



ICRC

Fifth Expert Meeting on the Notion of Direct Participation in Hostilities

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Summary Report

International Committee of the Red Cross

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 the International Committee of the Red Cross 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) organized a Fifth Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law". This meeting, which took place on 5 and 6 February 2008 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 2008. The process aims at clarifying the defining elements of "direct participation in hostilities" and to offer guidance for the interpretation of that notion in contemporary armed conflicts of both international and non-international character.

The Agenda for the 2008 Expert Meeting was based on the comments provided by experts on the revised draft "Interpretive Guidance on the Notion of Direct Participation in Hostilities" of 2007 and focused on those topics, which had given rise to the most serious divergences of opinion among the experts. The corresponding background document entitled "Discussion Notes" provided an overview of the individual comments made by experts on each of these topics, as well as preliminary elements of response to the respective expert comments. For each topic, the "Discussion Notes" also proposed a possible "Way Forward" including, most notably, a substantially revised draft version of Section IX of the Interpretive Guidance. Additionally, the Organizers provided the participating experts with a complementary informative document entitled "Expert Comments & Elements of Response", which provided a complete summary of expert comments (i.e. not only on the topics that were put on the Agenda).

The aim of the present Report is to provide an overview of the discussions held during the 2008 Expert Meeting, as well as of the conclusions reached with regard to the steps to be taken to bring this expert process to a conclusion. 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 of the meeting's Agenda (see Annex).

I. Opening Session

The Organizers welcomed the participating experts and recalled that the aim of this expert process was not to develop IHL, but to interpret existing IHL in the light of the circumstances, which the civilian population, military personnel and humanitarian actors encountered in contemporary situations of armed conflict. In view of the difficulty of this task, the Organizers were very grateful to be able to benefit from the immense experience and expertise with which the participants contributed to this process. Despite the remarkable progress achieved in the course of more than four years of intense work within the expert group, it was inevitable that certain divergences of opinion would continue to exist even at the end of this Expert Meeting. Some of these disagreements were of merely theoretical or doctrinal nature and did not affect the practical results of the legal analysis. Other divergences of opinion were perhaps more fundamental and rooted in the wide variety of views and backgrounds, which were represented in this group and which had been so important for the quality of this process. Clearly, the aim of this Expert Meeting could not be to negotiate a seventy-page text which every expert subscribed to as his or her own legal opinion on the issue of direct participation in hostilities. Instead, the Organizers hoped that, by the end of the present Expert Meeting, the expert group would arrive at a commonly shared result, which not only fully acknowledged the continuing diversity of opinion but also provided an overall package that all participants could feel comfortable to support.

Apart from the discussion on substantive issues, it was therefore important to think of how the continuing diversity of opinions could be adequately expressed. Obviously, the final product of an expert process aiming at "clarifying" a complex area of the law could not be limited to an endless collection of diverging expert opinions, but must propose a clear, comprehensive and coherent interpretation of IHL as far as it relates to direct participation in hostilities. At the same time, the legitimate concerns that were expressed with regard to all major questions of law must duly be taken into account, and opinions that significantly diverged from the proposed interpretation must be honestly reflected. While all views expressed in the course of the expert process had their measure of legitimacy and merited to be properly recorded, the ultimate responsibility for the process and its outcome would probably have to be assumed by the ICRC.

II. Restraints in the Use of Force in Direct Attack

Introductory Remarks

The Organizers acknowledged that Section IX of the Interpretive Guidance on the restraints imposed by IHL on the use of force against legitimate military targets had given rise to significant controversy among the experts. The most important arguments raised against Section IX were: (a) that the topic of restraints imposed by IHL on the use of force against legitimate military targets was beyond the scope of the present expert process; (b) that the standards proposed in this respect had no basis in IHL; and (c) that, if the principles of humanity and the restrictive dimension of military necessity could be superimposed on positive IHL for humanitarian reasons, the same could be done for the permissive dimension of military necessity, which would be tantamount to re-introducing the universally condemned doctrine of "*Kriegsraison*".¹ Based on the comments received from experts until late 2007, the Organizers had drafted preliminary elements of response, as well as a revised version of Section IX, which were included in the background document for the present Expert Meeting.²

The aim of the Section was not to "invent" new rules of IHL, but to propose an interpretation of positive IHL where it did not, or not sufficiently, regulate the kind and degree of permissible force. In accordance with the basic principles underlying IHL, such an interpretation must avoid imposing restrictions on armed forces that would no longer allow them to conduct effective military operations. At the same time, it also had to be ensured that basic notions of humanity were always taken into account by those involved in the conduct of hostilities. It was recalled that positive IHL did not precisely regulate the kind and degree of force permissible against persons not entitled to protection against direct attack. According to the definition provided in Article 49 AP I, lack of protection against direct "attack" means lack of protection against "acts of

¹ See summary of expert comments in "Discussion Notes", pp. 3 to 6.

² See "Discussion Notes", pp. 7 to 8 and, respectively, pp. 8 to 12.

violence against the adversary, whether in offence or defence". Apart from the prohibition or restriction of specific means and methods of warfare, however, the kind and degree of permissible "violence" was not expressly regulated but had to be determined based on the principles of military necessity and of humanity underlying and informing the entire body of IHL. Contrary to the doctrine of "*Kriegsraison*", the Interpretive Guidance did not claim that one or both of these principles "override" positive IHL, but simply clarified that, within the margins of judgment that is left to military commanders, rebel leaders and others conducting hostilities, there were still fundamental principles which governed the kind of degree of permissible force. The Interpretive Guidance was based on the principles of military necessity and humanity as interpreted in contemporary military manuals, which essentially required that, within the parameters of positive IHL, no more death, injury or destruction be caused than was actually required to accomplish a legitimate military purpose in the concrete circumstances.

Lastly, the revised Section IX included a "without prejudice"-clause with regard to other branches of international law, most notably human rights law. While it had been decided that this expert process was limited to analyzing and interpreting IHL as far as it related to civilian direct participation in hostilities, it could not be ignored that in many contexts other branches of international law may apply in parallel to IHL. Taking this reality into account without entering into a more substantive analysis, the Interpretive Guidance simply recalled that its conclusions and recommendations remained without prejudice to obligations that may arise under other branches of international law.

Expert Discussion

1. General Concerns Expressed by Experts

Some experts, while speaking in their personal capacity, drew the attention of the group to the fact that the draft version of Section IX of the Interpretive Guidance had given great concern to them but also to certain representatives of their governments. Their

perception was that Section IX of the Interpretive Guidance went beyond the declared aim of this expert process and that this expert group should try to clarify the notion of “direct participation in hostilities” without examining the standards governing the use of force more generally. From a legal perspective, their main concern was that the proposed textbox of Section IX did not reflect the *lex lata* of IHL, but an unwarranted mix between IHL and human rights law. As states were determined to preserve their discretion as to how exactly IHL should be applied and translated into rules of engagement (ROE), maintaining Section IX could jeopardize the practical relevance of the Interpretive Guidance on the battlefield. These and several other experts feared that if the concerns expressed by governments were not taken seriously, the entire expert process might run into serious difficulties and the credibility of the excellent work accomplished in the course of the past four years would be severely undermined. Moreover the perception by states of similar expert processes could be negatively influenced in the future. Therefore, these experts recommended that if the Interpretive Guidance was to have an actual impact on the conduct of states involved in combat operations, Section IX had to be deleted or replaced by a moderate compromise, such as a Martens Clause or more general savings clause.

