely to adversely affect the military capacity of a party to the conflict; or (iii) Providing planning, military training or intentional logistical or operational assistance to the execution of the above. (B) Any of the acts listed in (A) will be considered ‘direct’ (or ‘active’) participation in hostilities upon being clearly attempted, even when the act is not completed”.

held that the conduct of such civilians should not be regarded as direct participation in hostilities unless it represented an actual military threat that could not be prevented by anything less than a direct attack. Another expert agreed that he felt uncomfortable with the word “adversely” and suggested that it should be replaced by the term “significantly”.

b) Determination of the Quantitative Threshold in General

Observing that, according to the Interpretive Guidance (p. 28 Interpretive Guidance), 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 etc, did not reach the required quantitative threshold, one expert pointed out that this kind of conduct had been equated to “armed attacks” in the ICTY Trial Chamber decisions in the *Kunarac* case (2002) and in the *Stakic* case (2003) and, therefore, should perhaps be regarded as sufficiently grave to amount to direct participation in hostilities.

In response, several other experts pointed out that the ICTY had made the relevant statements in relation to crimes against humanity, which was a completely different context. The decisive criterion of a crime against humanity was the existence of a generalized or systematic “attack” against a civilian population, which did not necessarily have to amount to an “attack” within the meaning of IHL, but could also include widespread rapes, torture and similar systematic abuse. For the international criminality of such abuse, it did not matter whether it occurred in the context of a military attack or in a territory under the complete control of the perpetrators. Conversely, for the qualification of an act as direct participation in hostilities the criminality of the act was irrelevant. Nevertheless, it was pointed out that while not every international crime amounted to direct participation in hostilities, the two concepts were not mutually exclusive. For example, in the opinion of several experts, the 1994 genocide in Rwanda simultaneously also amounted to the conduct of hostilities, even though the hostilities resembled much more a massacre of defenseless civilians than any form of classical confrontation between armed forces.

Other experts agreed that trying to prevent the commission of a crime, no matter what the scale, did not in and of itself amount to the conduct of hostilities. While it was recognized that a distinction must be made between direct participation in hostilities and ordinary criminality or, respectively, between fighting and law enforcement, not all experts were convinced that the relevant criteria for this distinction proposed in the Interpretive Guidance were sufficiently clear and convincing. In this respect, one expert suggested that, based on the case law of the ICTY, a distinction could be made between crimes that were and, respectively, that were

not committed as part of a military attack. The general tendency among the experts was to say that abuse against civilians that did not reach the quantitative threshold of death, injury or destruction, could nevertheless amount to direct participation in hostilities provided it was used as a tool to conduct hostilities and caused harm of a military quality.

c) Hostage Taking (Quantitative Threshold)

One expert found it unconvincing that killing and injuring civilians should be considered to constitute direct participation in hostilities while the taking of civilian hostages should not. In the opinion of this expert, the taking of civilian hostages and, more generally, any arrest of civilians by other civilians should be regarded as direct participation in hostilities where it was designed to put pressure on the adversary and to achieve a political goal related to the armed conflict. According to this expert, the arrest of civilians belonging to the other party to the conflict was part of the conflict regardless of whether it was carried out by soldiers, policemen, armed groups or civilians. As far as policemen were concerned, they could be considered as equivalent to soldiers for the limited purpose and specific duration of each arrest without necessarily turning the whole police force into part of the armed forces. Where civilians or armed groups engaged in hostage taking, this expert suggested that the qualification of such hostage taking as direct participation in hostilities should be examined according to the concrete situation and the nature of the hostilities. For instance, where the hostilities essentially consisted of attacking, killing, injuring and capturing civilians, holding them as hostages should be regarded as part of the hostilities.

However, according to other experts, the difficulties raised by the issue of hostage taking actually confirmed that, absent military quality of the harm caused, the quantitative threshold of harm should require the causation of death, injury and destruction and could not be lowered to include deprivation of freedom. More specifically, several experts recalled that the question of whether a particular deprivation of freedom constituted a lawful arrest or a prohibited hostage taking was irrelevant for its qualification as direct participation in hostilities and, thereby, for the lawfulness of direct attacks against the operating civilians. Consequently, if the quantitative threshold was lowered to include any deprivation of freedom with a belligerent nexus in the concept of hostilities, the arrest by civilian law enforcement personnel of civilians suspected of collaborating with the opposing party to the conflict would have to be regarded as direct participation in hostilities, thus exposing such law enforcement personnel to lawful attack. According to these experts, this result was hardly consistent with promoting the protection of civilians. Moreover, strictly speaking, such law enforcement

personnel would then become unprivileged belligerents because, as civilians, they did not have a “right” under IHL to directly participate in hostilities.

Yet another expert pointed out that the issue of hostage taking was actually a special sub-issue of the previously discussed topic of abuse directed against the civilian population while not reaching the quantitative threshold required for a qualification as direct participation in hostilities. Thus, where mass rape, torture, deportation and hostage taking was in fact the *raison d'être* and the purpose of an armed conflict, such conduct could be regarded as part of the hostilities. So, perhaps, there was not that much difference between the position expressed by the first speaker on this topic and the approach proposed in the Interpretive Guidance. One expert also recalled that the Interpretive Guidance proposed three cumulative elements for the qualification of an act as direct participation in hostilities, adding that there seemed to be no justification for introducing separate criteria for hostage taking. According to this expert, even acts that would normally amount to direct participation in hostilities, such as the taking of soldiers as hostages, could turn out to be ordinary crimes, if they were totally unrelated to the hostilities. Therefore, this expert was convinced that the decisive question in each case should remain whether all three constitutive requirements were cumulatively fulfilled.

d) Voluntary Human Shields (Qualitative Threshold)

In the opinion of two experts, the question of voluntary human shields was too contentious to allow the expert group to reach a consensus. They requested that the issue be completely removed from the text of the Interpretive Guidance. Several other experts insisted, however, that the issue of human shields should be addressed in the Interpretive Guidance and said that the commentary should explain the various points on which there was agreement or disagreement. One of these experts observed that there already seemed to be general agreement that voluntary human shields should be regarded as directly participating in hostilities when their voluntary activity created a physical obstacle between attacking forces and a targeted military objective. According to this expert, this was already a partial consensus of considerable value. Another expert also found that the issue of human shields needed to be addressed in the Interpretive Guidance precisely because it represented one of the major contemporary challenges to IHL. While the expert did not necessarily agree with every aspect of the assessment made in the Interpretive Guidance, he was of the opinion that the examples provided in the text and the footnotes (FN 76 and 78) struck a useful balance and clarified a number of borderline cases. This expert suggested that a sentence be added at the end of the relevant section stating that "beyond this point, the experts could

not reach agreement". Yet another expert also said that the Interpretive Guidance should address the issue of voluntary human shields, because it was not only one of the most difficult, but also one of the most interesting and useful examples for the clarification of certain aspects of the concept of direct participation in hostilities.

In substantive terms, one expert cautioned that if, as the Interpretive Guidance suggested, human shields could only be considered to be directly participating in hostilities where they were impeding the operations of ground forces (but not where they shielded objects against aerial attacks), the consequence would be that the same conduct could be qualified differently depending on the operational context. Another expert even argued that, for the purpose of establishing direct participation in hostilities, it was sufficient to distinguish between voluntary and involuntary human shields. According to this expert, civilians used by the enemy against their will as human shields to cover a military target should not be regarded as directly participating in hostilities. Conversely, civilians who deliberately volunteered to become human shields always intended to create an impediment to attacks, which this expert regarded as an obvious case of direct participation in hostilities. A third expert emphasized that it was necessary to qualify voluntary human shielding as direct participation in hostilities because, otherwise, they would have to be taken into account in the proportionality assessment.

Nevertheless, most experts rejected the view that every case of voluntary human shielding, in and of itself, amounted to direct participation in hostilities, and one expert even doubted whether voluntary human shields could ever fulfill the required criteria. Another expert recalled that, according to the Interpretive Guidance, the qualification of voluntary human shielding as direct participation in hostilities essentially depended on the same criteria applicable to any other specific act, namely fulfillment of the three cumulative criteria of threshold of harm, causal proximity and belligerent nexus. He gave the example of voluntary human shields who became a physical obstacle, and thereby adversely affected military operations in a direct way, so that it became difficult to come to the conclusion that such conduct did not amount to direct participation in hostilities. Yet another expert agreed with this view but also pointed out that, in many cases, human shielding represented not a physical obstacle, but rather a "legal" impediment in that the presence of civilian human shields in the vicinity of a military objective could shift the parameters of the proportionality assessment to the detriment of the attacker. In the view of this expert, if the mere attempt by civilians to influence the proportionality assessment of the adversary by their presence in the vicinity of a military objective were to entail automatic loss of civilian protection against direct attack, they would not have to be taken into account in the proportionality assessment and, consequently, would be unable to influence the proportionality assessment in the first place.

Therefore, the very fact that voluntary human shields were perceived as a legal impediment in terms of the principle of proportionality proved that they were generally considered to benefit from protection against direct attack and, consequently, not to be directly participating in hostilities. While asserting that not every case of voluntary human shielding could amount to direct participation in hostilities, one expert nevertheless recognized that cases were conceivable where the line had clearly been crossed. Therefore, it was necessary for the Interpretive Guidance to clarify the decisive criteria as far as possible and to note persisting disagreements in the accompanying commentary or footnotes.

Lastly, one expert pointed out that voluntary human shielding was regularly used by the weaker party to an asymmetric armed conflict in order to be able to counter the overwhelming power of the adversary. Nonetheless, the expert emphasized that there could be no rule that protected voluntary human shields whose conduct amounted to direct participation in hostilities better than other civilians simply because they represented the weaker party to an armed conflict. Ultimately, the aim must be to ensure respect for IHL in all circumstances and on equal terms for all parties to a conflict.

