



ICRC

Fifth Informal Expert Meeting

The Notion of Direct Participation in Hostilities under IHL

Discussion Notes*

(Working Sessions I to VII)

International Committee of the Red Cross

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* **Remark:** These Discussion Notes were prepared by Nils Melzer, Legal Adviser at the Legal Division of the International Committee of the Red Cross (ICRC), in a personal capacity and does not express, or intend to express, the institutional position of the ICRC or its Legal Division on any aspect of the topics discussed. The summary of expert comments, as well as the preliminary elements of response, were written in good faith and to the best of the author's ability, but cannot claim to provide a detailed and complete overview of the opinions held by the experts, or to offer comprehensive and consolidated solutions for the various issues to be resolved. In order to exclude misunderstandings and facilitate the discussion, the comments in the original version of this Background Document had been left nominally attributed. As the expert process was conducted under the Chatham House Rule, all names have been replaced by anonymous references in this published version.

Introduction

The present Discussion Notes aim to provide the participating experts with a practical tool to be used during the Working Sessions of the Fifth Expert Meeting on the Notion of "Direct Participation in Hostilities" on 5 and 6 February 2008. The Discussion Notes follow the order of the Agenda and essentially reproduce those Sections of the more comprehensive document "Expert Comments & Elements of Response", which are relevant to the topics selected for the Agenda of the Expert Meeting. The Discussion Notes also include the proposed revised version of Section IX of the Interpretive Guidance for discussion during the Expert Meeting. While the topics selected for the Agenda will be given priority during the discussions, experts are free to raise any other issue included in the document "Expert Comments & Elements of Response" during the time-slots reserved for "Varia".

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1. Restraints on the Use of Force in Direct Attack (Working Sessions I & II)

The means and methods resorted to, as well as the quality and degree of force used against persons not entitled to protection against direct attack must be both reasonably required in the concrete circumstances and not otherwise prohibited by international humanitarian law.

The standards proposed in Section IX of the 2007 Draft Interpretive Guidance for the use of force against persons not entitled to protection against direct attack have given rise to sharp controversy among the experts. While most experts who offered comments on Section IX clearly reject the binding nature of the proposed standards, some also express full or partial support for them. The majority of experts are of the opinion that these standards should be the main subject of the 2008 Expert Meeting.

1.1. Rejection of Standards and Concern over Consequences

One expert strongly recommends the deletion of the two paragraphs in Section IX, beginning "More concretely, the operating forces..." and concluding "...informing the entire body of IHL on the conduct of hostilities," as well as footnote 193 (pp. 61-62). These two paragraphs are beyond the scope of this study, which aims to clarify the notion of "direct participation in hostilities", that is to say, the circumstances in which a civilian be made the object of direct attack. These paragraphs deal into a tactical realm beyond establishment of the legitimacy of use of deadly force against a civilian. These paragraphs have no basis in either domestic or international law. If in accordance with Article 51 [3] AP I a civilian may be the object of direct attack for such time as he or she is taking a direct part in hostilities that means the individual may be engaged with deadly force. There is no legal obligation to attempt to capture, "shoot to wound," or limit the number of shots taken. The quotation from the 1973 ICRC Report ("If a combatant can be put out of action....etc.") was a comment made by Jean S. Pictet relating to what constitutes "unnecessary suffering." It did not survive as a principle regarding unnecessary suffering in the UN Conventional Weapons Convention debates and development that followed. In addition to its impracticability, this statement is here used

outside the context in which it was originally offered. In sum, these two paragraphs will seriously undermine the overall credibility of the study if they are allowed to remain.

One expert: Under IHL, there is no legal obligation to capture rather than kill an adversary in and armed conflict. The acceptance of such an obligation would imply a grave inconsistency with the principle of proportionality applicable in the context of incidental loss and injury (“collateral damage”). While the incidental civilian deaths would be lawful as long as they are not excessive in relation to the military advantage, the killing of an enemy fighter or civilian directly taking part in hostilities would be prohibited as soon as an alternative, non-lethal means is available.

One expert: It is the statement that the quality and degree of force used against persons not entitled to protection against direct attack must be “reasonably required in the concrete circumstances” which appears problematic. While such an approach may be desirable as a matter of policy, it is doubtful whether it finds sufficient basis in IHL currently in force, which the Interpretive Guidance takes as its sole point of reference. First, as the Interpretive Guidance expressly adopts IHL as the *exclusive* basis for the underlying analysis and discussions (p. 6), Section IX cannot be based on human rights law. Instead, a general caveat could be introduced to the effect that the Interpretive Guidance is without prejudice to legal obligations derived from areas of international law other than the law of armed conflict or from domestic law. The second argument, based on the ‘general principle of proportionality’, finds only insufficient support in the two Israeli cases cited in footnote 195. The first case of *Beit Sourik Village Council* seems to deal with the proportionality principle known from Articles 51 and 57 of AP I. While the second case of *The Public Committee Against Torture* admittedly establishes a requirement to employ the “least harmful means” against civilians taking a direct part in hostilities, the judgment expressly refers to *domestic law* as the basis for that test. Third, by deriving a requirement that force must be “reasonably required in the concrete circumstances” *directly* from the fundamental principles of military necessity and humanity, the latter are treated as if they were independent normative standards, which operate over and above the specific rules of IHL. However, this approach would not only allow superimposing humanitarian requirements and the restrictive dimension of military necessity, where positive IHL would be more permissive. Rather, the same argument could also be used to superimpose the permissive dimension of military necessity so as to allow for military action, which would otherwise be prohibited under the specific rules of IHL. In the final analysis, to view the two fundamental principles of humanity and military necessity as not being fully incorporated into the specific rules of IHL may lead to a reintroduction of concepts akin to *Kriegsraison*, with all its devastating effects.

1.2. Rejection of Standards and Need for further Discussion

Three experts support the rejection of a legal obligation to capture rather than kill in international and non-international armed conflict. This issue requires further discussion and is sufficiently important to convene another meeting. It should be discussed, for example, whether capture might be considered when using the precautionary measures of Article 57(2)(a)(ii) "to take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss or civilian life...." While there may be situations where capture might realistically be considered, there is, despite the Israeli judgment on targeted killings, no legal requirement to capture an opponent in an armed conflict.

One expert also recommends that Section IX be either deleted or "severely pruned". The group was not convened to discuss the "standards of the conduct of hostilities" or more general matters, such as the interrelationship between IHL and Human Rights Law. The issues raised in Section IX require further extended thought and are already finessed as well as they can be by Section VIII on Precautions and Presumptions. Section IX should be the major topic for discussion at the February 2008 Meeting.