Another group of experts firmly rejected the idea that the concerns of governments should be allowed to determine the substantive content of the Interpretive Guidance. They recalled that all experts participated not as government representatives, but in their personal capacity and that, therefore, it would be improper to feel bound or pressured by the positions and sensitivities of certain governments. This expert group had not been convened to cater to the needs or preferences of individual states, but to provide non-binding expert guidance as to the coherent interpretation of the notion of “direct participation in hostilities” under IHL. After all, there were other constituencies and stakeholders concerned by this issue than just governments. Within the parameters set by positive IHL, the ICRC's role as a neutral and independent organization was to interpret and implement IHL in a realistic and balanced manner, duly taking into account the concerns of both states and non-state actors. Ultimately, the ICRC and this expert group were not accountable to present and future governments of states, but to humanity as a whole, whose protection in armed conflict remained the very focus and purpose of IHL.

2. Theoretical and Practical Relevance

One group of experts was of the opinion that, although the purported duty to “capture rather than kill” in the conduct of hostilities was a contentious question of great practical relevance, particularly in counter-insurgency operations at the lower end of the spectrum of violence, it should not be addressed in the present Interpretive Guidance but should be left to other expert discussions at some stage in the future. The principles expressed in Section IX applied to attacks not only against civilians directly participating in hostilities, but also against combatants. In other words, they were neither unique to the concept of direct participation in hostilities, nor essential to its understanding and clarification and, therefore, went beyond the mandate of this expert group. In order to maintain the focus of the Interpretive Guidance on issues which were relevant and critical to the notion of “direct participation in hostilities”, Section IX should simply be deleted. Section VIII on precautions and presumptions of protection in situations of doubt went as far as the Interpretive Guidance could go in regulating the use of force in direct attack. One of these experts added that Section IX tried to achieve the impossible, namely to put in writing, in legal terms, the basic idea that even a fighting enemy in an armed conflict should be considered as a human being. According to this expert, the resulting text pointed in all directions without saying anything and, therefore, should be deleted.

Another group of experts insisted that it was both wise and necessary to include Chapter IX in the Interpretive Guidance. While the text might need some redrafting, the debate showed that the Section addressed extremely important and practical questions which could not be ignored in the reality of armed conflict. The relevance of Section IX to the notion of “direct participation in hostilities” was particularly obvious in light of the purported concept of a “global war on terror” in which the laws of war could be applied to every situation around the world. By recalling the practical relevance of the underlying principles of IHL, Section IX consolidated the Interpretive Guidance and could serve as a secondary framework of reference for military commanders in situations where it might be difficult for them to determine some of the other parameters provided in the Interpretive Guidance, such as nexus, membership etc. If there was a controversy as to

the role of human rights law, the applicability of law enforcement standards or the requirement of reasonable necessity in the use of force, this should be indicated in the commentary. But these topics were simply too important to be omitted from the Interpretive Guidance. These experts failed to see how it could be outside the mandate of the expert group to examine the consequences of the loss of protection due to direct participation of hostilities. On the contrary, by abolishing Section IX, the experts would neglect much of their current task of clarifying the notion of “direct participation in hostilities” and might leave the door wide open to abusive interpretation and excessive use of force.

As far as the mandate of the expert group was concerned, the Organizers recalled that the substantive interpretation of the notion of “direct participation in hostilities” had always been strongly influenced by the extensive or restrictive interpretations given to the notion of “civilian” and the various modalities of loss of protection. Therefore, Section I to III of the Interpretive Guidance first addressed the preliminary question of who qualified as a civilian under IHL, including the discussion on the functional membership approach. For the same reason, Sections VII to X of the Interpretive Guidance examined the precise modalities which governed the loss of protection resulting from direct participation in hostilities, including the kind and degree of permissible force. These issues were so closely linked to people's perception or willingness to interpret the notion of direct participation in hostilities in a certain way that they could not be ignored in the Interpretive Guidance.

3. Relation to the Membership Approach

One group of experts held that Section IX was a logical consequence of, and indispensable balance to, the adoption of a functional membership approach in the Interpretive Guidance. While it was often difficult or dangerous to try to arrest or capture persons while they were engaged in an act amounting to direct participation in hostilities, the option to “capture rather than kill” became much more realistic in the intervals between specific hostile acts. While civilians were subject to the specific acts approach and regained protection in the intervals between hostile acts, the functional membership

approach allowed direct attacks against members of the fighting forces even while they were not directly participating in hostilities. This logically required the debate as to whether the kind and degree of force that was permissible against persons not protected against direct attack was limited exclusively by the prohibitions or restrictions imposed on specific means and methods of warfare, or whether further restraints could be derived from fundamental principles underlying IHL as a whole, most notably from the principles of humanity and military necessity or even from other bodies of international law. Section IX was essential because it provided guidance for the kind and degree of force which could be applied, for instance, against a civilian transmitting targeting information by radio in an area where he could easily be captured, or against an unarmed military leader or a rebel group, who clandestinely intruded into government-controlled territory in order to visit his family there. Without Section IX, the functional membership approach and the concept of “direct participation in hostilities” adopted in the Interpretive Guidance might be misunderstood as a legal basis for the armed forces to simply kill the persons in question without even considering the option of an arrest. This would be unacceptable by all legal standards, whether derived from domestic law, IHL, human rights law or general international law. Therefore, in the opinion of these experts, the functional membership approach could not be maintained in the Interpretive Guidance without the considerations of Section IX and the reference to other bodies of international law, which might be applicable. It also would not be sufficient to relegate the principles expressed in Section IX to a “without prejudice” -clause, Martens Clause or some form of annex to the Interpretive Guidance. In the reality of armed conflict, unless restrictions on the use of force in direct attack were clearly spelled out in the main text of the document, they were going to be ignored.

Another group of experts rejected this reasoning. If Section IX was but a tool to mitigate the unacceptable consequences of a bad solution, namely the membership approach, then the latter should perhaps be discussed before the former. As the discussions during the previous Expert Meetings had shown, and as the Interpretive Guidance rightly concluded, states in operational practice actually applied a membership approach. Nevertheless, if some experts felt that the compromise reached in the paper regarding the functional membership approach was too far away from what they believed the law actually stated, the right manner of dealing with such divergences of opinion was to reflect them in the text or the footnotes of the commentary. But it was not the right

solution to simply incorporate a new Section IX with the aim of balancing previous compromises through an argument which had nothing to do with the actual topic of the Interpretive Guidance, namely the clarification of the notion of “direct participation in hostilities” under IHL.