4. Causal Proximity

a) Constituting an “Integral Part” of a Military Operation

With regard to the causal proximity test proposed in the Interpretive Guidance (p. 29 Interpretive Guidance), one expert questioned whether it was not too narrow to require that, in order to qualify as direct participation in hostilities, an act not directly causing harm to the adversary had to constitute an “integral part” of a larger military operation that directly caused such harm. In response, the organizers explained that the basic dilemma with regard to the requirement of causal proximity was that the criterion of “direct” causation, without more, was too strict, while “indirect” causation had been discarded in previous Expert Meetings as too broad. It was difficult to find a compromise between “direct” and “indirect” that captured the essence of direct participation in hostilities. The approach of the Interpretive Guidance was to still require “direct” causation of harm in a strict sense, but to extend the perspective with regard to the act causing the harm. Thus, instead of focussing exclusively on the specific act carried out by an individual civilian, it was deemed appropriate to say that direct causation still existed when the required harm was directly caused by a concrete and coordinated military operation of which that specific act constituted an integral part. In conjunction with the temporal inclusion of preparatory measures, “deployment to” and “return from”, the

Interpretive Guidance aimed at extending the scope of acts fulfilling the requirement of causal proximity while still keeping it sufficiently confined. In sum, the purpose of the term "integral" was to make it very clear that the act in question must be "part of" and not merely a "contribution to" a concrete military operation.

In the course of the ensuing discussion no expert was able to identify examples of acts that would amount to direct participation in hostilities if the term "integral" was deleted from the text, but not if that term was maintained. Nevertheless, some experts suggested replacing the term "integral" with one of the following alternative adjectives: "key", "necessary", "supportive", or "constituent". The expert who had proposed the term "constituent" explained that, in her view, this term did not require that the act in question reached any specific degree of essentiality for the larger operation, so that almost irrelevant acts could still qualify as direct participation in hostilities. Another expert cautioned, however, that the terms proposed in the discussion were too vague to prevent the interpretation of the notion of "direct participation in hostilities" from being either too narrow or too wide. Taking into account the ordinary meaning of the terms in the English language, as well as the aim of the text under review, this expert was of the opinion that the term "integral" remained the best solution for the text of the Interpretive Guidance.

In response to the various alternatives proposed by experts, the organizers recalled that the adjective "integral" used in the Interpretive Guidance deliberately did not exclude acts representing but minor parts of a military operation. For example, acting as a lookout in a spot next to which the adversary was very unlikely to pass was perhaps a minor part of an operation, but undisputedly still constituted part of the concrete operational set-up. Conversely, use of the adjectives "key" or "necessary" would require that the acts in question actually have a decisive or indispensable part in the causal chain of an operation. This would not only be far more restrictive than the term "integral", but also extremely difficult to define without slipping into subjective arbitrariness. The term "supportive" was perceived as allowing acts amounting to direct participation in hostilities to be confused with support activities that were not part of a concrete military operation, and the term "constituent" did not appear to offer any clear and perceptible advantage either. It was reiterated that the adjective "integral" aimed to emphasize and make perfectly clear that, in order to qualify as direct participation in hostilities, an act would have to be an actual "part of" and not merely a "contribution to" a concrete operation.

One expert recognized that direct participation in hostilities was a question of degree and held that the term "direct" meant "without other relevant circumstances intervening in the chain of causation". According to this expert, while this standard made sense, it was very

difficult to operationalize. In reality, various activities, such as driving an ammunition truck, observing the enemy or planning and preparation, would qualify as direct participation in hostilities depending on their proximity to a concrete military operation. This expert invited the organizers to clarify in what circumstances, for instance, the driving of an ammunition truck would, or would not, constitute an “integral” part of a concrete military operation. In response, the organizers offered the following examples on how the criteria proposed in the Interpretive Guidance could be applied to the case of the civilian ammunition truck driver:

- A civilian truck driver supplying a firing position with ammunition would be an integral part of the operation of firing from that position and, therefore, would be directly participating in hostilities.
- A civilian truck driver accompanying invading forces in order to supply them with ammunition as they invade would be an integral part of that ongoing invasion and, therefore, would be directly participating in hostilities.
- A civilian truck driver bringing ammunition to a store house on an airfield, where it was not going to be used but further transported to a firing position, was involved in an intermediate transport not amounting to direct participation in hostilities. However, both his truck and the store house remained military objectives.

b) Production of Armaments

Referring to the discussion of the standard of direct causation on page 31 of the Interpretive Guidance, one expert agreed that a distinction should be made between acts that were part of a military operation and acts that were merely of a war sustaining nature. Nevertheless, this expert insisted that, in determining whether a specific act qualified as direct participation in hostilities, the concrete circumstances of the situation would additionally have to be taken into account. For example, as the armament industry of a state comprised factories that could produce weapons and civilian goods at the same time, and as the industrial sector represented part of the economic structure of the state, not every person working in such a factory was necessarily taking a direct part in the hostilities. Conversely, according to this expert, organized armed groups committed a hostile act by manufacturing missiles, if missiles constituted the main weapon they used in the conduct of hostilities. Even if missiles were not used immediately, but stockpiled for subsequent operations, the production process should still be regarded as part of the chain of the hostilities; it was artificial to draw the line so as to exclude this stage from the scope of direct participation in hostilities. This expert concluded by recalling that, during the 2005 Expert Meeting, there had been a discussion about whether civilian specialists possessing expertise on decisive new means or method of

warfare could be considered to be directly participating in hostilities, and said that there had been mixed opinions about whether they could be lawfully targeted.

In response, several experts insisted that there has been a consensus since the Second World War that neither armament industry employees, nor nuclear weapons experts, were considered to be directly participating in hostilities regardless of their value to the war effort. While they could not be individually directly attacked, they often assumed an increased risk of incidental death or injury because their working places constituted legitimate military objectives. One of the experts also pointed out that, if working in a state's armament industry or being a nuclear weapons expert were regarded as direct participation in hostilities, the concerned persons would either have to be incorporated into the armed forces, or would have to be regarded as unprivileged combatants. Another expert additionally clarified that, even if working in an ammunition factory were to be regarded as direct participation in hostilities, the individual workers could only be directly attacked "for such time as" they were actually working in the factory, a time frame during which they would be exposed to attacks against the factory itself anyway. One of the experts, while agreeing with the principle that a civilian weapons expert should not lose protection against direct attack, nevertheless doubted whether this assessment could be maintained in extreme situations where the expertise of a particular civilian was of very exceptional and decisive value for the outcome of an armed conflict. For example, in the case of nuclear weapons experts during the Second World War, the enormous importance of the individual contribution to the war effort clearly exceeded the ordinary and could perhaps have led to a conclusion deviating from the general rule.

One expert responded that, according to the three cumulative elements of threshold, causal proximity and belligerent nexus proposed by the Interpretive Guidance, the manufacture of weapons or missiles could be considered direct participation in hostilities provided that there was a direct relation between such manufacture and a concrete military operation. In his opinion, while the industrial production of weapons and armament did not fulfill this condition, it could not be excluded that, in different circumstances, the production of missiles or other weapons could constitute a measure immediately preparatory to a concrete military operation. Yet another expert, supporting the comments of the preceding speaker, emphasized that it would be inadequate to describe the widespread construction of improvised explosive devices (IED) in Iraq as mere "weapons production" not amounting to direct participation in hostilities. One expert recalled that the answer to these questions was to be found through the careful application of the three cumulative elements set forth in the Interpretive Guidance and held that, as far as the distinction between industrial and insurgent weapons production was concerned, the key difference lay in the element of causal

proximity. According to this expert, the causal proximity of an industrial worker's activities to actual harm caused to the adversary could not be compared with the causal proximity between the construction of an improvised explosive device in the basement of a civilian house and the harm caused the next day when that device exploded on the road to the Baghdad airport. Yet another expert insisted, however, that there could be no rule that protected civilian employees in a state's armament industry better than civilians constructing improvised explosive devices for insurgents. After all, the ultimate aim was to ensure respect for IHL in all circumstances and on equal terms for all parties to a conflict. While states would always regard their own armament industry as lawful and the manufacture of weapons by an armed group as illegal, the previous discussions had already resulted in a consensus on the fact that the legality or illegality of an act was irrelevant for its qualification as direct participation in hostilities.

5. Belligerent Nexus

a) Belligerent Nexus and Subjective Intent

While agreeing with the approach proposed in the Section on "Belligerent Nexus", one expert requested the organizers to clarify how such a nexus could actually be distinguished from subjective intent, as was expressly required in the Interpretive Guidance. According to this expert, the Interpretive Guidance appeared to apply a subjective *mens rea* criterion (in addition to the requirement of a general nexus to a conflict), when it concluded that there is no belligerent nexus when refugees block a road because they are fleeing hostilities, whereas there would be a belligerent nexus when other civilians blocked the same road trying to impede military operations (p. 35 Interpretive Guidance). In reaction, another expert held that the relevant text made it quite clear that belligerent nexus was an objective criterion distinct from subjective intent. In the opinion of this expert, the only question to be clarified in relation to this element was whether its existence should be determined based on a "reasonable grounds" test or whether a stricter standard was required.