One expert likes the humanitarian considerations developed in Section IX, but wonders to what extent they really constitute positive law.

One expert expresses concern about the prominence given to the argument that the quality and degree of force must be 'reasonably required'. This argument, made in the specific context of operations against civilians taking a direct part in hostilities, might be regarded as applicable in all circumstances of the conduct of hostilities under the jus in bello. The question of whether there is a legal obligation to capture enemy combatants, who have not surrendered, rather than killing or wounding them, needs more debate.

One expert: Section IX introduces an innovative and far-reaching approach with respect to the widely accepted interpretation of the principle of military necessity under IHL. As the proposed approach did not benefit from sufficient discussion at the expert meetings, it seems problematic for inclusion in the draft.

1.3. Partial Support for the Proposed Standards

Two experts accept or (at least) do not exclude that the proposed standards may be legally binding in situations of non-international armed conflict and belligerent occupation:

One expert: The need to exercise restraint in attack, in circumstances allowing non-lethal options, is applicable only in occupied territories and in non-international armed conflicts but is totally inapplicable in ordinary combat.

One expert also expresses severe doubts as to Section IX which, whilst confirming that there is no 'obligation to "capture rather than kill"', goes a long way towards that. The real question is whether, in relation to the use of lethal force, civilians directly participating in hostilities are to be treated in the same way as 'lawful combatants' or whether they retain some residual protection. It is generally accepted that combatants can be killed regardless of the immediate threat they pose. While the Israeli targeted killings case indeed seems to distinguish between combatants and civilians who have lost protection, its applicability outside the context of occupation is doubtful. It would be correct to state that the use of lethal force against civilians who have lost protection is subject to the same constraints as the use of lethal force against lawful combatants, but the standard proposed in the 1973 Work of Experts referred to in footnote 193 is not accepted and certainly finds no basis in the text of the subsequent Additional Protocols.

1.4. Full Support for the Proposed Standards

One expert wholly agrees with the proposed Section IX and feels this may be the way out of the partial impasse reached on the relationship between law enforcement / human rights law on the one hand and conduct of hostilities / IHL on the other. The interplay of the principles of military necessity and humanity, together with the requirement to take all feasible precautions make for a workable regime which could bridge the gap between some of the views expressed during the previous Expert Meetings.

One expert agrees that military necessities, in conjunction with humanitarian necessities and the principle of proportionality impose an obligation to capture rather than kill, always provided that such an option is available in the first place. In any case it would be strange for the ICRC to come to a different conclusion in this respect.

One expert expresses the view that, in non-international conflicts, there is a clear obligation to capture where feasible, particularly because of the lack of formal combatant status. Moreover, as human rights law applies at all times in non-international armed conflict, the words "While the use of force against such persons clearly is not governed by law enforcement standards..." should be deleted, so that the sentence would start with the words "considerations of humanity require that no more death...". The rest of this section can remain unchanged.

1.5. Elements of Response and Proposed Way Forward

Elements of Response: *Generally speaking, apart from the restrictions and prohibitions imposed on specific means and methods of warfare, positive IHL does not expressly regulate the kind and degree of force which is permissible against persons not entitled to protection against direct attack. This does not mean, however, that in the determination of that question individual military or insurgent commanders enjoy an unlimited margin of appreciation. Instead, within the parameters of positive IHL, the quality and degree of force which is permissible against persons not entitled to protection against direct attack remains subject to the fundamental principles of military necessity and humanity underlying and informing the entire body of IHL. While the principles of military necessity and humanity do not derogate from or otherwise override positive IHL, they must, at the very least, inform the interpretation of the rights and duties of belligerents within the margins set by specific provisions of IHL. According to their generally recognized interpretation, these principles require that, within the parameters of positive IHL, no more death, injury and destruction be caused than is reasonably required to accomplish a legitimate military purpose in the prevailing circumstances.*

While “direct participation in hostilities” remains a technical term of IHL, and while the substantive legal analysis reflected in the Interpretive Guidance remains limited to the rules and principles of IHL, it cannot be ignored that, within the parameters of positive IHL, the consequences tied to civilian direct participation in hostilities may additionally be influenced by other international normative frameworks, which may be applicable in a particular context. Whereas it would exceed the scope of this expert process to express its views as to how these normative frameworks may interact with IHL, or to what extent such interaction may further restrict the kind and degree of force which is permissible in a particular attack, it should be recalled that other applicable normative frameworks must be taken into consideration when determining the precise conditions and modalities which govern the loss of civilian protection in a particular context.

Terminological concerns regarding the use of the term “arrest” could be addressed by using the term “capture” instead, without prejudice to the standards that may be applicable to such operations in contexts where military operations cannot easily be distinguished from law enforcement operations.

Proposed Way Forward: *The controversy triggered among the experts by the standards proposed in Section IX of the 2007 Draft Interpretive Guidance for the use of force against persons not entitled to protection against direct attack proves that the relevant questions should be further discussed during the 2008 Expert Meeting. The comments received also revealed that the 2007 draft text of Section IX still contains passages prone to misinterpretation. Therefore, a substantially revised draft of Section IX is submitted to the experts for discussion during the 2008 Expert Meeting (see below, 1.6. Revised Section IX of the Interpretive Guidance).*

1.6. Revised Section IX of the Interpretive Guidance

The following revised draft of Section IX of the Interpretive Guidance is submitted for discussion during the 2008 Expert Meeting:

IX. Restraints on the Use of Force in Direct Attack

In addition to the restraints imposed by specific provisions of IHL, the kind and degree of force which is permissible against persons not entitled to protection against direct attack remains subject to the fundamental principles of military necessity and of humanity, without prejudice to additional restrictions arising under other applicable branches of international law.

Civilians lose their protection against direct attack for such time as they directly participate in hostilities or, alternatively, for such time as they cease to be civilians due to their continuous assumption of combat function within an organized armed group. Such loss of protection does not mean that the concerned persons fall outside the law. It only entails that the lawfulness of the use of force against the concerned persons is no longer necessarily governed by the standards of law enforcement and individual self-defense, but that operations may now have to be carried out under the standards governing the conduct of hostilities. In contrast to situations of law enforcement or individual self-defense, the lawful use of armed force in the conduct of hostilities presupposes neither that the targeted persons have perpetrated a crime nor that they represent an imminent threat, but that they constitute

legitimate military targets.¹ As conventional IHL unambiguously acknowledges, however, "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited".² Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the fundamental principles underlying and informing IHL as a whole, or on additional obligations that may arise under other applicable frameworks of international law.