4. Binding Force and Practicality

4.1. Basic Approach to be taken in Section IX

Several experts had the impression that the disagreement within the expert group regarding the kind and degree of force that would be appropriate in the different scenarios was not fundamental. For instance, no expert had actually claimed that, as a matter of practice, it would be appropriate for a military commander to kill unarmed enemies where they clearly could have been captured without undue risk. Instead, the actual controversy seemed to relate to the theoretical underpinning of the proposed restraints, namely to the question of whether they were dictated by policy considerations or by legal considerations. When determining the current state of the law and identifying state practice and *opinio juris*, due consideration had to be given to the developments which had taken place during the last decade. Some experts pointed out that, today, international law no longer was the exclusive *chasse gardée* of the community of diplomats, military and government representatives but was increasingly recognized as being anchored in fundamental values and principles, which had to be accepted by society as a whole. Ultimately, what mattered for victims of war was not whether a certain rule of law was rooted in IHL, human rights law or domestic law, but whether they actually benefited from the protection derived from that rule. Therefore, rather than endlessly discussing to what degree Section IX was based on human rights law, on general principles of IHL, on the Martens Clause, policy considerations or common sense, this expert group should take a step backwards and simply acknowledge that, wherever armed actors exercised a sufficient degree of control to capture rather than kill their adversaries without undue risk or difficulty to themselves or the civilian population, they had a duty to do so.

However, several experts stressed that the Interpretive Guidance could only succeed if it was analytically and academically rigorous and useful, but also capable of being operationalized. Therefore, it had to be based on a coherent, honest and fair assessment of the current state of the law and should not try to set up rules and standards for practical and tactical decisions that could only be taken by the operating military commander or soldier. It certainly was not appropriate for an Interpretive Guidance to take treaty norms, which had been put in as much detail as the negotiating states had been able or willing to agree, and to apply a level of detail to them that clearly exceeded their mere interpretation. Moreover, appropriate behaviour on the battlefield was not an exclusive result of international law, but also of tailor-made rules of engagement and policy considerations. It would therefore be wrong to assume that the absence of a set of restraints in the Interpretive Guidance would suddenly lead to the widespread use of excessive force on battlefields across the world.

4.2. Section IX as Expression of the *Lex Lata*

One group of experts was of the view that the "capture rather than kill"-principle elaborated in Section IX had no basis in existing treaty law or state practice and, therefore, could not be regarded as *lex lata*. Contrary to the Organizers' assertion that the Interpretive Guidance was not creating new law but just interpreting the existing law, the proposals put forward in Section IX opened an issue that was not yet sufficiently explored or established in international law, namely the interpretation of military necessity as an aspect of the general principle of proportionality known to administrative and domestic law. It certainly was problematic to derive a binding rule of IHL from a single national court decision discussing this question, namely the 2006 judgment of the Israeli Supreme Court on Targeted Killings. As far as contemporary IHL was concerned, the principle of proportionality was still limited to balancing the anticipated military advantage against the expected collateral damage to peaceful civilians, without regard to the harm inflicted on the targeted person or object. One of these experts stressed that, while the Israeli High Court of Justice had to a certain degree relied on concepts of law enforcement and human rights law, it had not developed the obligation to "capture rather than kill" analytically under IHL, but had adopted it simply because it corresponded to a commitment taken by the State of Israel as a matter of policy. This

policy was designed for a very specific situation where there were different levels of violence in various areas in which law enforcement and hostilities co-existed at the same time. Therefore, this expert group should not rely on the Israeli High Court case in order to determine whether IHL generally required a "capture rather than kill" approach or to analyse the relationship between IHL and human rights law in international armed conflict. Overall, these experts were of the opinion that IX could arguably be regarded as best practice, but that reasonable necessity in the use of force was not a legal requirement in and of itself and that, more generally, reasonableness was not necessarily a precondition for legality.

In response to the claim that ROE issued by states for the conduct of their forces in specific situations could serve as indicators for state practice restricting the use of force against legitimate military targets, several experts stressed that ROE were not very useful as evidence of the *lex lata*. While some prescriptions in ROE were derived from legal obligations, others reflected tactical, political and other considerations, such as the instruction to use minimum force in counter-insurgency. One of the good reasons not to de-classify ROE in judicial proceedings was that the judge would normally be tempted to consider these instructions as expressing binding law rather than just tactical or political choice.

Another group of experts held that the revised version of Section IX was in full conformity with the basic principles of IHL. According to these experts it could not be denied that even the use of force against persons not protected against direct attack was subject to the principles of humanity and military necessity underlying positive IHL as a whole. While IHL did not prohibit attacking the enemy without giving him an opportunity to surrender, already the 1863 Lieber Code expressed the idea of military necessity as a limiting factor, a view which had most recently been confirmed by the Israeli Supreme Court in its 2006 judgment on the policy of targeted killing. Similarly, the principle of "economy of force", which was a well-known operative concept in military doctrine, required that the use of force be limited to what is strictly necessary to achieve the objective of the operation. There really would be nothing innovative in ROE which required a "capture rather than kill" approach where the circumstances were such that it was "manifestly" unnecessary to resort to lethal force. According to these experts, it was inappropriate under the *lex lata* to apply the exact same standards of force to all

conceivable situations, from an isolated civilian directly participating in hostilities to large-scale international confrontations, or from low intensity contexts of occupation or non-international armed conflict to traditional battlefields where it was impossible to exercise effective territorial control. Overall, therefore, Section IX did not introduce a new rule, which was foreign to IHL, but merely gave unambiguous expression to an old and unproblematic military rule which often remained unstated in other instruments. Given that this expert group was not called to negotiate a binding instrument of IHL but to provide interpretive guidance with regard to existing IHL, these experts found that the revised version of Section IX was satisfactory and added to the practical relevance of the Interpretive Guidance.

4.3. Equality of Standards of Force against all Armed Actors

Several experts pointed out that, in discussing the kind and degree of permissible force, Section IX did not distinguish between different categories of armed actors, which suggested that the resulting principles were to apply not only to civilians taking a direct part in hostilities, but also to combatants in international armed conflict. Indeed, most experts agreed that, both from a theoretical and a practical perspective, the kind and degree of permissible force could not be fundamentally different depending on whether the operating armed actors were confronted with state combatants, dissident armed forces, organized armed groups or civilians directly participating in hostilities. In principle, therefore, there was a need for equal standards in the use of force against all armed actors. In the view of some experts, the need for equal standards in the use of force proved the point that, even against combatants, there was no unlimited “license to kill”. Similar to the prohibition of poisonous and other weapons and the obligation to release captured soldiers if the circumstances did not allow their internment or evacuation, the principles of military necessity and humanity discussed in Section IX were part of the general limitations imposed on the use of lethal force in the conduct of hostilities.

In the view of other experts, however, the need for equal standards in the use of force proved that Section IX was fundamentally flawed. They argued that there was no obligation to capture rather than kill state combatants in international armed conflict and

that, therefore, no such obligation could exist with regard to armed non-state actors either. One of these experts pointed out that, to his knowledge, there had been no cases where a military commander or soldier had been charged or convicted of excessive use of force against combatants in the battlefield. Referring to his own experience as an infantry officer in combat, this expert recounted that, when two armed enemy combatants emerged from a hut in front of him during a village patrol, he immediately shot both of them at a distance of three feet without even thinking about the possibility of capturing them. In the harsh realities of combat or serious crime, where hesitation could easily cost someone's life, neither soldiers nor police officers should be asked to second guess their judgment as to the necessity of deadly force. This was a very dangerous area for the Interpretive Guidance to get into. Another expert contended that the absence of an obligation to capture rather than kill was obvious, at least with regard to state soldiers and fighting members of organized armed groups. In both cases, the rationale in attack was to achieve a military advantage by killing members of the fighting forces. In the case of civilians directly participating in hostilities, who were not part of the fighting forces, there was perhaps room for a different approach. The rationale of attacking such civilians was to prevent them from helping the enemy, but their killing was not a military advantage in itself.