The organizers agreed that the distinction between subjective intent and belligerent nexus was delicate. In essence, subjective intent related to the acting civilian, whereas belligerent nexus related to the act itself. While the determination of subjective intent aimed to establish what actually went on in the mind of each concerned civilian, the belligerent nexus of an act was determined based on objective factors as reasonably interpreted from the perspective of the person reacting to that act. The decisive question in determining belligerent nexus was whether a particular civilian act, interpreted from the perspective of the person who had to react to it, and based on the information available to that person, as well as on the

circumstances prevailing at the relevant time and place, looked like an activity designed to support one party to the conflict by causing harm to another. In other words, the criterion of belligerent nexus expressed an “objectivized” intent, which was not identical with subjective intent within the meaning of criminal law.

b) “...in Support of a Party to the Conflict and to the Detriment of Another”

Several experts requested the organizers to clarify why Heading V, in describing belligerent nexus, required that the act in question be designed to cause harm reaching the required threshold cumulatively “in support of a party to the conflict” and “to the detriment of another”. To these experts, an act carried out to the detriment of one party would always be in support of another and vice versa. In response, the organizers explained that the conjunctive formulation had been deliberately chosen because, in practice, it was conceivable that acts of violence, whether criminally or politically motivated, were directed against a party to the conflict without necessarily being part of the hostilities. However, as soon as acts of violence directed against one party to the conflict were designed to support another party to the conflict, it was impossible to escape their qualification as part of the hostilities. In reaction to this explanation, one expert recalled that Heading V already required three cumulative elements for the qualification of an act as direct participation in hostilities and held that the two preceding elements resolved any concerns that could be raised by adopting a disjunctive formulation.

Another expert was of the opinion that the cumulative requirement of “in support of a party to the conflict” and “to the detriment of another”, created a problematic loophole where hostilities in an international armed conflict were conducted by independent armed groups not operating on behalf of one of the parties thereto. The Interpretive Guidance already maintained that, in international armed conflict, members of independent armed groups should be regarded as civilians, said the expert. Now, the concept of hostilities was interpreted so narrowly that such groups could not even be considered civilians directly participating in hostilities unless they operated in support of one of the parties. Based on the Interpretive Guidance, armed violence by such independent armed groups could be addressed exclusively through law enforcement measures, concluded the expert.

In response, the organizers confirmed that the Interpretive Guidance was based on the understanding that the concept of “hostilities” denoted the resort to means and methods of warfare between parties to an armed conflict. Strictly speaking, therefore, armed violence which was not “part of” the armed violence occurring between parties to a conflict would not

constitute “hostilities”. In order to be “part of” or, in the words of treaty IHL, to “take part in” the hostilities occurring between parties to a conflict, armed violence would have to be carried out both “in support of one party” and “to the detriment of another”. If either element was missing, such armed violence became independent of the armed struggle taking place between the parties to a conflict, giving rise to the question of whether the “independent” armed violence was intense and protracted enough to reach the threshold required for a separate armed conflict, presumably of a non-international character. This was held to be the only way of clearly distinguishing situations of law enforcement from the conduct of hostilities.

c) Law Enforcement and Conduct of Hostilities

One expert agreed that there was an eminent interest in distinguishing conduct of hostilities from situations of law enforcement and in separating military actors from classical law enforcement personnel. This expert suggested that law enforcement would generally not take place on the battlefield, but further away from the front line. However, especially in non-international conflicts it was inevitable that, outside combat situations, persons directly linked to the conflict would also be arrested by law enforcement personnel. Therefore, in order for police forces not to be generally considered as targetable, this expert held that it would be particularly useful for the Interpretive Guidance to highlight which law enforcement operations did not amount to direct participation in hostilities.

Another expert held that the answer to that question depended on whether the police forces had been integrated into the armed forces, which would ordinarily be the case in non-international armed conflict and occupied territories. Once integrated, law enforcement personnel would become members of the armed forces. However, more specifically with regard to the integration of the police into the armed forces in accordance with Article 43 [3] AP I, one expert recalled that, according to his recollection, Belgium was the only state to have made an official declaration to that effect during the ratification process. In view of the fact that Belgium had subsequently withdrawn that statement, any discussion on Article 43 [3] AP I probably remained of academic interest only. Yet another expert cautioned, however, that the distinction between the police and the military was quite difficult and could not be reduced to a simple formality. The reality was that states involved in non-international armed conflicts normally referred to their operating forces neither as “police forces” nor as “military forces”, but simply as “security forces”.

Lastly, one expert recalled that “policing” was an inherently civilian function that had nothing in common with what was typically done by combatants in an armed conflict. Therefore, no activity of a genuine law enforcement character could amount to direct participation in hostilities. Where the police was integrated into the armed forces, it could also perform activities other than law enforcement, habitually reserved for combatants. According to this expert, while the distinction remained difficult, the integration of the police into the armed forces could not remove the distinction between the two fundamentally different functions of law enforcement and the conduct of hostilities.

VI. Beginning and End of Direct Participation in Hostilities

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section VI of the Interpretive Guidance dealing with the "Beginning and End of Direct Participation in Hostilities" with the following introductory remarks:

The notion of direct participation in hostilities should not be restricted to the actual execution of a specific military operation but, as the clarification process had shown, should also include certain "measures preparatory to", as well as geographical "deployment to" and "return from" the execution of such an operation. The purpose of Section VI of the Interpretive Guidance was to propose general criteria for distinguishing between preparatory measures that did and, respectively, did not amount to direct participation in hostilities, as well as for determining when "deployment to" started and when "return from" ceased to amount to direct participation in hostilities. The most important argument made in this Section was that, in order for a preparatory measure to amount to direct participation in hostilities, it was not sufficient that it built up or strengthened the general capacity of a group or individual to carry out hostile acts at a later point, but it had to be so closely linked to a subsequent concrete act that it already constituted an intrinsic part of that act. Similarly, for a geographical "deployment to..." to amount to direct participation in hostilities, it had to be carried out with a view to an already planned, concrete operation; it was not sufficient to simply travel to or within the area of an armed conflict with the general intent of becoming involved in the conduct of hostilities. Finally, a geographical "return from...", which amounted to direct participation in hostilities, necessarily occurred after the attempt or execution of a specific act amounting to direct participation in hostilities and essentially lasted until the preceding, concrete operation amounting to direct participation in hostilities was geographically completed.

The participating experts were invited to express their views with regard to the form and substance of Heading VI of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

One expert expressed concern about the examples in the Interpretive Guidance illustrating when a specific “measure preparatory to”, or a geographical “deployment to” or “return from” a concrete military operation could be regarded as direct participation in hostilities. For instance, the example of intelligence gathering (p. 38 Interpretive Guidance) was perhaps formulated in too generous a way, whereas other examples were perhaps too restrictive. This expert therefore suggested that it may be preferable to discuss examples in the footnotes and to formulate them more openly so as to reflect that, for instance, intelligence gathering could “in certain cases” amount to direct participation in hostilities without necessarily being too categorical as to whether or not a broad category of activities qualified as direct participation in hostilities.

Another expert agreed that, in determining whether a specific act constituted direct participation in hostilities, the concrete circumstances prevailing in a situation were extremely important. In the context of Iraq, for example, the mere possession of weapons by civilians was neither illegal nor uncommon. However, the conduct of persons transferring rocket-propelled grenades from one vehicle to another would probably be taken as an indicator of direct participation in hostilities. Other examples that were very common in the Vietnam War involved civilians who had been forced into carrying ammunition several hundred miles through the jungle between North and South Vietnam. The rockets or mortar rounds thus delivered would be used immediately on arrival, and civilians would be sent back to get more. While these persons were clearly civilians and committed no crime in doing what they were forced to do, they nevertheless were part of the armed components active in the area, giving rise to the question of whether their activities constituted “measures preparatory to”, “deployments to” or “return from” direct participation in hostilities, entailing loss of civilian protection against direct attack. As there were no simple solutions to the difficulties encountered in operational reality, this expert recommended that the Interpretive Guidance clarify in a footnote that the qualification of a concrete act as direct participation in hostilities should always be determined based on a greater understanding of the totality of the circumstances prevailing at the time.

Yet another expert suggested that the question of determining the beginning and end of direct participation in hostilities could perhaps be resolved by basing the assessment on the concrete and directly observable threat level posed by the persons in question. According to this expert, it was legitimate to attack civilians who were still in a fighting capacity during their withdrawal from an attack carried out by them.

3. Practical Distinction between Civilians and Organized Armed Groups

Several experts recalled that particular care had to be taken in determining the beginning and end of specific acts amounting to direct participation because the conclusions drawn from this discussion would have consequences only for civilians and not for members of armed forces or armed groups, who could be directly attacked regardless of direct participation in hostilities at the relevant time. Thus, this discussion was not about organized insurgents, but about civilians such as in the example of the 13-year old Vietnamese girl, who had been forced to place a booby-trap and would presumably have returned home after that, because she had not been forced to do anything else.

In response, several other experts emphasized that, in reality, it was very difficult to clearly distinguish between members of armed groups and civilians and, consequently, to know when to apply the functional membership approach and when the specific acts approach. According to one of these experts, there were basically two kinds of operations: On the one hand, there were reactive operations, which had to be carried out in response to an attack, and where the responding forces often lacked sufficient intelligence for identifying and categorizing those involved in the attack and had to rely on assumptions made based on individual conduct. For example, while it could be assumed that persons shooting missiles were members of an armed group, their activity would in any case amount to direct participation in hostilities, and direct attacks against them would be based on the specific acts approach. On the other hand, there were proactive operations initiated by the armed forces themselves based on solid intelligence regarding the leadership, membership or function of a person within an armed group. As this latter kind of operations could also be carried out in a moment when the targeted persons were not directly participating in hostilities, it required a careful distinction between civilians and members of armed groups. In reality, while both categories of persons and both approaches existed and had their justification, it was important to be aware that they did not necessarily correspond to two clear-cut and distinct scenarios identifiable as such in the field.