1. Prohibitions and Restrictions Expressed in Positive IHL

Clearly, any military operation directed against persons not entitled to protection against direct attack must comply with all applicable provisions of treaty and customary IHL governing the conduct of hostilities. This includes not only the prohibition of indiscriminate attacks and the principles of precaution and proportionality, but also other restraints imposed on the means and methods of warfare, such as the prohibition of denial of quarter, the prohibition of attacking persons *hors de combat*, the prohibition of perfidy and the restriction or prohibition of certain weapons.³ Apart from the prohibition or restriction of specific means and methods of warfare, however, positive IHL does not expressly regulate the kind and degree of force, which is permissible against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection against direct "attacks", that is to say, against "acts of violence against the adversary, whether in offence or in defence".⁴ From a theoretical perspective, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without any further considerations. As illustrated by the longstanding recognition that the only legitimate purpose of the conduct of hostilities is to weaken the adversary by rendering his personnel *hors de*

¹ Background Doc. DPH 2005, WS VI–VII, p. 12; Report DPH 2005, pp. 31, 67. During the Expert Meetings, there was general agreement among the experts that loss of civilian protection from direct attack due to direct participation in hostilities is not a sanction for "bad" behavior and that, similarly, the granting of protection was not a reward for "good" behavior (Report DPH 2005, p. 44). The experts also distinguished direct attacks against civilians directly participating in hostilities from the preventive use of lethal force in situations of self-defense (Report DPH 2003, p. 6; Report DPH 2004, p. 14; Report DPH 2005, pp. 31, 36, 37, 38 and 67).

² Article 22 H IV R. See also Article 35 [1] AP I: "In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is no unlimited".

³ Affirmative Report DPH 2006, D.IX.2, pp. 77 f. See, for example, the prohibitions or restrictions imposed on the use of poison (Art. 23 [1] (a) H IV R; 1925 Geneva Protocol prohibiting asphyxiating, poisonous or other gases and analogous liquids, materials or devices), expanding bullets (1899 Hague Declaration IV/3) and certain other weapons (CCW-Convention and Protocols of 1980 and 1995), as well as the prohibition of methods involving the denial of quarter (Art. 40 AP I; Art. 23 [1] (d) H IV R) and the resort to treachery or perfidy (Art. 23 [1] (b) H IV R; Art. 37 AP I).

⁴ Article 49 [1] AP I.

combat,⁵ the primary aim in the conduct of hostilities is not to *kill* the enemy, but to *defeat* him, even if it should be necessary to kill him for that purpose.

2. The Principles of Military Necessity and Humanity

It has long been recognized that matters not expressly regulated in treaty IHL should not, “for want of a written provision, be left to the arbitrary judgment of the military commanders”.⁶ In the absence of express regulation, the kind and degree of force that is permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which are generally recognized as underlying and informing the entire normative framework of IHL.⁷ The principles of military necessity and humanity neither derogate from, nor otherwise override, the specific provisions of positive IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by positive IHL.⁸ Today, the principle of military necessity is generally recognized to permit “only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”.⁹

⁵ See the Declaration of St. Petersburg (1868), which states: "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable [authentic French version: *mettre hors de combat*] the greatest possible number of men".

⁶ Preamble H II (1899). See also Preamble H IV (1907).

⁷ Instead of many, see: Sandoz et al. (eds.), *Commentary AP*, (Article 35 AP I) § 1389.

⁸ The importance of the principle of humanity for determining the rights and duties of belligerents within the margins of judgment left by positive IHL is also reaffirmed in the famous Martens Clause, according to which, in cases not regulated by treaty law, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Article 1 [2] AP I. See also: Preambles H II (1899), H IV R (1907), AP II (1977), CCW (1980); Articles 63 GC I, 62 GC II, 142 GC III, 158 GC IV (1949); ICJ, *Nuclear Weapons Opinion*, § 78; ICTY, *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment of January 2000 (Trial Chamber), § 525). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law. See also the statement of Lauterpacht that "the law on these subjects [i.e. on the conduct of hostilities] must be shaped - so far as it can be shaped at all - by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being" (Lauterpacht, *Revision of the Law of War*, p. 360).

⁹ United Kingdom: Manual of the Law of Armed Conflict (2004), Section 2.2 (Military Necessity). This interpretation of the principle of military necessity is confirmed in numerous other military manuals and glossaries. See, for example, NATO: *Glossary of Terms and Definitions*, p. 2-M-5; United States: US Army Field Manual 27-10 (1956), § 3; US Navy, *Commander's Handbook*, § 5.3.1, p. 5-2.; France: *Manuel de Droit des Conflits Armés* (2001), pp. 86 f.; Germany: *Triservice Manual ZDv 15/2*, § 130;

Complementing the principle of necessity, and implicitly contained within it, is the principle of humanity, which “forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes”.¹⁰ In other words, in conjunction, the principles of military necessity and of humanity can be said to reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the concrete circumstances.¹¹

What kind and degree of force can be regarded as “necessary” in attack against a specific military target involves a complex assessment based on a wide variety of unpredictable operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards, but must be to avoid error, arbitrariness and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation. As far as the use of lethal force against persons not entitled to protection against direct attack is concerned, positive IHL neither imposes a general obligation to “capture rather than kill”, nor does it provide an

Switzerland: Army Regulations 51.007/IV, § 160. The modern notion of “military necessity” has been strongly influenced by the definition provided in Article 14 Lieber Code (1863).

¹⁰ UK Manual of the Law of Armed Conflict (2004), Section 2.4 (Humanity); US Air Force Pamphlet, § 1-3 (2), p. 1-6. Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of positive IHL.

¹¹ During the 2006 Expert Meeting, some experts held that the interpretation of the principles of military necessity and of humanity in Section IX of the Draft Interpretive Guidance (2006) made a novel argument unknown under contemporary IHL. According to these experts, both principles had already been taken into account in the formulation of the particular provisions of IHL. Therefore, military necessity neither justified exceptions from concrete provisions of IHL unless expressly foreseen in that provision, nor did it constitute a requirement superimposed on existing rules of IHL (Report DPH 2006, D.IX. 2, pp. 77 f.). However, several other experts expressed their support for the view expressed in Section IX of the Interpretive Guidance and rejected any suggestion to delete it. According to these experts, the interpretation provided in Section IX accurately reflected contemporary IHL as understood and applied in recent international jurisprudence and constituted an important counterbalance to the application of a functional membership approach to members of organized armed groups (Report DPH 2006, D.IX.4, pp. 80 f.). Also during previous Expert Meetings, diverging views were expressed about the relevance of the principle of military necessity for the lawfulness of direct attacks against civilians directly participating in hostilities. While one group of experts held that IHL permits the killing of adversaries only to the extent that capture is not possible, others insisted that there is no legal obligation to “capture rather than kill”. However, throughout the discussions, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection from direct attack, nor that such a person can lawfully be killed in a situation where there manifestly is no military necessity to do so. In fact, while each group of experts emphasized a different (namely the *restrictive* and the *permissive*) aspect of the principle of military necessity, the respective views remained reconcilable and, in conjunction, compatible with the generally recognized interpretation of the principle in contemporary military manuals and in prevailing legal doctrine (see N 9 above and Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 45. f., 56 f., 67).