4.4. Interpretive Importance of Guiding Principles

The scenario raised by one expert of a group of civilians lying passively on a bridge to prevent a military convoy from proceeding triggered a wider discussion on the principles which should guide the kind and degree of force resorted to against legitimate military targets in operational practice. There seemed to be general agreement on the basic observation that, even if holding up a military convoy in a situation of armed conflict amounted to direct participation in hostilities, the correct way of dealing with that situation depended on the concrete circumstances. If there was no likelihood of any hostile action at that time, no commander in his right mind would machine gun or run over the civilians lying on the bridge. The scenario would be very different, however, if the purpose of the set-up was to hold up military forces as part of an ambush. Furthermore, neither of those scenarios could be compared to a situation where the civilians in question served as human shields against an air attack on the bridge.

With regard to concrete restrictions imposed on the use of force against persons not entitled to protection against attack, several experts held that IHL provided no protection to combatants and civilians directly participating in hostilities, except for the prohibition and restriction of certain weapons, the prohibition of unnecessary suffering and denial of quarter, and general references to military necessity and humanity. While reasonable commanders would not use unnecessary force in situations that did not warrant it, there was no legal obligation to refrain from using excessive force in the battlefield. Other experts acknowledged that, even though specific rules of IHL did not provide a precise answer for each situation, it could not be disputed that there were general guiding principles in IHL that could assist a commander in deciding on the kind and degree of force to be used. While considerations of military necessity and humanity were intrinsic to IHL and had practical value, operational decisions on the appropriate use of force were strongly influenced also by personal, tactical, political and moral considerations. In the view of these experts, it was impossible to predict operational circumstances with sufficient precision to formulate abstract guidance that would be satisfactory in all conceivable situations.

Some experts attempted to provide a more detailed analysis on the interrelation between the various rules and principles of IHL. According to these experts, although the entire body of IHL rested upon a balance between the two most fundamental principles of military necessity and humanity, these two principles did not have independent legal meaning. It was only the specific rules and so-called "secondary" principles of IHL, all of which were derived from the underlying principles of humanity and military necessity, which had independent legal meaning. Clearly, therefore, it was not possible to superimpose requirements of military necessity and humanity on positive provisions of the Geneva Conventions and the Additional Protocols, which already took these considerations into account. As regards military necessity, this had already been rejected in the post World War II war crimes trials and, as a matter of logic, the same had to apply to humanitarian considerations. Accordingly, military operations could only become unlawful because they violated positive rules of IHL and not because they contradicted the principles of humanity or because they were not justified by military necessity.

One expert added that the secondary principles of IHL included not only the principles of distinction, precaution and proportionality, but also the prohibition of superfluous injury and unnecessary suffering, which had so far been neglected in the present discussion about the restraints on the use of force. This expert recalled that Pictet's famous statement that "[i]f 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 [...]" had been made precisely in the context of the prohibition of superfluous injury and unnecessary suffering. Arguably, therefore, this principle might provide a firm and independent basis in IHL for the arguments made in Section IX. Another expert cautioned, however, that there would hardly be any added value in mere, unspecified references to Pictet's well-known citation and the prohibition of superfluous injury and unnecessary suffering. Finally, one expert held that there was nothing wrong with including non-legal considerations, such as economy of force, humanitarian considerations, reasonableness etc. in the discussion of Section IX.

4.5. Practicality of Proposed Standards

It was generally agreed among the experts that, ultimately, this expert process could only be regarded as a success if the resulting Interpretive Guidance was perceived as realistic and operable to those who had to apply it in practice. In this respect, several experts criticized that it was not clear from the Interpretive Guidance how the standards proposed in Section IX should apply in operational practice. For example, it was not clear in what circumstances there "manifestly" would be no military necessity for the application of lethal force. If this meant that soldiers operating in an international armed conflict could only resort to means and methods which enabled them to capture rather than kill enemy combatants and that, for the same reason, ground forces must be used instead of the air force, then the whole logic proposed in Section IX was not workable in contemporary military conflicts. In response, the Organizers recalled that the Interpretive Guidance did not try to come up with a strict and inflexible standard, but precisely reaffirmed the discretion of states as to the contextual interpretation of positive IHL. This was illustrated by the following passage of the revised Section IX:

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 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".³

Thus, the principles of military necessity and humanity did *not override* positive IHL, but governed the application of force *within* the parameters established by it. In revising Section IX, great care had also been taken to clarify that armed forces could not be required to increase the risks for themselves or the civilian population in order to spare an enemy's life and that the principles expressed in Section IX did not restrict available options of force where they were reasonably necessary for the achievement of a lawful and legitimate operational goal. But in situations where a variety of tactical choices was available and where these choices were equal from a military point of view, it simply could not be denied that humanity played a role in determining the permissible kind and degree of force. Such situations might be rare in traditional interstate confrontations, but they were quite likely to occur in contexts where civilians participated in hostilities.

³ See Discussion Notes, pp. 11-12.

5. Section IX and Human Rights Law

One group of experts was of the opinion that the inclusion of human rights law in the analysis of Section IX would introduce a stronger rule of law and *lex lata* perspective into the Interpretive Guidance. IHL was not a self-contained regime but, according to fundamental rules of treaty interpretation, had to be interpreted in light of other applicable obligations under international law such as human rights law. For example, an Interpretive Guidance which disregarded the European Convention on Human Rights and the Court's case law concerning the conduct of hostilities against persons in internal armed conflicts certainly could not be very useful for the 50 member states of the Council of Europe. As Section IX was primarily designed for non-international armed conflicts and occupied territories, and not for traditional interstate confrontations between professional armies, the question of the applicability of human rights law and its interrelation with IHL was of utmost practical importance. While the present "without prejudice"-clause was better than nothing, it should be more injunctive and positively require that other legal obligations under international law must be taken into account, including human rights law.

However, the prevailing opinion among the experts was that the interface between IHL and human rights law, though extremely important, was beyond the scope of this expert process. In the opinion of most experts, they had been convened to provide guidance on the interpretation of a genuine notion of IHL, namely "direct participation in hostilities". The interrelation and overlap between human rights law and IHL in situations of armed was a vastly complex, insufficiently explored and continuously developing area of international law. At this stage of the process, this expert group had neither the time nor the resources to conduct an in-depth study and to produce anything meaningful on the subject in the Interpretive Guidance. One of these experts also recalled that basing Section IX on human rights law would limit the applicability of resulting principles to government forces and, thereby, would render the scope of the Interpretive Guidance incomplete for practical purposes. In order for Section IX to also apply to rebel groups and other non-state actors, who were not bound by human rights law, the standards would have to be derived exclusively from IHL. Another expert added that, in its Advisory Opinions on Nuclear Weapons (1996), and the West Bank Barrier (2004), the

International Court of Justice had held that the relationship between IHL and human rights law was governed by the principle of *lex specialis*. Therefore, as far as targeting in the conduct of hostilities was concerned, IHL was far more relevant than human rights law and domestic law. In the view of some experts, the basic principles of IHL were absolutely capable of providing an adequate balance between military and humanitarian considerations without the crutch of human rights law. Depending on the situation, considerations of human rights law and even domestic law might also have to be taken into account, but it would be inaccurate to say that targeting decisions in a situation of occupation or non-international armed conflict would necessarily be governed by human rights law. In this context, it was also recalled that, in the Al-Skeini case, the British House of Lords had concluded that belligerent occupation within the meaning of IHL did not necessarily presuppose the existence of effective control within the meaning of human rights law, but that this question depended on the concrete circumstances.