Another expert described a hypothetical situation where an explosion had taken place on a public square and, thanks to a drone flying over the scene, it was possible to identify the perpetrators moving away. If the withdrawal phase was excluded from the scope of direct participation in hostilities, the observing forces would have to determine whether these persons were members of an armed group. If so, they could be attacked at any time.

However, if it turned out that they were merely civilians involved in a specific act of direct participation in hostilities, the operating forces could only attack them right on the square, because they would have regained civilian protection against attack once the withdrawal phase had begun. According to this expert, this approach was unrealistic, because it required the operating forces to take a completely impracticable decision.

In view of these practical problems, one expert suggested that the distinction between armed groups and civilians, although it looked quite convincing in theory, should perhaps be discarded with the result that any person could only be targeted for such time as he or she was directly participating in hostilities. This proposal was however rejected by another expert who insisted that practical difficulties should not prevent the expert group from trying to clarify the law and, in a second step, to try to cope with the resulting practical difficulties by way of precautions, presumptions etc. This expert also recalled that the same difficulties could arise with regard to the distinction between civilians and combatants in international armed conflict and that this did not justify simply discarding that distinction. Unless one wanted to end up with no law at all, one simply had to live with the practical difficulties raised by the principle of distinction. Yet another expert agreed with the preceding speaker that the practical problems of determining whether a particular person was a member of an armed group or a civilian engaging in a specific act of direct participation in hostilities could not be resolved by law. Therefore, in concrete situations, decisions would simply have to be based on the information that was available about the person. As a matter of law, however, the revolving door of protection was part of the rule on the direct participation of civilians in hostilities expressed in Article 51 [3] AP I and Article 13 [3] AP II and, as such, could not be extended to members of armed forces or groups.

Lastly, it was recalled that the practical difficulties of distinguishing categories of persons and identifying their function or activities would also be addressed in Section VIII of the Interpretive Guidance dealing with the precautions and presumptions to be applied in a situation of doubt.

4. Direct Participation in Hostilities as a "Chain" or "Stream" of Events

According to two experts the determination of the beginning and end of direct participation in hostilities should not necessarily be based on the commission of an isolated specific act but on a chain or stream of events following the same pattern. The first of these experts

suggested that direct participation in hostilities could be regarded as a chain of events or, in criminal law terms, a course of conduct, which started with the first preparatory measures and ended with the commission of the actual act itself. For example, where an act of direct participation in hostilities by a civilian consists in detonating an improvised explosive device (IED), it is preceded by a number of preparatory measures. First, the ingredients for the IED are, for instance, stored in a garage somewhere, and the civilian has to deploy from his home to the garage and back on several occasions in order to actually construct the IED and to transport the completed device to its place of destination. In such a case, the course of conduct would start with the accumulation and storage of the various parts or ingredients of the IED, be continued by the assembly of the ingredients into the IED and culminate in the actual placement and detonation of the IED. According to this expert, to seek to place a dividing line anywhere within that sequence of events was likely to introduce a degree of artificiality into a reality marked by sequences of shades of grey.

Similarly, the second expert interpreted direct participation in hostilities as a stream of conduct that started and ended at certain points in time. According to this expert, while it was lawful to go as far “upstream” and “downstream” as possible from a concrete attack, the problem was that, in practice, there was doubt both at the beginning and end of the stream of conduct. As doubt worked in favor of a civilian, attacks were lawful only when doubt was removed based on reliable information, military intelligence or because the observed conduct was reasonably interpreted as an obvious act of “preparation to” or “withdrawal from” an attack. In the view of this expert, the most interesting scenario offered so far during the discussion was the example of two persons visibly digging two holes on both sides of the road, filling them with explosives and connecting them with a wire. According to this expert, when a sniper possessing no additional information in advance saw two persons arrive and start digging two holes on the sides of the road, he still did not have enough information to lawfully open fire. He could begin to suspect that these persons were probably up to no good, but could not exclude that they were fixing the road, installing an electricity line, or planning to use the holes for a sewer. However, once the observed persons brought explosives and started stringing up the installation intended to stop the car, the sniper could reasonably conclude that this was a measure preparatory to an attack. In the opinion of this expert, the sniper could lawfully open fire at this point, even though there was no car that could be threatened by the installed device. The withdrawal phase was important because, in the average case, the engagement of a person in an act of direct participation in hostilities was identified only after the act had already been carried out and an explosion occurred. In the immediate aftermath of an attack, the possibility to identify those responsible for the attack depended on the availability of appropriate means of observation, such as sensors, helicopters or unmanned aerial vehicles (UAV). For example, unarmed civilians who fled the

scene of an explosion by car and purported to be peaceful civilians could perhaps be identified by a UAV. If the same civilians subsequently avoided a road block erected to stop them, it could reasonably be concluded that they were indeed those who had previously brought, installed and detonated the explosives. In the opinion of this expert, at this point, it was lawful to target the civilians, even though it occurred very far "downstream". Lastly, this expert held that it was wrong to assume that the armed forces were necessarily in a rush to open fire. In fact, in the aftermath of an attack, the first priority of the military was to obtain intelligence as to who carried out the attack, who else belonged to the group, who had trained them and provided the explosives etc. Therefore, the armed forces would normally do whatever they could to capture those involved alive and interrogate them.

Several other experts cautioned, however, that to regard direct participation in hostilities as a chain or stream of events rather than a specific act could lead to a "slippery slope" with dangerous results. One expert held that the "chain of events" approach could inadvertently encourage or condone the extrajudicial killing of suspects, particularly because operating forces never had absolute certainty about the reliability of their intelligence information. These problems were dramatically illustrated by the erroneous killing of what turned out to be an innocent man in the London subway system in July 2005. In the previously discussed example, if the location of the garage serving as a storage and assembly place for an IED were known, it would presumably constitute a legitimate military objective and could be directly attacked. There was no reason to follow the involved civilian and target him at home. In response, one expert cautioned that if the storage place for the IED was located in a civilian area, it might be preferable to target the involved civilian elsewhere, rather than bomb the garage and cause substantial civilian death, injury and destruction.

With regard to the same example, another expert cautioned that it could easily be argued that the chain of events had started much earlier, already when the civilian in question had gone to a shop or to a market to buy some of the ingredients for the IED to be subsequently stored and assembled in the garage. As the chain could continue endlessly, a line had to be drawn at some point. However, the line drawn by criminal law for penalizing criminal attempt was not necessarily the same as the one drawn by IHL for loss of civilian protection due to direct participation in hostilities. This was particularly true in view of the fact that the line established by criminal law was determined in a meticulous procedure subject to strict standards of due process, whereas the line drawn by IHL had to serve as an operational basis for immediate decisions as to whether a particular person could be targeted on sight.

Yet another expert agreed that notions of national or international criminal law, such as "suspects" and "course of conduct", were unhelpful in the operational context of the conduct

of hostilities. There was no certainty whatsoever that a civilian who, according to the judgement of the operating forces, was directly participating in hostilities would also be convicted in court. This expert emphasized that where standards for the use of lethal force were in question, utmost caution was required not to depart from the established concepts, rules and principles of conventional and customary IHL. According to this expert, the proximity of “deployments to”, “return from” and “preparatory measures” to the execution of a concrete act amounting to direct participation in hostilities needed to be as close as possible. Otherwise, no distinction was possible, with the result that all decisions would depend only on considerations of military necessity. While the loading of a gun constituted a good example of a recognizable preparatory measure amounting to direct participation even though the weapon had not yet been used, in many other examples the proximity of the preparatory measure to the act of direct participation was less obvious.

One expert also pointed out that the example of the IED assembly in a garage repeated the previous discussion on the manufacture of ammunition by civilians. Thus, if the storage and assembly of ingredients and parts of an IED in a garage constituted a preparatory measure amounting to direct participation in hostilities, then it would be difficult to hold otherwise for civilian industrial workers who produced weapons in a factory and returned home every evening. In the opinion of this expert, both of these examples were far removed from actual direct participation in hostilities, such as picking up a weapon and performing an attack.

Lastly, while agreeing that the storing and assembling of parts and ingredients of an IED in a garage was a good example of direct participation in hostilities, one expert held that this example also illustrated that there were a number of classical rules that additionally had to be taken into account, such as the rule of presumption of civilian protection, the rule of precaution and, more generally, the classic rule of the law of warfare, which was the law of the lesser evil (*la loi du moindre mal*). In other words, particularly in situations of asymmetric conflict, the stronger party would be obliged to employ other available options that were less destructive than a heavy-handed resort to armed force.

5. Preparatory Measures

One expert questioned whether the distinction made in the Interpretive Guidance (p. 38 Interpretive Guidance) between “general” and “specific” preparation was actually workable and remained concerned that the Interpretive Guidance could end up too far “upstream” in qualifying acts as direct participation in hostilities. Another expert agreed that utmost care was required when qualifying preparatory acts as direct participation in hostilities. Contrary to

members of armed forces and groups, civilians should be liable to attack exclusively during deployment on a military type operation, otherwise the word "direct" in the phrase "direct participation in hostilities" would no longer have any meaning. While it appeared logical to say that a person discarded civilian protection during the time of deployment to and withdrawal from a military type operation, this expert expressed concern about the example that had been given of the thirteen year old girl in Vietnam, who had been forced to lay improvised explosive devices. In response, one expert recalled that, in armed conflicts, there were often individuals who conducted attacks without necessarily being affiliated to an armed group. In practice, it was absolutely essential to be able to attack during the preparatory phase, because this could be the only opportunity to deter and defeat a lethal attack. While this expert recognized that general preparation, such as securing funds, did not have a sufficiently close causal link to amount to direct participation in hostilities, he held that the requirement of causal proximity was clearly met in the case an IED being assembled in a garage with a view to being used the next day.