unfettered "license to kill". While it would be impossible to determine, *ex ante*, the precise standards which should govern the use of force in each conceivable situation, considerations of military necessity and humanity do require that, within the parameters of positive IHL, no more death, injury or destruction be caused than is actually necessary for the accomplishment of a lawful military purpose in the prevailing circumstances. Accordingly, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity to surrender where the circumstances are such that there manifestly is no necessity for the application of lethal force.¹² Lastly, although the present Interpretive Guidance is concerned with the analysis and interpretation of IHL only, it should be emphasized that its conclusions remain without prejudice to additional restrictions, which govern the use of force under other applicable branches of international law such as, most notably, international human rights law.¹³

¹² It is in this sense that Pictet's famous statement should be understood that: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil" (Pictet, *Development and Principles of IHL*, pp. 75 f.). During the 2006 Expert Meeting, it was widely acknowledged that the approach proposed by Pictet is unlikely to be operable in open battlefield situations such as artillery barrages and other large scale confrontations (Report DPH 2006, D.IX.2 and 4, pp. 77 f., 81) and that armed forces operating in situations of armed conflict do not always have the means to carry out arrests, even if they are equipped with sophisticated weaponry and means of observation (Report DPH 2006, C.VI.6, p. 65). More generally on the discussion of this principle during the Expert Meetings, see *infra* N 11.

¹³ See also Article 51 [1] AP I, according to which the rule on "direct participation in hostilities" expressed in Article 51 [3] AP I is "additional to other applicable rules of international law". Similarly, Article 49 [4] AP I recalls that the provisions of Section I AP I (Arts 48-67) are "additional to the rules concerning humanitarian protection contained in the Fourth Convention [...] and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians [...] against the effects of hostilities". According to the Commentary, while these provisions refer primarily to sources of IHL other than AP I, they also aim to include "instruments of more general applicability that continue to apply wholly or partially in a situation of armed conflict" (Commentary Article 2 (b) AP I, §§ 128-131, on the definition of "rules of international law applicable in armed conflict"), such as "the regional and universal Conventions and Covenants relating to the protection of human rights" (Commentary Article 49 AP I, § 1901) and other applicable treaties, which "can have a positive influence on the fate of the civilian population in time of armed conflict" (Commentary Article 51 [1] AP I, § 1937). During the 2006 Expert Meeting, some experts suggested that the arguments made in Section IX of the Interpretive Guidance were arguments of human rights law and, therefore, should be addressed based on concrete human rights provisions, such as those on the right to life, rather than on vague concepts of IHL, such as military necessity and humanity (Report DPH 2006, D.IX. 3, pp. 76 ff.). Nevertheless, most experts regarded "direct participation in hostilities" as a genuine concept of IHL and held that the Interpretive Guidance should not express any views as to the impact of human rights law on the kind and degree of force, which is permissible against persons having lost protection against direct attack. Instead, a general savings clause should clarify that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law (Report DPH 2006, D.IX. 3. and 4., pp. 78 f.).

2. “Revolving Door” of Protection (Working Session III)

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed forces or groups belonging to a party to the conflict lose civilian protection for the duration of their membership.

Six experts: The notion of an unlimited "revolving door" of protection must be rejected. The thought that a civilian can “repeatedly lose and regain protection against direct attack within a short period of time” is exceedingly problematic, particularly on an open ended basis, as it would allow civilians to take advantage of their status and would place “uninvolved” civilians at incredible risk. A narrow interpretation of “for such time as” will seem unbalanced to members of armed forces, who are permanently targetable, and may erode their respect for the law, particularly in case of repeated acts of participation, including repeated spontaneous or unorganized acts. Therefore, a persistently recurrent mode of conduct amounting to direct participation in hostilities, such as "farmers by day fighters by night", must entail continuous loss of protection. The decisive factor for continuous loss of protection should be that persons have repeatedly engaged in direct participation in hostilities and, therefore, could be perceived as having “joined the fight”. As nothing is certain in war and the judgment will be made based on the available information, and as it would be unacceptable to demand corroboration, repeated participation could be said to raise the presumption of continuous participation.

One of these experts strongly disagrees with the interpretation in the Draft Interpretive Guidance (p. 21) of the example of a villager who takes up arms every time an armed group passes through. As it is known that this person will do so again the next time the armed group passes through, it would make no operational sense to wait until then with targeting him.

One of these experts: If someone is involved in laying mines or IEDs on a recurring basis, he must be directly targetable also in the intervals between each action. Therefore, the loss of civilian protection should not be limited to the duration of "each specific act" but rather to the duration of their "direct participation in hostilities". With regard to members of organized armed groups, the requirement of "continuous combat function" may be too difficult to implement in practice, if it requires elaborate knowledge on the actions of every member. The requirement to base the determinations on "concrete, objectively verifiable facts" sets a

very high threshold which too often may be unrealistic due to the dynamics and uncertainties inherent in armed conflicts.

One expert, on the other hand, remains very concerned about the "membership" approach underlying Section VII.2. While the distinction between unorganized and organized armed actors is understandable, civilians may also temporarily get swept up in the activities of very well organized armed groups, particularly where the group exercises territorial control. While the core of the group may well consist of "members", many of those who temporarily or occasionally take part in hostilities on behalf of the group should not be deemed to be "members". Those civilians may be coerced, or they may participate for remuneration, or they may be sympathetic to the objective, but they are not really "members". They are not "farmers by day, soldiers by night", because their involvement is far more sporadic and irregular to be combatants. Also, in the absence of "membership cards", membership cannot easily be ascertained. This difficulty is not sufficiently addressed simply by saying "the determination must be made based on concrete, objectively verifiable facts and on the standards of good faith and reasonableness in the prevailing circumstances, presuming entitlement to civilian protection in the case of doubt" (p. 56).