Nevertheless, most experts also acknowledged that the continued applicability of human rights law in situations of armed conflict could not be completely ignored in the Interpretive Guidance. After all, the essential question was to what extent human rights law influenced the kind and degree of force that was permissible against persons not entitled to protection against direct attack, particularly in internal armed conflicts, and situations of occupation. Therefore, there should be at least some kind of reminder that the qualification of an act as "direct participation in hostilities" was not necessarily the only criterion to be taken into account in a targeting decision, but that there could be obligations arising under other legal frameworks as well. Overall, the "without prejudice"-clause proposed in the revised version of Section IX adequately clarified that IHL did not exist in a legal vacuum by itself but operated alongside other areas of international law. This reminder indisputably was within the agreed mandate of the expert group.

6. Section IX and the Martens Clause

According to one group of experts, instead of referring directly to the principles of military necessity and humanity and incorporating a vague "without prejudice"-clause, Section IX should be based on the famous Martens Clause, which provided a vehicle by which

some of the general principles of international law could convincingly be brought into the debate while staying faithful to fact that the Interpretive Guidance was limited to the interpretation of IHL. Some experts even suggested to replace the entire Section IX with a textual restatement of the Martens Clause or, at least, to replace the reference to the principles of military necessity and humanity by the notion used in the Martens Clause of "fundamental principles of international law as derived from established custom, from the principles of humanity and the dictates of public conscience". The Martens Clause excluded the assumption that, in armed conflicts, any behaviour not explicitly prohibited would be *ipso facto* permitted. According to the Clause, conduct in armed conflicts was governed not only by treaties, but also by the principles of natural law as derived from established custom, the principles of humanity or the dictates of public conscience. The latter two principles were put on the same footing as state practice as historical sources of principles of international law, thus loosening, in the specific area of international humanitarian law, the requirements prescribed for *usus*, while at the same time elevating *opinio iuris ac necessitatis* to a rank higher than normally admitted in international law. Whatever interpretation was given to the Martens Clause, however, it seemed to be generally recognized among the experts that, for more than a century, the Clause had been a constant witness that considerations of humanity remained important and relevant even in areas of the law for which states could not agree on more specific rules.

Another group of experts doubted the added value of the Martens Clause for a discussion on the kind and degree of force which was permissible against persons not entitled to protection against direct attack. These experts recalled that the Martens Clause had been invented as a temporary compromise to bridge gaps in treaty law until a more complete code regulating the law of war would be adopted. Since contemporary IHL expressly described combatants as legitimate military targets and expressly deprived civilians of their protection against direct attack if and for as long as they directly participated in hostilities, there no longer was such a gap in IHL and, therefore, no need for the residual protection provided by the Martens Clause. Moreover, contrary to "custom", the "principles of humanity" and "dictates of public conscience" referred to in the Martens Clause were not actual sources of international law. Although such considerations might inspire further developments *de lege ferenda*, positive IHL essentially left it up to the parties to the conflict to decide what kind and degree of force was permissible against persons not entitled to protection against direct attack.

7. Relevance of Effective Territorial Control

7.1. Compromise Proposal

One expert suggested that a viable compromise solution could be to limit the restraints on the use of force proposed in Section IX to situations where the operating forces exercised effective territorial control. For this purpose, the previous text of Section IX as contained in the Revised Draft Interpretive Guidance of 6 July 2007⁴ should be adapted as follows:

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 not be prohibited by international humanitarian law. Where a party to the conflict exercises effective territorial control, such force must be reasonably required in the concrete circumstances.

While the first sentence was entirely unproblematic and merely reaffirmed that means and methods of warfare resorted to must not be incompatible with other rules of IHL, the controversy triggered by the phrase "reasonably required in the concrete circumstances" was resolved by limiting its applicability to situations where a party to the conflict exercised effective territorial control. This formulation corresponded to the logic expressed in the Israeli Supreme Court's 2006 judgment on targeted killings, according to which the resort to targeted killings against civilians directly participating in hostilities was permissible only where the persons in question could not be apprehended through law enforcement measures. In the view of this expert, the judgment was right because it was confined to occupied territories over which the occupying power, by definition, exercised effective control. Correctly understood, the notion of "effective territorial control", which was a notion of IHL, referred not only to occupied territories, but also to

⁴ See Revised Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities, 6 July 2007, p. 60: "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".

such areas as were under effective control either by dissident groups or by the government in an non-international armed conflict or, in the previously raised examples of unarmed civilians lying on a bridge in order to prevent the passage of a military convoy or the single shoe-bomber arriving at a domestic airport, even in international armed conflict. In short, wherever the operating forces actually exercised effective territorial control, they would be obliged to adapt their means and methods of warfare to what was reasonably necessary in the circumstances. Conversely, it would be revolutionary and incongruous to require a "capture rather than kill"-approach where the operating forces lacked such effective control, such as in air warfare or in traditional battlefield situations in international armed conflict.

7.2. Meaning of "Effective Control"

Some experts expressed concern over the terminology underlying the compromise proposal because, at this stage, there did not seem to be any general consensus as to the meaning of "effective control" in international law. As one expert pointed out, the mere fact that a state such as Afghanistan had a government and functioning state institutions did not necessarily mean that it exercised effective control over its territory. In some areas, the strength and level of organization of the insurgency might be comparable to that of a traditional armed force, which certainly posed a serious challenge to the government's exercise of territorial control. Even more difficult questions arose with regard to the existence of "effective control" where a group of 20 armed fighters had taken control over a compound within a city controlled by the government.

One expert recalled that the meaning of "effective control" had been outlined in the case law of the European Court of Human Rights, as well as by the House of Lords in the *Al-Skeini* case. Furthermore, according to the Human Rights Committee, the criterion of effective control did not necessarily have to refer to territorial control, but could also denote physical control over a particular person. In response, several experts insisted that, when discussing standards governing the use of force against legitimate military targets, "effective control" must necessarily refer to control over territory. Under IHL, as soon as effective control was exercised over a person, that person had to be regarded

as being "in the hands of" a party to the conflict and, therefore, as protected against direct attack to begin with.

Several experts were convinced that the restraints on the use of force proposed in Section IX were derived from human rights law. According to one of these experts, if the obligation to "capture rather than kill" could be limited to belligerent occupation and non-international armed conflict, it could not be derived from the principles of military necessity and humanity, which applied in all kinds of armed conflict, but had to be rooted in human rights law. Another expert also recalled that, strictly speaking, the applicability of human rights law did not depend on the existence of "effective control" but of state "jurisdiction". Therefore, the decisive criterion for the applicability of the restraints proposed in Section IX should be the existence of "jurisdiction" of a state. Admittedly, this gave rise to the question of whether or not human rights standards were binding on non-state actors and the potential inequality of belligerent parties that could result from a rule based on human rights law.