6. "Return From..."

Qualifying "return from" a concrete military operation as direct participation in hostilities gave rise to serious concerns by several experts. According to one expert, once an act of direct participation in hostilities was completed and there was nothing left to prevent, temporally prolonging loss of civilian protection to the phase of return from the execution of a specific act amounted to a form of vengeance or punishment and could result in extrajudicial executions. In response, the organizers recalled that, as reported in the Commentary on the Additional Protocols, the inclusion of return from a specific military operation in the notion of direct participation in hostilities had already been advocated by several delegations during the Diplomatic Conference of 1974 to 1977. This interpretation could be relevant, for example, where civilians spontaneously set up an ambush for members of the armed forces and, after the attack, returned home still armed. At that point, the civilians were still engaged in a concrete military operation because, although the main attack was over, they were still withdrawing and clearly had not surrendered or otherwise completely dissociated from their operation.

One expert also warned that reality must be kept in mind when the issue of withdrawal was discussed. In situations of non-international armed conflict, armed violence by guerrillas or civilians was regularly, and deliberately, carried out in places where an immediate response by governmental forces would involve a substantial risk of genuine civilian casualties. To say that civilians could not be targeted as soon as they withdrew from the area in which they had

carried out an attack could potentially force governmental troops to carry out their counter-attack immediately, in the middle of the civilian area, regardless of the increased risk of civilian casualties. Another expert agreed that it was difficult to ask operational forces to draft rules of engagement (ROE) that prohibited the engagement of civilians who had carried out an attack, just because they had already begun their withdrawal. Instead, as suggested both in the Interpretive Guidance and the Commentary to the Additional Protocols, loss of civilian protection had to continue throughout the withdrawal phase until there was no longer a connection to the act of direct participation. This expert warned against basing a general rule on the exceptional example of a girl being forced to place booby-traps, when the predominant scenario to be addressed was that of a group of civilian men who decided to kill armed forces with weapons and bombs. However, the expert who had raised the example of the girl being forced to lay booby-traps responded that, during his time as an operational company commander, innocent civilians being forced by the insurgency to carry out attacks were a daily occurrence rather than an exception. It was also recalled that, if the escaping civilians wanted to regain safety and protection, they always had the possibility of surrendering.

One expert, while agreeing that retreating civilians who had taken a direct part in hostilities should remain subject to attack as a practical matter, did not see how this could be deduced from the text of the Additional Protocols. This expert was also uncomfortable about the argument that direct attacks in the withdrawal phase could amount to punishment, and questioned whether this difficulty could perhaps be resolved based on the terminological difference between “active” and “direct” participation in hostilities. In response, it was pointed out that in French, the other official language of the Geneva Conventions and the Additional Protocols, the relevant provisions, namely Article 3 GC I to IV, Article 51 Protocol I and Article 13 Protocol II, uniformly referred to “*participation directe*”. Therefore, under the Vienna Convention on the Law of Treaties, the meaning of the terms “active” and “direct” in the English version had to be the same.

Another expert agreed that in the “final phase”, when persons returned to their civilian activities after having committed an act of direct participation, there was a certain danger that direct attacks against them came quite close to punishment for such behavior. Similarly, one expert pointed out that the fact that a civilian had been identified as “responsible” for an attack justified law enforcement measures and not direct attacks. According to this expert, the rule on direct participation in hostilities suspended civilian protection against direct attack not because of individual responsibility or as punishment for unlawful conduct, but in order to address a concrete threat. Otherwise, in the example previously mentioned, civilians who had detonated a roadside bomb and were fleeing from the scene in an unarmed in a car

could simply be shot, even if they had not, additionally, tried to avoid a road block. This expert insisted that the armed forces were not free to decide whether the civilians in question should be captured and interrogated or attacked and killed based on mere opportunity. Yet another expert suggested that, even if the civilians were subject to direct attack after an act of direct participation in hostilities, the operating forces would have to give appropriate warnings before opening fire. Finally, one expert pointed out that the use of lethal force did not necessarily require loss of civilian protection against direct attack. Even law enforcement personnel could, if necessary, use lethal force to arrest or prevent the escape of a person who had detonated a bomb, killing many people. The result would be the same even if the civilian in question was no longer considered to be directly participating in hostilities and the armed forces changed switched into a law enforcement mode. However, this expert conceded that, in situations of armed conflict, a practical problem was that the operating forces, even if equipped with sophisticated weaponry and means of observation, did not always have the means to carry out arrests.

D. Modalities of the Suspension of Civilian Protection

VII. The “Revolving Door” of Civilian Protection

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section VII of the Interpretive Guidance dealing with the “revolving door” of civilian protection with the following introductory remarks:

Having discussed the category of persons who are protected unless and for such time as they directly participate in hostilities in Part B (Section I to III) of the Interpretive Guidance, as well as the constitutive elements and duration of acts amounting to direct participation in hostilities in Part C (Section IV to VI) of the Interpretive Guidance, Part D (Sections VII to X) focuses on the conditions and modalities of the ensuing suspension of civilian protection against direct attack. The first issue addressed in Section VII is the mechanism of the so-called "revolving door of civilian protection" which sets the duration of an act of direct participation in hostilities (discussed in Section VI of the Interpretive Guidance) into relation to the duration of the corresponding loss of civilian protection. In other words, Section VII addressed the question of for how long a civilian engaged in an act of direct participation in hostilities lost protection against direct attack. In this respect, the Interpretive Guidance was based on the understanding that the term "for such time as" used in the Additional Protocols meant that loss of civilian protection against direct attack lasted exactly as long, and could not be extended beyond, the corresponding conduct amounting to direct participation in hostilities. Thus, as soon as a civilian ceased to be engaged in conduct amounting to direct participation in hostilities as determined according to Sections IV to VI of the Interpretive Guidance, he or she regained full civilian protection and could no longer be directly attacked. The mechanism of the revolving door of civilian protection also applied to combatant members of organized armed groups, albeit according to a different temporal cycle, namely based on the duration for which a combatant function was assumed rather than on the duration of a specific act of direct participation in hostilities. Strictly speaking, as had been pointed out by some experts in previous meetings, the revolving door of protection even applied to combatants in state armed forces, because they also lost civilian protection only

for the duration of their membership in the armed forces and regained civilian status and protection thereafter.

The participating experts were invited to express their views with regard to the form and substance of Heading VII of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

Several experts generally supported the textual proposal made in Section VII of the Interpretive Guidance. One of them particularly commended the fact that Section VII distinguished between organized and unorganized armed actors with a view to avoiding the “farmer by day - fighter by night” scenario, as it undermined respect for IHL and led to unacceptable risks for the peaceful civilian population. Similarly, another expert found that the proposed text was very good as it mitigated concerns over the risks of adopting a functional membership approach. It did so by clarifying that there were two different temporal scopes of loss of civilian protection against direct attack depending on whether, in the individual case, such loss of protection was due to a spontaneous, sporadic or unorganized act by a civilian, or whether it was the consequence of a continuous function assumed by a person on behalf of a party to the conflict. According to this expert, although combatant members had already been excluded from the civilian category in Section II of the Interpretive Guidance, it was necessary to reintroduce them in Section VII to clarify the different consequences of these two scenarios. In the view of this expert, the “revolving door” represented part of the law and was not a real problem.

Nevertheless, one expert was of the opinion that the logic applied in Section VII of the Interpretive Guidance to non-combatant members of organized armed groups was problematic. In the examples on page 42 of the Interpretive Guidance, members whose function within an armed group was limited to the manufacture of weapons, general training and other support activities were regarded as non-combatant civilians who could only be attacked based on the specific acts approach. This expert argued that, in practice, it was not possible to differentiate between individual activities within an armed group that amounted to merely temporary direct participation in hostilities and activities that amounted to continuous direct participation in hostilities or a permanent combatant function. This expert reiterated that loss of protection should be based on “membership” rather than “function”, with the effect that all members of an armed group, whether their role focused on fighting or on support, would be subject to the same approach and standards. Similarly, another expert

recalled that, in order to be respected, the guidance given would have to be simple and make sense to operational soldiers in a combat area. This expert suggested that some of the practical problems involved could perhaps be addressed by introducing a rebuttable presumption that those who had directly participated in hostilities on a recurrent basis were legitimate military targets.

3. “Specific Acts” Approach and “Recurrent Acts” Approach

One expert recalled that persons assuming a permanent combatant function, such as members of organized armed groups, had already been excluded from the category of civilian. Therefore, Heading VII of the Interpretive Guidance should address the mechanism of the "revolving door" with regard to civilians only. Moreover, loss of protection should not be limited to the duration of a specific act but should be extended to cover short intervals between such acts as well, so that civilians having directly participated in hostilities could be directly attacked at any moment until the chain of acts of direct participation definitely came to an end.⁹ Nevertheless, a civilian suspected of hostile activities could only be directly attacked if reliable intelligence information proved that he or she directly participated in hostilities on a recurrent basis. Three other experts at least partly supported this view, specifying that a civilian who had twice been engaged in direct participation in hostilities within a short interval should no longer benefit from the presumption of civilian protection but had to bear the burden of risk that the adversary would misinterpret his or her actions as being recurrent. In order to avoid ending up with three different categories of persons, these experts advocated that any civilian who frequently directly participated in hostilities should be regarded as assuming a permanent combatant function.