Elements of Response: *The Interpretive Guidance is based on the conclusion that (a) the so-called "revolving door" of civilian protection is not a malfunction of IHL, but constitutes an integral and intended part thereof, and (b) that civilians lose and regain protection in parallel with their engagement in each specific act amounting to direct participation in hostilities, whereas members of organized armed groups lose protection for as long as they assume combat function.*

The feared "persistently recurrent mode of conduct amounting to direct participation in hostilities" is typical for organized armed actors, who do not regain protection in the interval between specific hostile acts anyway. Where there is recurrent direct participation in hostilities without lasting allegiance to a particular party to the conflict, such as the example of a villager who takes up arms in support of various parties to the conflict depending on which armed force or group happens to pass through, there can be no continuous assumption of a combat function and the revolving door must continue to operate based on specific acts. The "revolving door" of protection for civilians directly participating in hostilities on a spontaneous, sporadic or unorganized basis is essential in order to avoid erroneous, arbitrary or unnecessary targeting based on unreliable intelligence, hearsay and mere suspicion.

The obvious lack of fail-safe criteria for the determination of "membership" in non-state armed groups does not justify sacrificing the integrity of IHL by rejecting the "revolving door" mechanism or, respectively, the "membership approach", both of which constitute integral

parts of IHL. Instead, the Interpretive Guidance should make an honest attempt to identify the criteria which best reflect the logic and purpose of the underlying principle of distinction. The extensive discussions conducted on this question during the Expert Meetings led to an emerging consensus on what was described as a "limited membership approach", which ties continuous loss of protection to the actual and lasting assumption of fighting function within an armed group. Such "combat function" is the only criterion, which allows a comparatively reliable distinction between organized armed actors and persons who do not, or only on a spontaneous, sporadic or unorganized basis, directly participate in hostilities. In conjunction, the criterion of "combat function" and the mechanism of the "revolving door" of protection aim to balance the legitimate demands of both military necessity and humanity by trying to ensure that no unreasonable restraints are imposed on the operating forces, while at the same time avoiding unacceptable risks for peaceful civilians.

Proposed Way Forward: *In view of its decisive importance within the Interpretive Guidance, the issue of the "revolving door" of protection will be put on the Agenda of the 2008 Expert Meeting.*

3. The Functional Membership Approach (Working Sessions IV & V)

In *non-international* armed conflict, all persons who are not members of state armed forces, dissident armed forces or other organized armed groups under a command responsible to a party to the conflict are civilians and, therefore, are entitled to protection against direct attack unless and for such time as they directly participate in hostilities. Irregularly constituted armed forces or groups comprise only those individuals whose continuous function it is to directly participate in hostilities for a party to the conflict on a regular basis.

3.1. Appropriateness of the Functional Approach

Two experts: The determination of group membership based on individual “combat function” is too narrow and draws upon a questionable analogy with state armed forces to distinguish between the “combat” arm of non-state groups and “support” personnel in such groups. Depending upon the nature, structure and purpose of the group, such distinctions may be impractical or unworkable from the perspective of states. While membership should not be presumed based on arbitrary criteria prone to abuse, it should be determined based on a factual analysis, including the individual’s specific acts in support of an organized armed group and, where appropriate, demonstrated hostile intent. In addition, as with regular armed forces, the overall function of the organization must be considered when assessing whether the organization includes any individuals who do not have a combat function or whether its supporters have a combat function. The aim should therefore be to accurately define the group and not individual function. Finally, “continuous direct participation in hostilities” should be a basis for targeting alternative to membership, because these concepts seem to be very closely linked, and the “continuous direct participation” approach helpfully permits appropriate weighing of temporal and functional considerations.

One expert rejects the “combat function” idea altogether and holds that a cook in an organized armed group should also be regarded as a non-civilian.

One expert also favors a group approach rather than one based on individual function. While it is often difficult to determine membership, some groups may wear uniforms or other distinctive signs facilitating their identification. Overall, a more reasonable and operationally

practicable approach would be to allow the membership approach but to fall back onto the individual function test in case of doubt. A membership approach would not necessarily have to embrace anyone associated with the group but could be more narrowly defined. If combat function is relied on, the term and its relation to the notion of “direct participation in hostilities” should be better defined and explained in the text.

Two experts: Express support for the proposed distinction between civilians and members of armed forces or groups based on the functional determination of membership.

One of these experts: Persons could even be excluded from the concept of civilians based on combat function alone, but not on membership alone. In other words, while combat function may serve as a guidance to identify membership in case of doubt, even a "fully licensed" member of an armed group with membership card who lacks fighting function (the accountant or the fundraiser) must be regarded as a civilian benefiting from the “direct participation in hostilities” rule. In order to avoid misunderstandings, the term “membership” should be used in conjunction with the clarification “determined based on the individual’s function in the group” as often as possible. Particularly where reference is made to a “revolving door” operating based on "membership" and to loss of protection “for the duration of membership”, these statements must imperatively be read together with the functional determination of membership.

One expert: Membership within an armed group should be determined based on the function performed by the persons in question but emphasizes that, contrary to the statement on p. 20 of the Interpretive Guidance, the performance of an administrative function within an armed group, such as certain logistical functions, may qualify as a combat function. Furthermore, where persons assume “functions” that include fighting, they are lawful targets regardless of whether they *also* carry out non-combat support functions. Only where “cooks” perform a pure “support function” similar to a civilian contractor for state armed forces, are they not “members” of the armed group and cannot be individually targeted on that basis.

One expert, while not rejecting the functional determination of membership, suggests that it should include not only direct combat or assistance thereto, but also more general activities not necessarily related to concrete acts and operations – such as military training (both instructors and trainees), recruiting of combatants, manufacturing, procuring and storing arms, devising military strategies, etc. Consequently, any activities which are either "security-related" or "military" in nature, including all military "capacity-building", should lead to loss of civilian protection.

Elements of Response: *The objective and reliable determination of membership in organized armed groups belonging to non-state parties to an armed conflict is one of the most difficult and delicate issues to be addressed. Apart from the levée en masse, treaty IHL*

bases collective and continuous loss of protection against direct attack invariably on "membership" in organized armed forces or groups belonging to a party to the conflict. In view of the underlying purpose and principles of IHL, the rationale behind the conventional concept of "membership" must be to distinguish the fighting personnel and military command of non-state armed groups from civilians accompanying or supporting the group in functions which do not amount to direct participation in hostilities. The only relatively reliable criterion for such a distinction, which emerged during the expert process, is whether an individual assumes "combat function" within the group in question, that is to say, a continuous function which involves activities amounting to direct participation in hostilities on a regular basis.

Determining membership based on combat function is not necessarily a more "individualized" approach than the group approach suggested by some experts. In the end, once the group has been identified, it will still be necessary to decide whether the targeted individuals are, in fact, fighting members of the group or merely civilians accompanying or supporting it without directly participating in hostilities. Depending on the circumstances, this determination may be easy or difficult, may be made based on uniforms, distinctive signs, visible weapons and other context-specific indicators, and it always remains subject to the principle of precaution and the presumption of protection in case of doubt.