The expert who had made the compromise proposal responded, however, that the phrase "effective control" was a genuine term of IHL relating to occupied territories, which long predated the 1948 Universal Declaration of Human Rights and subsequent human rights instruments. While there admittedly were areas where the exact meaning of "effective control" was not yet clarified, guidance could be found in the doctrine, practice and case law concerning occupied territories, where the term had received a relatively precise content. However, another expert pointed out that, in its definition of belligerent occupation, the Hague Regulations did not use the notion of "effective control", but the term "authority". Therefore, "effective control" was not an actual *terminus technicus* of treaty IHL.

Lastly, several experts pointed out that the notion of "effective control" might prove to be particularly useful precisely because it had been used by courts as a criterion for determining use of force standards both under IHL and human rights law. In response, one expert cautioned that the use of the same criterion in IHL governing the conduct of hostilities and in the context of the extraterritorial applicability of human rights was more likely to create confusion than clarity. In any case, there was a real danger that, in conjunction with the notion of effective control, Section IX introduced an almost non-

rebuttable presumption in favour of an obligation to capture rather than kill in the conduct of hostilities against persons not entitled to protection against direct attack.

7.3. Support for Criterion of "Effective Control"

One group of experts expressed various degrees of support for the proposal to base the restrictions on the use of force expressed in Section IX on the criterion of "effective territorial control". One of these experts held that he could live with the compromise proposal provided that the term "reasonably" in "reasonably necessary" was deleted and provided, furthermore, that the phrase "particularly in non-international armed conflict and occupied territory" be inserted after the words "where a party to the conflict exercises effective territorial control". Additionally, there should be a reference to the Martens Clause, as well as a "without prejudice"-clause regarding other applicable rules of international law.

Several other experts argued, however, that the proposed restraints on the use of force should remain tied to the factual existence of effective control, regardless of the legal qualification of the situation as a belligerent occupation, international or non international armed conflict. Thus, even in situations of occupation and non-international armed conflict, a duty to "capture rather than kill" could exist only where the authorities or armed forces were actually able to exercise sufficient control to capture or arrest, but not where effective control had been lost due to the intensity of the fighting. This observation was particularly important in view of the fact that the concept of non-international armed conflict underlying the Interpretive Guidance was not limited to internal conflicts, but included also non-international conflicts that crossed national borders provided that the conduct of at least one party could not be legally attributed to a state.

Yet another expert acknowledged that the ability and corresponding duty of the operating forces to capture rather than kill an enemy was strongly influenced by the level of control actually exercised. This expert cautioned, however, that the Israeli Supreme Court had developed its "least harmful means"-requirement in relation to targeted killings which were normally carried out in the Gaza Strip and, thus, in territory which precisely was not under the effective control of Israel. Therefore, while effective control might be

an important factor for the determination of the kind and degree of permissible force, the restriction to "reasonably necessary" means and methods did not depend on the existence of effective territorial control.

7.4. Disapproval and Alternative Proposals

One group of experts emphasized that the restraints proposed in Section IX did not become more acceptable if their applicability were limited to occupied territories, non-international armed conflict and other situations where there was effective territorial control. In the view of these experts, while "effective control" was one of many factors to be taken into consideration before deciding on the use of lethal force, it was not a legally binding concept. One of these experts added that, in terms of clarifying the standards of IHL regarding the use of lethal force in the conduct of hostilities, there simply was no added value to the "effective control" criterion. Once there was effective control, human rights law was likely to apply. However, human rights law could not provide the desired clarity because, in the conduct of hostilities, the "arbitrariness" of a deprivation of life had to be judged in the light of IHL, thus making the argument circular.

Some experts criticized that, as far as the level of violence was concerned, there appeared to be a trend to equate non-international armed conflicts to situations of belligerent occupation and to automatically regard both as low-intensity contexts, where it was possible to exercise authority through law enforcement measures. As illustrated by the wide variety of contexts of occupation during the Second World War, however, or by the current situation in Afghanistan, military action taking place within a very small geographical area could range from simple IED⁵-strikes to quite large brigade level operations against significant military forces comparable to traditional battlefield scenarios. The extreme danger posed by suicide bombers further illustrated how difficult it was to deduce a strict "capture rather than kill" obligation from the criterion of effective control. Therefore, the applicability of certain standards on the use of force should not

⁵ IED: Improvised Explosive Device.

blindly be tied to situations of occupation or non-international armed conflict without a proper analysis of the concrete circumstances.

One of these experts added that there also seemed to be a misconception regarding the standards applicable to the use of force in law enforcement operations. For instance, in US federal practice, the authorities regularly refused to “count shots” or to second guess the decision of the officer on the scene as to whether or not deadly force was necessary at the time. Even the case of a bank robber who had been shot 68 times the use of force was not considered excessive. Similarly, in the McCann-case, the European Court of Human Rights refrained from second guessing the tactical judgment of the operating SAS soldiers that it was absolutely necessary in the circumstances to intentionally kill the three involved IRA-terrorists in Gibraltar. In response to this speaker, another expert recalled, however, that the British government actually lost in the McCann case, because it failed to take sufficient precautions in advance which could have avoided the soldiers finding themselves in a situation in which they genuinely, but erroneously, feared that the IRA-operatives in question were about to kill a significant number of people.

Alternative Proposal 1: Overall, rather than limiting Section IX to occupation and non-international armed conflict or to situations under "effective territorial control", these experts preferred the introduction of a general "without prejudice"-clause in the beginning of the document, which could make reference to human rights law, as well as to considerations of military necessity and humanity.

Alternative Proposal 2: One expert suggested that the reference to the reasonable necessity requirement should be deleted altogether and that only the first, uncontroversial sentence of the compromise proposal should be kept. Accordingly, the final text-box of Section IX would read:

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 not be prohibited by international humanitarian law.

Another group of experts rejected the limitation of the restraints on the use of force proposed in Section IX to situations of "effective territorial control" and argued that these restraints were flexible enough to be applied in all circumstances. According to these experts, if the applicability of the restraints proposed in Section IX were to be limited to situations in which there was effective territorial control, the consequence would be that, in the absence of effective territorial control, the use of force would no longer be subject to a requirement of reasonable necessity. As this was not an acceptable result, several of these experts preferred the original text of the revised Section IX as proposed by the Organizers. Additionally, three of these experts made their own alternative compromise proposals for Section IX, which would avoid the problems introduced by the criterion of "effective control":

Alternative Proposal 3: One expert suggested that the compromise proposal be maintained but that the word "particularly" should be inserted before the words "where a party...", so that the final text-box of Section IX would read:

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 not be prohibited by international humanitarian law. Particularly where a party to the conflict exercises effective territorial control, such force must be reasonably required in the concrete circumstances.