However, both the organizers and several other experts criticized this proposal for a variety of reasons. While the organizers agreed that the notion of “permanent combatant function” would have to be revised in accordance with the terminological concerns raised by several experts, they preferred a text which would cover both generic scenarios of loss of civilian protection. Where the “revolving door of civilian protection” applied to civilians directly participating in hostilities on a merely spontaneous, sporadic or unorganized basis, it operated based on the specific acts approach. In the case of combatant members of organized armed groups, however, the “revolving door of civilian protection” operated based

⁹ Therefore, this expert proposed the following alternative text for Heading VII of the Interpretive Guidance: "Civilians who directly participate in hostilities on a recurrent basis (the so-called "revolving door" phenomenon) will lose their protection from attack even during short intervals between their engagements in such activities. For the purposes of this clause, a “short interval” means a period of time that is measured in hours, days, or perhaps even weeks (but certainly not months)".

on the functional membership approach. In both scenarios, loss of protection could not extend beyond the duration of the specific act or, respectively, of the function.

One expert also held that, according to Article 3 [1] GC I to IV, continuous loss of protection could only be based on the concept of “membership” in the armed forces of a governmental or non-state party to the conflict and not on “recurrent acts” by individual civilians. Another expert agreed that the “recurrent acts” approach excluded too many categories of persons on a continuous basis from civilian protection, namely not only members of armed forces and groups, who were regarded as (or like) combatants, but also simple civilians who had more than once directly participated in hostilities. According to this expert, to say that such civilians could henceforth be directly attacked even during the intervals between specific acts was absolutely contrary to the clear wording of the Additional Protocols. Yet another expert pointed out that the “recurrent acts” approach led to a proliferation of categories (from “members” via “recurrent participants” to “isolated participants”), which had no basis in treaty law and were not understandable for soldiers in the field. To continue to make such detailed classifications would complicate and obfuscate the law rather than clarify that the notion of “direct participation in hostilities” referred to an act and not an activity, and that it was therefore confined to the actual duration of each specific act.

The question was also asked on what basis a soldier was supposed to decide whether a civilian, whose specific act of direct participation in hostilities had come to an end, was at the beginning of a short interval, with the result that he remained a military target, or whether he regained protection because this had been the last specific act carried out by him. One expert fully supported the text proposed in the Interpretive Guidance, emphasizing that the “short interval” criterion of the “recurrent acts” approach clearly contradicted Article 50 [1] AP I and, therefore, had to be regarded as a proposal *de lege ferenda*. This expert also pointed out that, even if the membership element was inherent in the concept of armed organized group, such membership had to be identified based on the “act element”. The issue of specific acts amounting to direct participation in hostilities therefore remained at the centre of the questions to be resolved. While agreeing that the “recurrent acts” approach created too many categories of persons, one expert nevertheless held that this was a consequence of the fact that the Interpretive Guidance as a whole was based on a very confined specific acts approach. This expert could not deduce the temporal limitation of the loss of protection for “the duration of each specific act” from the text of the Additional Protocol, which simply referred to “for such time as” civilians took a direct part in hostilities. Thus, according to this expert, Heading VII of the Interpretive Guidance should be limited to restating this rule and all the other issues, including permanent combatant function, should be discussed in the Commentary. In reference to the terminological discussion held on Section II of the

Interpretive Guidance, several experts also reiterated that the term "permanent" should be removed from the text of Heading VII.

VIII. Precautions and Presumptions in Situations of Doubt

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section VIII of the Interpretive Guidance on "Precautions and Presumptions in Situations of Doubt" with the following introductory remarks:

A second, extremely important aspect of the conditions and modalities governing the loss of civilian protection against direct attack are the precautions and presumptions to be applied in situations of doubt. This was the context in which practical difficulties arose as the result of insufficient intelligence about whether a particular person was a civilian and, if so, whether his or her conduct amounted to direct participation in hostilities. In such situations, it was of great importance to respect the general principle of precaution, which required that all "feasible" precautions must be taken in determining whether a civilian has lost protection against direct attack. As far as the notion of "feasibility" was concerned, the Interpretive Guidance was based on the interpretation found in various IHL treaties, which stated that: "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".¹⁰ The Interpretive Guidance came to the conclusion that if, after all feasible precautions had been taken, reasonable doubt remained as to whether a particular civilian had lost protection against direct attack, there was a legal obligation to presume that the person in question was protected against direct attack. This general presumption of civilian protection also applied to the analysis of "measures preparatory to", "deployments to" and "return from" a military operation. In the view of the organizers, the precautions and presumptions clause was an absolutely essential part of the overall balance struck in analyzing the theoretical and practical questions surrounding the issue of direct participation in hostilities, particularly in view of the adoption of a functional membership approach.

The participating experts were invited to express their views with regard to the form and substance of Heading VIII of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

¹⁰ 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").

2. General Comments and Suggestions

Several experts suggested that the phrase "protected against the effects of hostilities" in Heading VIII was misleading and that it would be preferable in the context of direct participation in hostilities to use the phrase "protected against direct attack". One expert also suggested replacing the phrase "combatants are [...] military objectives" on page 44 of the Interpretive Guidance with the phrase "combatants may be directly attacked". In response, it was pointed out that, in Article 52 AP I, only the *definition* of "military objective" was limited to objects, but not the *use of that term* as such.

3. "Reasonable Doubt" and "Honest Belief"

Several experts recommended that the word "reasonable" be removed from Heading VIII and that only the phrase "in case of doubt" (Article 50 AP I) be kept, or even suggested that the standard of "reasonable doubt" be replaced with a standard of "honest belief". One of these experts clearly acknowledged the general presumption of civilian protection set out in the applicable law but pointed out that, if any circumstance of doubt were sufficient to prohibit an attack, it would in practice become impossible to conduct military operations. This expert was concerned about the proposed standard of "reasonable doubt", which in certain jurisdictions had a specific meaning in criminal proceedings. However, operational decision-making had to rely on information that was reasonably available at the relevant time and required an interpretation of that information by the decision-maker. Such information could be drawn from a variety of sources, could be conflicting and was likely to be imperfect. Nevertheless, the decision-maker reviewing the information was charged with reaching a decision based on an honest interpretation. In conclusion, this expert questioned whether "reasonable doubt" realistically characterized the standards based on which the relevant decision would actually be reached or whether it was more accurate to base such a decision on "honest belief". Several other experts agreed that the standard of "reasonable doubt" was too high, but were also of the opinion that a standard of "honest belief" was too subjective and vague. Therefore, these experts suggested removing the word "reasonable" and keeping the phrase "in case of doubt" in parallel to the original text of Article 50 AP I. One expert, while agreeing with removal of the word "reasonable" from the Heading, proposed inserting it elsewhere, namely under the title "The requirement of feasible precautions", (p. 44 Interpretive Guidance) in the sentence: "This determination must be made in good faith and in view of all

information available in the concrete situation", so that the sentence would end as follows: "all information reasonably available in the situation".

Another expert cautioned that a clarification of the applicable standard of doubt could not be avoided because, after all, the very same standard also determined when civilians would be deprived of their protection against direct attack and whether a person was regarded as a combatant member of an armed group. Moreover, a similar, if not identical standard would also have to be applied when a person was moved back into civilian protection. Therefore, according to this expert, whatever standard was adopted for the presumption of civilian protection it had to match the standard applied with regard to the functional membership approach. While this expert considered that the word "reasonable" was quite subjective, he proposed that a "balance of probability", based on the evidence available at the time, could perhaps be a way forward. Yet another expert suggested the standard of "substantial doubt" as an alternative to "reasonable doubt".

One expert argued that the first question to be resolved with regard to the standard of doubt was whether one wanted to use a subjective or an objective test, and the second question related to the actual standard of that test. In the view of this expert, it was inappropriate to use a subjective test such as "good faith" or "the sensibilities of the commander", because targeting decisions should not be made based on intuition, feelings or other non-objective criteria. The notion of "reasonableness" was an objective test, at least in the criminal law context, and referred to what a reasonable person or outsider would think in similarly situated circumstances. It did not mean "beyond the shadow of a doubt" or that there was "no doubt at all". This expert held that a standard based on a "balance of probabilities" was inappropriately generous, because it came too close to a "fifty-fifty" judgement to be compatible with the legal presumption of civilian status. Therefore, this expert recommended that the standard of "reasonable doubt" be maintained in the Interpretive Guidance.

Another expert was not too concerned about the precise language used in the Interpretive Guidance to describe the applicable standard of doubt because the Interpretive Guidance intended to give an overall picture rather than a hard test rule. According to this expert, there were essentially two different scenarios. The first kind of operation was premeditated and was conducted based on consolidated intelligence information indicating that a particular person was indeed taking a direct part in hostilities. Here the question to be addressed was no longer whether it was lawful to attack, but became an issue of "capture or kill". The other scenario concerned reactive operations by individual soldiers responding to something they were confronted with in the field. Both in law enforcement and in the conduct of hostilities, such a response had to be carried out based on a test of reasonable and honest belief as

was applied, for example, by the European Court of Human Rights in the McCann case relating to the killing of three suspected IRA-terrorists by SAS-operatives in Gibraltar. In order to avoid misunderstandings, this expert also recommended removing the word “reasonable” in order to align the text of Heading VIII with the treaty text. The applicable standard of doubt and the element of “reasonableness” could then be further explained and elaborated on in the accompanying commentary. Another expert expressed her full support for this statement.

Lastly, the organizers pointed out that the existence and recognition of the rule of doubt was a central part of the overall balance struck in the Interpretive Guidance. While many of the experts had commented on the proposed Heading from the perspective of high-tech warfare and specific targeting decisions, it should not be forgotten that these guidelines had to be operable and applicable in the much more basic conditions prevailing in most contemporary non-international conflicts. In such contexts, which currently still claimed the largest number of victims, the doubt rule was an absolutely essential counter-balance to the functional membership approach applied to organized armed groups. Nevertheless, it was noted that it may be preferable to remove the word “reasonable” and to simply refer to “doubt”, like the treaty text did.