In any case, however, conduct that would not be sufficient to entail temporary loss of protection if carried out by a civilian on a merely spontaneous, sporadic or unorganized basis should not entail continuous loss of protection merely because it is carried out as part of a function continuously assumed within an organized armed group. Loss of protection in case of such "non-combat membership" exists exclusively in state armed forces, because it is based on a formal notion of membership that cannot be transposed to non-state armed groups.

Finally, accepting the concept of "continuous" direct participation in hostilities as a basis for targeting in addition to "membership" would severely undermine the clarity of distinction between members of organized armed forces and groups of the parties to the conflict, who are subject to direct attack for the duration of their combat function, and civilians, who are entitled to protection unless and for such time as they directly participate in hostilities.

Proposed Way Forward: In view of its decisive importance within the Interpretive Guidance, the "functional membership" approach will be put on the Agenda of the 2008 Expert Meeting.

3.2. Terminology: Reference to “Continuous” Combat Function

Four experts: Concern with regard to the use of the term “continuous” in relation with “combat function”. According to the dictionary, the word “continuous” means “without interruption, forming a series with no exceptions or reversals”. Therefore, the current wording of the Interpretive Guidance may lead to the misunderstanding that, for example, members of the dissident armed forces might not be considered performing a “continuous” function when they return to a “civilian” domestic employment during the day. This would contradict the express rejection of the “farmer by day, soldier by night” scenario elsewhere in the Interpretive Guidance. An acceptable alternative may be the word “primary”, or the phrase of “lasting integration into the organized armed group” used on p. 20 of the Interpretive Guidance.

One of these experts: Interpreting “continuous function” only as acts performed “on a regular basis” raises questions as to the extent of information required until an individual could be positively identified as assuming a “continuous function” and, thus, as a member of an organized armed group.

Elements of Response: *The word “continuous” does not refer to the actual fighting, but to the ongoing assumption of a function, even on “stand-by”, which involves direct participation in hostilities on a regular - but not necessarily continuous - basis. The alternative word “primary” appears too restrictive, because a person whose “primary” function is to cook for an armed group may, nevertheless, regularly take a direct part in hostilities based on a “secondary”, but continuous, combat function. The alternative phrase of “lasting integration into the organized armed group” may be descriptive for the term “membership” but does not provide criteria for the distinction between fighting personnel and non-combat supporters.*

Proposed Way Forward: *It is proposed to maintain the word “continuous” in the Interpretive Guidance, but to expressly clarify its meaning in order to avoid misunderstandings.*

3.3. The Notion of “Irregularly Constituted” Armed Forces

One expert: Doubts as to the use of the notion of “irregularly constituted armed forces”. As far as “State Armed Forces” (pp. 17 ff.) are concerned, the concept of “irregularly constituted

armed forces” is not of assistance in the context of IHL, because the definition of armed forces depends on functional criteria and rather than regularity under domestic law. Decisive is whether there has been an explicit or implicit authorization to use of methods and means of warfare by the respective government, regardless of whether this occurred in accordance with domestic law. “Non-State Armed Forces” (pp. 18 ff.), on the other hand, are by their nature irregularly constituted. Therefore, the text should only use “organized armed groups”. One expert also requests clarification as to the purpose of the definition of “irregularly constituted armed forces” and as to the consequences of membership therein.

Elements of Response: *The distinction between “regularly” and “irregularly” constituted armed forces or groups is made because of the different concepts of membership on which they are based. Membership in “regularly constituted” forces is generally based on formal incorporation, regulated in domestic law and evidenced by uniforms, insignia and equipment. These factors can be used to determine membership in regular state armed forces, including incorporated units of police, border guard and similar uniformed forces, as well as in dissident armed forces which maintain their previous (regular) structure after turning against the government. Conversely, membership in “irregularly constituted” armed forces or groups, whether organized paramilitary or resistance groups belonging to the state or non-state armed groups other than dissident armed forces, generally is not regulated in domestic law, is rarely based on an official act of integration other than taking up a certain function within the group, and is not, or not consistently, expressed through uniforms or other distinctive signs. Therefore, membership in such irregularly constituted armed forces or groups should be determined based on functional, rather than formal, criteria (i.e. combat function).*

Proposed Way Forward: *Having in mind the provided Elements of Response, experts are invited to further comment / propose alternative terminology for the envisaged distinction between “regularly” and “irregularly” constituted armed forces or groups during the 2008 Expert Meeting.*

3.4. Police and Armed Forces in Non-International Armed Conflict

One expert: The position on police forces in non-international armed conflict (pp. 17 f.) should be clarified. The proposed text is not clear as to whether all armed police forces should come within the definition of “armed forces” or only those actually incorporated into

the armed forces, and what would be the solution for police forces, which are only armed in specific circumstances, or for (unarmed) police operating alongside an armed response unit.

One expert: As far as police forces are concerned, the concept of armed forces is not the same in international and non-international armed conflicts. In international armed conflicts, members of police forces are only combatants if they are incorporated into the armed forces. If not, they are neither authorized to directly participate in hostilities nor subject to lawful attack. In non-international armed conflicts, police forces cannot be prohibited from arresting rebels who, even if they respect IHL, remain criminals under domestic law. Moreover, in international armed conflicts, the distinction between the conduct of hostilities and law enforcement also depends on the status of those targeted. While the police act against civilians, only combatants have the right to act against armed forces. As there is no combatant status in non-international armed conflicts, police forces should not be regarded as civilians, independently of whether or not they are incorporated into the armed forces.

Elements of Response: *For the purposes of the principle of distinction, where police units have been formally incorporated into the armed forces, or where they de facto have been assigned continuous combat functions exceeding the framework of duties usually fulfilled during peacetime, such units should be regarded as part of the “armed forces”. In non-international armed conflict, there clearly is an overlap between law enforcement and the conduct of hostilities. Where the “arrest” of a criminal suspect (law enforcement) concerns a rebel leader in non-international armed conflict, the arrest simultaneously also qualifies as a military operation aiming to “capture” a legitimate target (conduct of hostilities). Specific operations, in which the ordinary law enforcement functions of police become part of the conduct of hostilities, should be regarded as “sporadic” direct participation in hostilities (as opposed to the continuous assumption of combat function) and, therefore, should lead to loss of civilian protection only for the duration of each relevant operation. In sum, members of police units, whether armed or unarmed, lose protection against direct attack only where their conduct, or the continuous function they assume, amounts to direct participation in hostilities.*

Proposed Way Forward: *It is proposed to clarify the text of the Interpretive Guidance in accordance with the preceding Elements of Response.*

4. Qualification of Specific Conduct (Working Session VI)

In order for a specific act to qualify as direct participation in hostilities,

- ∅ the act in question must be likely to adversely affect the military operations or military capacity of a party to the conflict or, alternatively, to inflict death, injury or destruction on persons or objects not under the effective control of the acting individual (*threshold of harm*), and
- ∅ there must be a direct causal link between the act in question and the harm likely to result from that act, or from a concrete and coordinated military operation of which that act constitutes an integral part (*direct causality*), and
- ∅ the act in question must be specifically designed to support a party to an armed conflict by harming another (*belligerent nexus*).