Alternative Proposal 4: Another expert advocated a solution based on the revised Section IX proposed by the Organizers for discussion at the present expert meeting,⁶ in which the references to military necessity and humanity were replaced with the principles contained in the Martens Clause, namely "fundamental principles of international law derived from established custom, from the principles of humanity and the dictates of public conscience". Thus, the final text-box of Section IX would read:

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 international law derived from established custom, from the principles of humanity and the dictates of public conscience, without

⁶ See "Discussion Notes", p. 8.

prejudice to additional restrictions arising under other applicable branches of international law.

According to this expert, the purported rule that fighters in an armed conflict could be lawfully killed wherever they were and regardless of any circumstances whatsoever never had been, and was not today, a part of IHL.

Alternative Proposal 5: One expert suggested that, in order to avoid the introduction of numerous new and unresolved problems through the notion of "effective territorial control", the two sentences of the compromise proposal should be connected to form a single paragraph, the reference to "where a party exercises effective control" should be deleted and the word "must" before "be reasonably necessarily in the concrete circumstances" should be replaced with the word "should". Accordingly, the final text-box of Section IX would read:

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 not be prohibited by international humanitarian law and should be reasonably required in the concrete circumstances.

According to this expert, this solution would provide a reasonable necessity requirement while avoiding arguments over whether that requirement was a restatement of binding law, or whether it depended on the existence of "effective control", belligerent occupation or other similar factors. Another expert expressed support for this proposal, because it maintained the restrictions proposed in Section IX while avoiding the confusion likely to result from the criterion of "effective territorial control".

8. Editorial and Terminological Comments

In addition to the substantive discussion, several editorial and terminological comments were made:

- Some experts proposed that the first sentence of the textbox of Section IX should be formulated positively so as to state that the use of force "must be in conformity with rules and principles of IHL" or "must comply with IHL".
- Another expert held that the first sentence of the textbox of Section IX should refer to "civilians" rather than "persons" in order to make clear that the text did not apply to uniformed combatants.
- Several experts objected to the use of the phrase "license to kill", which alluded to "James Bond"-language and inappropriately implied an assumption that the goal of armed forces was to kill rather than to defeat the enemy. Instead, reference should be made to a "legal authority to use deadly force".
- One expert suggested that, in the second sentence of subsection IX.1. entitled "Prohibitions and Restrictions Expressed in Positive IHL", the principle of distinction principle should be mentioned before the principle of precaution.
- One expert suggested that, in the final version of the Interpretive Guidance, the number of examples should be multiplied in order to better illustrate the different conclusions reached in the document.

III. "Revolving Door" of Protection

Introductory Remarks

In their written comments, several experts had expressed renewed concerns with regard to unresolved problems posed by the concept of the "revolving door" of protection. These concerns justified to put the "revolving door" on the agenda again, even if it was just to clarify the purpose and *modus operandi* of this legal mechanism. In essence, the phrase "revolving door" of protection referred to the possibility of successive loss and regaining of protection against direct attack, which was foreseen in IHL for all categories of persons. According to the Interpretive Guidance, where a civilian directly participated in hostilities on a merely unorganized, spontaneous or sporadic basis, the "revolving door" of protection operated based on the duration of specific acts amounting to direct participation in hostilities. In other words, civilians regained protection against direct attack after the completion of a specific hostile act and until the commencement of the next hostile act. As soon as a person ceased to be a civilian and became a member of the organized fighting forces of a party to the conflict, on the other hand, the "revolving door" started operating based on membership. Consequently, members of such fighting forces lost protection for as long as they assumed continuous combat function for a party to the conflict.

In their written comments, several experts had emphasized that it was unacceptable for IHL to allow civilians to show a persistently recurrent mode of conduct amounting to direct participation in hostilities without continuous loss of protection against direct attack. In the view of the Organizers, however, such a persistently recurrent mode of conduct appeared to be typical for organized armed actors rather than for civilians, who were much more likely to engage in hostile acts on a merely sporadic, spontaneous or unorganized basis and who might even be obliged or otherwise inclined to change their allegiance based on whose fighting forces happened to pass through their area. In applying different standards to organized and unorganized armed actors, the Interpretive Guidance endeavoured to provide a realistic and operable response to the legitimate

concerns raised by such persistently recurrent direct participation in hostilities while at the same time avoiding the erroneous or arbitrary targeting of peaceful civilians.

Expert Discussion

1. Terminology of the "Revolving Door" of Protection

Although some experts found the phrase "revolving door" of protection to be useful because it described the implications of the "specific acts"-approach in terms that were easily understandable to the layman, several other experts expressed considerable concern about its use as a "quasi" term of art in the Interpretive Guidance. In the view of these experts, "revolving door" of protection was a misleading term that provoked inappropriate, almost frivolous images of civilians constantly walking in and out of their entitlement to protection against direct attack. From the perspective of a soldier, the use of the term "revolving door" of protection in relation to civilians directly participating in hostilities implied that the persons in question tried to take advantage of the law to escape the consequences of their action by way of almost perfidious conduct. In view of the misunderstandings which reference to a "revolving door" of protection was likely to cause, these experts recommended to discard the phrase altogether and to describe the specific acts approach in less misleading terms.

2. Unorganized Armed Actors: Importance of Specific Acts Approach

Several experts expressly reiterated their support for the approach taken in the Interpretive Guidance that, in the case of civilians, loss protection against direct attack

should be based on the specific acts approach.⁷ In the view of these experts, it was important to consider not only the perspective of the operating soldier faced with the decision of whether or not to target a particular person, but also the situation of a civilian peasant, his family and children who might be subjected to attack. The notion of "civilian" included both peaceful civilians and civilians who engaged in direct participation in hostilities on a spontaneous, sporadic or unorganized basis, and it was absolutely essential to avoid erroneous, arbitrary or unnecessary targeting of peaceful civilians. In the case of unorganized armed actors, therefore, loss of protection against direct attack had to be limited to the duration of each specific act amounting to direct participation in hostilities and, in case of doubt, any civilian had to be presumed to benefit from protection against direct attack. It was extremely dangerous to leave the individual commander without guidance for targeting decisions and to allow attacks against civilians based on mere suspicion, hearsay, unreliable or politically motivated intelligence or, more generally, based on what they had done in the past or what they were presumed to plan or were likely to do at some point in the future. At the Diplomatic Conference of 1974-77, the words "for such time as" had been chosen deliberately in order to ensure that civilians could only be directly attacked while they were actually engaged in an activity which, in the circumstances ruling at the time, required the loss of civilian protection. The specific acts approach adopted in the Interpretive Guidance faithfully reflected this intention, as did the complementary membership approach for those who become members of the fighting forces of non-state parties to an armed conflict and, therefore, cease to be civilians.

3. Persistently Recurrent Direct Participation in Hostilities

3.1. Supporting Continuous Loss of Protection

⁷ See background document "Elements of Response", p. 14.

a) Need for Continuous Loss of Protection in Case of Recurrent Hostile Acts

One group of experts found it very unsatisfactory that the Interpretive Guidance did not limit the possibility for civilians to lose and regain protection against direct attack in case of systematic and recurrent direct participation in hostilities, but that the "revolving door" of protection could continue to operate indefinitely. Therefore, these experts argued that, next to the specific acts approach for civilians sporadically engaging in direct participation in hostilities and the membership approach for those assuming a continuous combat function for a party to the conflict, a third approach of "continuous direct participation in hostilities" should be adopted to provide continuous loss of protection for those individuals who, while not integrated into the fighting forces of a party to the conflict, nevertheless directly participated in hostilities on a persistently recurrent basis, whether voluntarily or under pressure from organized armed actors.