4. Proportionality Assessment

One expert referred to the statement made on page 32 of the Interpretive Guidance that, an ammunition truck constituted a legitimate military objective even if the driver was a civilian and was not considered as directly participating in hostilities. While the Interpretive Guidance stated that direct attacks against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment, this expert was of the opinion that direct attacks against a military objective did not require any proportionality assessment, unless the truck was in the middle of a civilian area with a great risk of incidental casualties outside the truck. Although driving the truck did perhaps not lead to individual loss of protection for the civilian driver, there was no realistic way to determine that this driver was a civilian. Therefore, in this situation, an aircraft pilot could not be required to make a proportionality assessment, and a civilian driving a military truck simply had to assume the risk related to that conduct. In response, the organizers agreed that, in practice, there would probably be no way for the pilot to know that the truck driver was a civilian. This was an evidentiary matter. However, it would be conceivable to have a military objective, such as a house with an anti-aircraft gun mounted on the roof. Where the pilot knew that there were also civilians inside that house, a proportionality assessment had to be made. The previous

speaker agreed with this scenario, because it concerned a case where what was normally a civilian object had become a military objective. This expert reiterated, however, that where a Ministry of Defense was directly attacked, one could reasonably assume that there were civilians working there as well. Nevertheless, in the view of this expert, such an attack required no proportionality assessment as the presence of the civilians constituted an assumed risk. In response, both the organizers and another expert insisted that, in their view, whether or not there was an assumed risk on the part of the concerned civilians, any civilian not directly participating in hostilities at the time of attack necessarily had to be taken into account in the proportionality equation.

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

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section IX of the Interpretive Guidance with the following introductory remarks:

Section IX of the Interpretive Guidance on the practical relevance of the principles of military necessity and humanity had been introduced in reaction to discussions and comments made during the 2005 Expert Meeting, which clarified that IHL did not provide an unfettered “license to kill” even with regard to persons who did not benefit from protection against direct attack. This observation carried particular importance in contexts, where parties to the conflict were likely to be confronted, within their territorial control, with isolated individuals or small groups of persons who were not entitled to civilian protection against direct attack. In such situations, depending on the concrete circumstances, it was conceivable that a concerned party had all the means at its disposal to simply confront and capture the individual in question without additional risk to its own forces. In a variation of the example given during previous discussions of the girl who had been forced by the insurgents to plant booby-traps, it was conceivable that she could be intercepted by the operating forces on her way back, a phase which could perhaps still be considered part of the specific act amounting to direct participation in hostilities. In view of the fact that the girl was obviously unarmed, had neither the intention nor the possibility to engage in combat and could easily be taken into physical custody, it would not only have been unacceptable but also unlawful to simply target her in these specific circumstances. In sum, Section IX of the Interpretive Guidance expressed the binding nature of basic notions of humanity even towards persons who had lost protection against direct attack. It clearly did not suggest the application of the law enforcement standard of strict necessity for the use of lethal force in the conduct of hostilities. Instead, recourse was had to the fundamental principles of military necessity and humanity underlying the entire normative framework of IHL. Even though the principle expressed in this Section would perhaps only exceptionally restrict or even prohibit certain means and methods of warfare otherwise available for a particular operation, it was of essential importance as part of the overall balance struck by the Interpretive Guidance. After all, situations marked by civilian participation in hostilities were more likely than large scale confrontations between state armed forces to lead to the kind of situations where these fundamental principles would have to be applied.

The participating experts were invited to express their views with regard to the form and substance of Heading IX of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. Suggestions to Delete Section IX

Some experts held that Section IX of the Interpretive Guidance made a novel argument unknown under contemporary IHL. According to these experts, the principles of humanity and of military necessity were expressed in the particular provisions of IHL and had already been taken into account in their formulation. Therefore, military necessity neither justified exceptions from concrete provisions of IHL unless expressly foreseen in that provision, nor constituted a requirement superimposed on existing rules of IHL.

One of these experts was not convinced that, under the principle of military necessity, all military action had to fulfill the dual requirement of being lawful under IHL and necessary for the submission of the enemy. If the view expressed in this Section was to be accurate, the relevant rule also had to apply to combatants and not only to civilians directly participating in hostilities. Another expert held that if the Interpretive Guidance introduced military necessity as a further legal limitation expressing considerations of proportionality in a wider sense, there was a risk that this argument could be misinterpreted in line with the famous Prussian doctrine of "*Kriegsraison geht vor Kriegsmanier*", meaning "military necessity prevails over the law of armed conflict". Yet another expert held that Section IX, like some other Sections of the Interpretive Guidance, was concerned with a peripheral issue and only distracted from the discussion of the central question, namely the meaning of direct participation in hostilities. Yet another expert was of the opinion that the most problematic part of Section IX of the Interpretive Guidance was footnote 152 quoting Jean Pictet's sentence in the 1973 Report on the Work of Experts.¹¹ According to this expert, anybody who had ever been in an artillery-barrage knew that this sentence did not reflect what actually happened in combat situations. For practical reasons, not even domestic law enforcement agencies trained their officers, let alone members of the armed forces, to shoot to wound.

¹¹ 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".

Therefore, this group of experts held that it was neither necessary nor desirable to have Section IX included in the Interpretive Guidance. Instead, it was suggested that a general clause clarify that the general rules on the conduct of hostilities and, in certain circumstances, human rights law continued to apply in operations against persons who had lost protection against direct attack.¹²

In view of the critical comments received, the organizers recalled that the constraints expressed in Section IX were unlikely to have any practical effect in large scale confrontations between state armed forces, artillery barrages and other open combat situations. Instead, this Section was primarily designed for situations where armed forces were confronted with individuals within their territorial control who did not benefit from civilian protection against direct attack although they did not pose an immediate threat at the time and could be captured without additional risk. For example, where unarmed members of armed groups were surprised while sleeping in the woods or sitting in a restaurant, it would be unacceptable for the operating forces to simply kill them without even attempting an arrest. The organizers emphasized that they regarded this aspect as an imperative counterbalance to the adoption of a functional membership approach, which excluded certain categories of persons from civilian protection on a continuous basis. To the organizers, the constraints expressed in Section IX of the Interpretive Guidance represented an indispensable safeguard against arbitrary interpretation of the functional membership approach.

3. Suggestions to Maintain Section IX

Another group of experts expressed their full support for Section IX of the Interpretive Guidance and rejected any suggestion to delete it. They underlined, *inter alia*, that practical relevance must be given to the principles of military necessity, proportionality, and humanity both in combat situations as during law enforcement operations, and this was adequately reflected in Section IX.

One of these experts held that the principle expressed in Section IX accurately reflected the historical evolution of IHL. While the 1863 Lieber Code was still based on the idea that almost unlimited harshness was permitted against belligerents or combatants, the permissive effect of military necessity was increasingly recognized as being restrained by considerations

¹² In this context, one expert suggested the following alternative text for Heading IX: "Any attack against civilians directly participating in hostilities is subject to all applicable rules regarding the conduct of hostilities period".

of proportionality where there was a risk of incidental civilian death, injury and destruction. In 1996, the International Court of Justice went beyond this classic principle of proportionality when, in the Nuclear Weapons Advisory Opinion, it held that even attacks directed against military objectives were subject to humanitarian constraints. According to this expert, this more recent perspective on proportionality required, for example, that a party to the conflict refrained from destroying five enemy divisions if it could achieve its military objectives by destroying a single battalion. In conclusion, this expert held that the principle as stated in Heading IX of the Interpretive Guidance was a correct reflection of modern trends of humanitarian law and should be left unchanged. According to this expert, the legal questions raised by the loss of civilian protection due to direct participation in hostilities could be better resolved based directly on IHL than via human rights law with its associated questions concerning derogation and extraterritoriality. Therefore, this expert also advocated a general disclaimer stating that the Interpretive Guidance was drafted without prejudice to other applicable legal frameworks, including human rights law.

Another expert agreed with the organizers that Heading IX had an important function within the Interpretive Guidance as a counterbalance to the adoption of the functional approach and was therefore comparable to the classic role of the Martens clause within treaty IHL. It was important for the Interpretive Guidance to recall that the fact that a civilian had lost protection against direct attack did not mean that everything was permitted against that civilian. Nevertheless, this expert conceded that it might be preferable to remove footnote 152 from the text. Yet another expert pointed out it was impossible for the Interpretive Guidance to comprehensively anticipate the wide variety of operational circumstances for which it would have to provide guidance. Therefore, it was extremely useful that Section IX of the Interpretive Guidance recalled the basic principles, which governed all military operations. More specifically, it was important to keep in mind that even combatants could not lawfully be targeted if there was no reasonable need to do so.

One expert also recalled that IHL traditionally prohibited not only the murder of civilians, but also the assassination of soldiers. According to this expert, this prohibition proved that, under the law of war, even soldiers who had not surrendered could not be killed without any further considerations. Another expert recalled that “the law of the lesser evil” was a classic rule of the law of warfare. Thus, particularly in situations of asymmetric conflict, the stronger party would be obliged to use those alternatives at its disposal that were less destructive than a heavy-handed resort to armed force. Lastly, some experts, while rejecting the deletion of Section IX of the Interpretive Guidance, suggested that it could perhaps be presented differently. One of these experts proposed that Section IX, which was more general and less operational than the other Sections of Part D of the Interpretive Guidance could perhaps be

moved to the end of the document and be combined in a final Section together with other saving clauses. Another expert suggested that Heading IX itself could be limited to a general savings clause with regard to the applicability of the rules and principles governing the conduct of hostilities, which could then be elaborated in view of more specific principles, such as military necessity and humanity, within the accompanying text.