4.1. Terminology: “Effective Control”

Three experts: The text on the “quantitative threshold” of harm (pp. 36-38) is difficult to comprehend and should be clarified.

One of these experts requests clarification whether the wording “under effective control” refers to occupied territory or detained persons and what source or concept of IHL or, if not, of human rights law, it is derived from. Depending on what is meant, this wording may raise complex questions as to the beginning and end of territorial control or occupation and why the qualification of attacks against civilians should depend on such control. This passage should not be understood to mean that only law enforcement means would be permissible in dealing with military threats in a situation of occupation.

Elements of Response: *Admittedly, the wording “under effective control” is not entirely satisfactory and requires clarification. It aims to distinguish, to the extent possible, force used against civilians in exercise of territorial control or of detaining authority (which is not part of the hostilities) from force used in the conduct of hostilities. The wording “under effective control” aims to indicate that the persons and objects in question are “in the hands” of the acting individual. In principle, the killing or injuring of persons “in the hands of” a party to the conflict may constitute a war crime, but is not part of the hostilities, unless it causes harm of a specifically military nature.*

Proposed Way Forward: *The appropriateness of, and possible alternatives to, the wording “under effective control” in the textbox of Section V of the Interpretive Guidance should be discussed during the 2008 Expert Meeting. Alternatively, the meaning of the phrase should be better explained in the Interpretive Guidance.*

4.2. Voluntary Human Shields

One of the most controversial issues related to the material scope of the notion of “direct participation in hostilities” continues to be the qualification of “voluntary human shields”:

Four experts: Express unequivocal disagreement with the analysis of the draft Interpretive Guidance regarding voluntary human shields. Voluntary human shielding - contrary to involuntary human shielding - constitutes an attempt to impede enemy military operations and, therefore, must qualify as direct participation in hostilities. As a minimum, the footnotes expressing this dissent would have to be strengthened in the final Interpretive Guidance.

One expert: Voluntary human shielding can constitute direct participation in hostilities but must not necessarily reach the required qualitative threshold. The restraints imposed on military action against voluntary human shields will depend on the circumstances and are adequately addressed in Section IX of the Draft Interpretive Guidance.

Three experts: Voluntary human shields are not directly taking part in hostilities.

One of these experts supports this conclusion with the following six arguments: (1) To qualify as direct participation in hostilities, an act must directly (and physically) cause harm to the enemy or its military operations. Similar to a propaganda speaker trying to convince enemy forces to surrender, retreat or not to attack, voluntary human shields try to hinder the enemy to attack through moral and legal ways, but not through physical impediment of an attack. Conversely, a group of women blocking a road in an attempt to hinder tanks from attacking enemy forces would have to be regarded as directly participating in hostilities because they are at least trying to physically impede a military operation. (2) If the theory qualifying voluntary human shields as “unlawful” combatants or civilians directly participating in hostilities were correct, their presence would have no legal or moral impact on the ability of the enemy to attack the shielded objective and, therefore, cannot possibly amount to direct participation in the hostilities. (3) The purpose of qualifying voluntary human shields as “unlawful” combatants or civilians directly participating in hostilities is to allow direct attacks against the shielded objective despite the presence of the human shields. The logical (albeit absurd) consequence of such qualification would be, however, that it would become lawful for the enemy to kill every human shield individually through snipers without even attacking the military objective. (4) The distinction between voluntary and involuntary human shields is

based on a factor which may be important in criminal law and law enforcement operations, but is irrelevant in hostilities. Members of state armed forces are legitimate military targets irrespective of whether they volunteer or are forced to join the forces and to attack the enemy. (5) The distinction voluntary and involuntary human shields cannot reliably be made by a pilot or soldier launching a missile on a military objective surrounded by civilians. Even more difficult is the question of whether persons can be regarded as “voluntary” human shields if they are persuaded or misled to act through (false) propaganda, peer pressure or threats on the part of neighbors, employers or family, if they are not aware that the object constitutes a military objective, or if they are voluntarily crossing a strategically important bridge for other reasons. (6) There is a danger that the notion of voluntary human shields is abusively extended to everyone voluntarily being present in the vicinity of a military objective, thus entailing that the requirements of proportionality and precautions would rarely be respected when preparing an attack. Even apart from deliberate abuse, it is often difficult and controversial to distinguish cases of human shields from cases of simple lack of precautions.

Elements of Response: *First, while voluntary human shielding would generally fulfill the requirement of “belligerent nexus” and, depending on the circumstances, of “threshold of harm”, the decisive question is whether such conduct can be said to cause the required harm “directly” with the meaning given to the term in the Draft Interpretive Guidance. From an analytical perspective, similar to the case of hostage taking, the decision not to attack a military objective is generally “self-inflicted” and not “directly” caused by the presence of voluntary human shields, except where they actually pose a physical obstacle designed to adversely affect the ability of the attacker to identify, access, target or successfully attack the shielded objective. Second, the standard of excessiveness of the principle of proportionality in attack is flexible enough to take into account the voluntary and purposeful nature of the presence of civilians in the vicinity of a military objective. Strictly speaking, therefore, the presence of voluntary human shields does not necessarily make an otherwise lawful attack against a military objective unlawful and, therefore, does not necessarily represent a legal obstacle to the military operation. While the considerable nuisance posed by voluntary human shields in political and publicity terms may justify exposing them to an increased risk of incidental death and injury, it cannot, in and of itself, justify deliberately exposing them to direct attacks independently from the “shielded” objective. Therefore, however effective voluntary human shielding may turn out to be in convincing an adversary to refrain from attacking the “shielded” objective, such conduct should not be regarded as “direct” participation in hostilities unless it “directly” causes harm reaching the required threshold.*

Proposed Way Forward: *It is proposed to retain the approach to voluntary human shields proposed in the Draft Interpretive Guidance and to adequately reflect dissenting opinions on this point in the footnotes to the Commentary.*

4.3. Hostage Taking

Two experts: Civilians taking other civilians as hostages in the context of an armed conflict should be regarded as directly participating in hostilities. According to one of these experts, hostage taking is frequently resorted to by organized armed groups and usually has more far-reaching effects than that of injuring or killing a civilian, because the intent is often to use pressure to achieve a strategic goal within the framework of the armed conflict (such as the release of detainees or withdrawal of forces) and, thus, to adversely affect the other party to the conflict. The second expert recalls that hostage taking is expressly prohibited in treaty IHL governing both international and non-international armed conflict and is made a Grave Breach in Article 147 GC IV (re-affirmed in Article 85 [2] API). Not qualifying hostage taking as direct participation in hostilities would diminish the universal condemnation of hostage taking and suggest acceptance of the increasing use of hostages as human shields despite the prohibition expressed in Article 51 [7] AP I.

Elements of Response: *See also previous response. The fact that civilians taking other civilians hostage may commit a war crime does not make that hostage taking an integral part of the conduct of hostilities. Loss of protection against direct attack is a consequence required by military necessity and not a sanction for criminal behavior. The fact that hostage taking is designed to pressure a party to the conflict into releasing detainees or withdrawing its forces and, thus, to adversely affect the other party to the conflict may fulfill the requirement of “belligerent nexus” and, depending on the circumstances, even of “threshold of harm”. Strictly speaking, however, such harm is not “directly” caused by the hostage taking, but still requires the decision to comply with the demands of the hostage takers. The fact that hostage taking does not, as such, qualify as direct participation in hostilities does not, of course, prevent the use of armed force against the hostage takers under the standards of law enforcement and individual self-defense.*

Proposed Way Forward: *It is proposed to retain the approach to hostage taking proposed in the 2007 Draft Interpretive Guidance, and to reflect dissenting opinions on this point in the footnotes to the Commentary.*

5. General, Formal or Editorial Comments (Working Session VII)

5.1. Proposed Disclaimers and General Remarks

One expert: It should be clarified more explicitly in the Interpretive Guidance that the main text must be read in the light of the footnotes.

One expert: It should be expressly clarified in the introduction that the Interpretive Guidance addresses various interrelated issues in different Sections and that, therefore, it should be read and understood in its entirety. Moreover, there should be a statement or disclaimer clarifying that: (a) the opinions expressed in the Interpretive Guidance are those of experts attending in their individual capacities and, as such, do not reflect *opinio juris*; (b) the conclusions in the Interpretive Guidance do not necessarily reflect customary international law; (c) treaty interpretation is ultimately a function of States; (d) the contents of the Interpretive Guidance do not necessarily reflect the state practice or views, and are not an authoritative statement on the law of armed conflict.

The study deals with a complex subject matter but must endeavor, to the greatest extent possible, to simplify and clarify issues such that they can realistically be applied by armed forces. This requires recognition of the fluidity of the battlefield and that a rigid or binary approach may be difficult to apply in practice. The approach of the study may be perceived as too mechanistic or legalistic. It appears to assume a quality of military intelligence that may not exist in practice. It should include the "totality of the circumstances" approach that is alluded to in several footnotes, so that the military commander responsible for targeting can apply status-based (membership or continuous participation) analysis, along with one or more of the "constitutive elements" (like temporal or geographic proximity) to determine direct participation for targeting purposes. The "continuous participation" analysis is a useful means of interpretation that ties temporal and functional analysis together.

One expert: The current draft is somewhat vague about what the issues really are and should be refined: What is the problem with direct participation in hostilities? What is the principle of distinction? Why would military forces directly target and attack civilians? As the main addressees of this Interpretive Guidance are military forces and their commanders, it should be made more clear that "direct participation in hostilities" is a question of fact to be determined largely by military commanders, not by judges and academics.

5.2. Presentation of Dissenting Opinions etc.

One expert highly appreciates the consideration that “direct participation in hostilities” remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner’ and, in the light of this point of departure, is convinced that the form and content of references to some experts’ opinions in the footnotes are fully satisfactory.

One expert: The form of the Interpretive Guidance is good and permits rapid, clear and coherent reading on a very complex issue. For each issue that remains controversial, dissenting expert opinions and ongoing discussions are mentioned in the footnotes, which is important in view of the fact that no consensus has yet been reached on the notion of direct participation in hostilities.

One expert suggests that the “dissenting opinions” should not be dealt with in the footnotes only. While it is understood that the operative text reflects the majority view, the minority view reflected in the footnotes is, in many cases, not a negligible quantity.

One expert: As all expert opinions are already mentioned in the reports on the Expert Meetings, it would be better to have no footnotes in the Interpretive Guidance itself, because it should represent a summary of the process in a clear/simple and logical / legal sequence.

One expert decidedly rejects discursive or argumentative footnotes. Apart from rare exceptions, footnotes must be limited to naming the sources of the information used in the text. Either the information in the footnote is not important and, therefore, does not deserve to be mentioned at all, or the information is important and, therefore, deserves to be mentioned in the main text.

One expert: The examples mentioned throughout the text are helpful, even though they are sometimes included in the text and sometimes in the footnotes. It may be useful to add more examples and to present them in a uniform and clear way.

5.3. References to the Israeli “Targeted Killing”-Judgment

Several experts react to the references made in the Interpretive Guidance to the so-called “Targeted Killing”-Judgment of the Israeli Supreme Court:¹⁴

¹⁴ Israeli Supreme Court, The Public Committee Against Torture et al. v. The Government of Israel et al. (HCJ 769/02), Judgment of 14 December 2006.

One expert: The numerous references to the Israeli targeted killing decision need to be closely reviewed to see if they should be included and if so whether the manner in which they are framed reflects a common understanding of the case and its impact.

One expert: While this case is important and interesting for the subject of direct participation in hostilities, caution is necessary in using it in the Interpretive Guidance. The statements in the judgment are not always accurate. Moreover, the case focuses on Israeli domestic law and on the specific circumstances in Gaza and the West Bank.

One expert even strongly recommends to avoid references to the jurisprudence of national courts, such as the Israeli Supreme Court, and to refer exclusively to the jurisprudence of International Courts. It is extremely important to avoid the (false) impression that the Interpretive Guidance endorses national jurisprudence as an authoritative interpretation of international law.

One expert: It should be noted that, in the “Targeted Killings”-judgment, the Israeli High Court did not apply law enforcement standards because it concluded that the violence *vis à vis* Palestinian armed groups reached the threshold of an armed conflict.

Proposed Way Forward: *It is proposed that the above general, formal and editorial comments be discussed during the relevant working session assigned to address these issues at the 2008 Expert Meeting.*