4. Suggestions to Base Section IX on Human Rights Law

Some experts held that the arguments made in Section IX of the Interpretive Guidance were genuine arguments of human rights law and, therefore, should be addressed based on that body of law and not on IHL.

One of these experts held that, instead of superimposing vague concepts such as humanity and military necessity, the Interpretive Guidance should recognize the important role of human rights law, in parallel with IHL, in regulating the consequences of direct participation in hostilities, especially in situations of non-international armed conflict. Accordingly, if members of fighting groups or civilians who had directly participated in hostilities were intercepted in circumstances where the operating forces exercised sufficient control to carry out an arrest, they were legally required to try to do so under human rights law. Of course, this obligation did not apply in the middle of active bombardments and other combat situations. Therefore, according to this expert, Heading VII of the Interpretive Guidance should be amended by the phrase "unless the person is in a place, where he or she is under total control and can be arrested". According to this expert, Principle 9 of the UN Force and Firearms Principles applied not only to law enforcement officials, but also to military and other security forces. This principle summarized the results of abundant case law from the European, the Inter-American and the United Nations human rights system when it stated that security officials could use fire arms against persons: (a) in self-defence or defence of others against an imminent threat of death or serious injury, or (b) to prevent the perpetration of a particularly serious crime involving grave threat to life, or (c) to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape. As could be seen, the last point even addressed the concern of some experts over the ability to prevent the escape of civilians who were withdrawing after a specific act of direct participation in hostilities. This expert also pointed out that, in the case *Isayeva et al. v. Russia*, the European Court of Human Rights had analyzed the conduct of hostilities by the Russian forces under human rights law and came to the conclusion that armed force could lawfully be used to suppress an insurrection if it did not exceed the minimum required for that purpose in the prevailing circumstances. The result of this analysis under human rights law

was the same as would have been reached had IHL been applied to the same circumstances. In the opinion of this expert, some of the hard cases, such as the examples dealing with measures preparatory to, deployments to and the return from specific acts of direct participation in hostilities, could more easily be resolved based on human rights law than based on IHL alone. In conclusion, this expert held that it would be preferable if the Interpretive Guidance included the perspective of human rights law, instead of just referring to the general principles of humanity and military necessity underlying IHL.

Another expert supported the statement made by the preceding speaker and specifically disagreed with the second sentence in Section IX reading “the use of force against them is no longer governed by standards of law enforcement”. According to this expert, international jurisprudence, such as the recent Congo Case of the ICJ, clearly confirmed that human rights law remained applicable in these situations. Moreover, the European Court of Human Rights had repeatedly applied human rights law directly in situations of armed conflict. Thus, both regimes of law were complementary rather than exclusive of one another. In conclusion, this expert urged that the IHL obligations relating to direct participation in hostilities should be interpreted in light of other obligations binding upon all states, such as the obligation to respect the right to life. Yet another expert, while agreeing that the principle of humanity had a role in the Interpretive Guidance, argued that if the purpose of the exercise was to clarify issues of IHL, it only caused confusion to address human rights issues with IHL language. Instead, it was better to include a well drafted clause clarifying the Interpretive Guidance did not exclude the applicability of human rights law.

However, several other experts rejected suggestions to base the arguments made in Section IX on human rights law. According to these experts, this process was not about the consequences of the territorial or extraterritorial applicability of human rights obligations in international and non-international armed conflict, but about clarifying a genuine concept of international humanitarian law. The Interpretive Guidance should not give an answer to what extent human rights law had an impact on the lawfulness of the use of force against civilians directly participating in hostilities. Instead, the issue of parallel human rights obligations should be resolved by including a general savings clause clarifying that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law.

X. Consequences of Regaining Civilian Protection

1. Introductory Remarks by the Organizers

The organizers opened the discussion on Section X of the Interpretive Guidance dealing with the consequences of regaining civilian protection with the following introductory remarks:

The last Section of the Interpretive Guidance emphasized that a person who had regained civilian protection against direct attack after having either ceased to directly participate in hostilities or having affirmatively disengaged from combatant function did not enjoy immunity from law enforcement measures. Under national legislations, direct participation in hostilities or the assumption of permanent combatant function in a non-state armed group would normally constitute a criminal offence, subjecting the civilian in question to arrest and prosecution. Depending on the circumstances, if absolutely necessary, such arrest could even justify the use of armed force, albeit under the stricter standards applicable to law enforcement. In sum, this Section of the Interpretive Guidance aimed to complete the discussion by recalling that, once someone regained protection against direct attack, law enforcement measures still remained available to ensure that the authorities could re-establish and maintain law and order.

The participating experts were invited to express their views with regard to the form and substance of Heading X of the Interpretive Guidance, as well as of the accompanying commentary and footnotes.

2. General Comments and Suggestions

One expert stated that the Subsection of the Interpretive Guidance entitled "Lack of immunity from domestic prosecution" was a good paragraph providing a good synopsis and that this was the right and only place in the document to discuss this issue. Another expert who generally supported the text of Section X nevertheless suggested that at least a footnote should clarify that the described consequences of regaining protection against direct attack were not only triggered by ceasing to directly participate in the hostilities or disengaging from combat function, but also by falling *hors de combat* due to capture, injury, surrender or any other reason. Yet another expert proposed that, instead of affirming that civilians "remained subject to prosecution", the text of Heading X of the Interpretive Guidance should be

reformulated in the sense that the fact of regaining protection from attack did "not exempt" civilians from prosecution for violation of international or domestic law.¹³ Finally, one expert reiterated his personal disagreement with the view that was generally accepted within the expert group, namely that direct participation of civilians in hostilities was not, as such, prohibited under IHL. In the opinion of this expert, civilian direct participation in hostilities should be regarded as an international offence and a war crime.

¹³ Accordingly, this expert proposed the following alternative text for Heading X: "The fact that civilians have regained protection from attack after the termination of direct participation in hostilities does not exempt them from prosecution for any breaches of international or domestic law".

E. Way Forward

During the concluding Session of the Expert Meeting, the organizers and the majority of the experts expressed their conviction that, after four years of extremely fruitful research, analysis and discussion within the expert group, the time had come to bring the clarification process to a conclusion. It was agreed that the following steps should be taken with the aim of producing, by the end of 2007, a document that would provide clear and consistent interpretive guidance while appropriately reflecting the remaining disagreements among the participating experts:

The organizers would revise the Headings and Commentary of the Interpretive Guidance based on the discussions held and the comments received during the 2006 Expert Meeting. Once finalized, the revised version of the Interpretive Guidance would be transmitted to the experts for written comments, on the understanding that the purpose of this exercise was not to reopen the discussion on every aspect addressed during the Expert Meetings, but for the experts to highlight points in the revised document that appeared unacceptable to them.

In order to avoid repetitive discussions on the same issues, an additional Expert Meeting would be organized only if - in view of the written comments received from the experts on the revised version of the Interpretive Guidance - the organizers were convinced that another, very concentrated discussion on certain select questions was indispensable to bring the process to a conclusion. In any case, the experts' written comments would be incorporated in the commentary to ensure that the final version of the Interpretive Guidance appropriately reflected any substantial disagreements.

The options of drafting, within the framework of the expert group, a simplified document additional to the Interpretive Guidance and, respectively, of a separate list of examples to be annexed to the Interpretive Guidance were generally discarded. Instead, wherever suggested by the experts or deemed appropriate by the organizers, additional examples could be integrated directly into the text of the Interpretive Guidance.

In conclusion, the organizers reiterated that their hope and aim was that the final Interpretive Guidance resulting from the clarification process could be published as a document supported by the entire expert group. However, should this goal prove to be too ambitious, the organizers would aim to present the final document under their own authority, on the understanding that diverging opinions would remain adequately reflected in the commentary.

ANNEX:

**The Notion of Direct Participation in Hostilities
under International Humanitarian Law**

Agenda

**Fourth Informal Expert Meeting
International Committee of the Red Cross
TMC Asser Institute**

Geneva, Switzerland, 27 / 28 November 2006

Monday, 27 November 2006

Welcome

9.00 – 10.30

Opening Session

- Welcome
- Introduction and discussion

10.30 – 10.50

Coffee Break

Personal Scope: The Concept of "Civilian"

10.50 – 12.30

Working Session I

- International Armed Conflict
- Non-International Armed Conflict
- Private Contractors and Civilian Employees

12.30 – 14.00

Lunch

14.00 – 15.45

Working Session II

- Continuation of discussion from Working Session I

15.45 – 16.15

Coffee Break

Substantive Scope: "Direct Participation in Hostilities"

16.15 – 18.00

Working Session III

- Direct Participation in Hostilities as a Specific Act
- Constitutive Elements of Direct Participation in Hostilities
- Beginning and End of Direct Participation in Hostilities

18.30

Cocktails

19.30

Dinner

Tuesday, 28 November 2006

08.30 – 10.00

Working Session IV

- Continuation of discussion from Working Session III

10.00 – 10.20

Coffee Break

10.20 – 11.50

Working Session V

- Continuation of discussion from Working Session IV

11.50 – 13.00

Lunch

Modalities of the Suspension of Civilian Protection

13.00 – 14.30

Working Session VI

- The "Revolving Door" of Protection
- Precautions and Presumptions in Situations of Doubt
- Practical Relevance of the Principles of Military Necessity and of Humanity
- Consequences of Regaining Civilian Protection

14.30 – 14.50

Coffee Break

14.50 – 16.00

Working Session VII

- Continuation of discussion from Working Session III

16.00 – 17.00

Conclusion / Way Forward

17.00

Farewell Drinks