According to these experts, in operational reality, soldiers simply were not willing to accept that civilians could repeatedly "opt in" and "opt out" of the conduct of hostilities. Admittedly, civilians sometimes got caught up in the fighting unexpectedly or because they wanted to protect their homes. Therefore, soldiers would probably accept that a civilian could regain protection after an isolated hostile act. After a civilian's second engagement in direct participation in hostilities, the armed forces might perhaps still give him or her the benefit of the doubt. But at the latest after the third instance of direct participation in hostilities, civilians would almost certainly be regarded as having "signed on" to the fighting for good. Particularly in the absence of uniforms, distinctive signs or "membership cards", persistently recurrent direct participation in hostilities was likely to be regarded as strong evidence that the person in question was a member of an organized armed group, even if that perception ultimately proved to be erroneous. Therefore, even where individuals who sequentially engaged in direct participation in hostilities were not members of an organized armed group, their conduct should not be regarded as a chain of separate individual acts, but as a continuous mode of direct participation in hostilities.

b) Subjective and Objective Criteria for Continuous Loss of Protection

Some experts recognized that it was difficult to determine how long an interval between two hostile acts must last in order to cause an interruption in the continuity of the participation and a return to the specific acts approach. Therefore, instead of a temporal criterion, continuous loss of protection should depend on the continued existence of an intent on the part of the individual to directly participate in the hostilities. One of these experts held that such continued intent to directly participate in the hostilities entailed not only a temporal suspension of civilian protection, but even a transition from civilian to (unprivileged) combatant status. According to these experts, the mindset required for this transition could not only be expressed by joining an organized armed force or group, but also by individually taking a direct part in hostilities on a recurrent basis. The phrase "for such time as" would then refer to the duration of the mindset of an individual and not to the duration of each specific hostile act. Of course, soldiers could not be required to examine the mindset of every individual but had to be provided with contextualized rules of engagement outlining what exactly amounted to sufficient evidence that a civilian had continuously lost protection. Ultimately, however, this was an issue of evidence which had to be determined by commanders based on the circumstances prevailing on the ground and not by a group of experts dealing with abstract normative constructs. It was also pointed out that, according to the Commentary, the decisive question for loss of civilian protection seemed to be whether the civilian in question continued to pose a danger to the adversary.⁸ As always in a situation of armed conflict, commanders must be given generous margins of appreciation to determine whether a civilian was engaged in direct participation in hostilities and, if so, whether he still endangered the military forces and could be targeted because it could reasonably be assumed that he would again engage in direct participation in hostilities.

Other experts rejected the idea that continuous loss of protection could be tied to subjective intent and required an objective criterion. As one of these expert elaborated, the wording "for such time" in Articles 51 [3] AP I and 13 [3] AP II proved that the framers of the Additional Protocols accepted the mechanism of a "revolving door" of protection

⁸ Commentary to Article 13 AP II, § 4789: "If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked".

for certain situations. Furthermore, the word "unless" meant that it was the attacker who had the burden to prove that a targeted civilian was currently taking a direct part in hostilities. While the ongoing engagement of a civilian in a specific hostile act was clearly sufficient evidence to entail loss of protection for the duration of that act, it was questionable what factors would be required to justify continuous loss of protection. In the opinion of this expert, while subjective intent clearly was not a sufficiently reliable and objective criterion, the persistently recurrent engagement of a civilian in direct participation in hostilities would provide an objective evidentiary basis for the expansion of the "for such time"-element beyond the duration of specific hostile acts and until the civilian in question clearly and unconditionally disengaged from direct participation in hostilities. Another expert recalled that, according to Section VIII of the Interpretive Guidance, "[a]ll feasible precautionary measures must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person in question must be presumed to be entitled to civilian protection against direct attack". Thus, the attacker simply had to use all sources of information reasonably available to him in the concrete circumstances and was obliged to abstain from carrying out an attack if the information he was able to obtain was not sufficiently reliable.

c) Concrete Examples of "Continuous" Direct Participation in Hostilities

Several experts illustrated the *modus operandi* of the "continuous direct participation in hostilities"-approach proposed by them based on concrete examples: Thus, a civilian who fired at a military convoy from a hiding position and who then returned home just to conceal his weapon and wait for the next occasion to ambush a convoy should be regarded as continuously engaged in direct participation in hostilities throughout the entire period, even if the intervals between individual hostile acts lasted several weeks. While such civilians did not necessarily have to be killed rather than captured, they remained subject to attack from the time when they deployed for the commencement of the first attack to the time when they manifested an intention to no longer directly participate in hostilities. Similarly, farmers who were living peacefully in their village for months could suddenly be forced by a party to the conflict to lay mines or otherwise to engage in direct participation in hostilities for six consecutive nights, just to return to their

peaceful civilian lives thereafter. Although these civilians did not become members of an organized armed group, the recurrent mode of their direct participation in hostilities required loss of protection for the entire six nights in which they assumed a fighting role for a party to the conflict. Although, in reality, it was often possible to determine that certain individuals were regularly involved in activities amounting to direct participation in hostilities, such as the placing of IED's, it could be very difficult to target them at the very moment of that act. Therefore, continuous loss of protection in case of recurrent direct participation in hostilities was essential also from an operational perspective.

It was nevertheless cautioned that an exception from continuous loss of protection should be made where recurrent direct participation in hostilities remained without a lasting allegiance to a particular party to the conflict, such as in the case of villagers inclined to take up arms in support of various parties to the conflict depending on whose forces happened to pass through. In such cases, the specific acts approach was the only appropriate solution. In reality, however, villagers usually took up arms in support of the same party to the conflict every time its forces passed through, thus making it very difficult to distinguish between members of the fighting forces and civilians supporting them by temporarily engaging in direct participation in hostilities. According to the draft Interpretive Guidance, continuous loss of protection required not only recurrent direct participation in hostilities and a lasting alliance to a party to the conflict, but also the continuous assumption of a combat function under a command responsible to that party to the conflict. This was unrealistic and unworkable approach. At the very least, the Interpretive Guidance should recognize that recurrent direct participation in hostilities, in conjunction with a lasting alliance to a particular party to the conflict, was indicative of membership in the fighting forces.

3.2. Rejecting Continuous Loss of Protection

Another group of experts insisted that there could be no third approach of "continuous" direct participation in hostilities next to the specific acts approach for unorganized armed actors and the membership approach for those assuming a continuous combat function for a party to the conflict.

a) Contradiction to the *Lex Lata*

According to these experts, already in the *travaux préparatoires* to the Additional Protocols, there was no hint whatsoever that recurrent direct participation in hostilities should lead to continuous loss of protection. As far as the interpretation of the resulting treaty provisions under the Vienna Convention on the Laws of Treaties was concerned, the starting point was to examine the degree of clarity of the text itself. The phrase "for such time" in Articles 51 (3) AP I and 13 (3) AP II was absolutely clear and meant that civilians lost protection while they were actually engaged in an activity amounting to direct participation in hostilities, as well as on their way to, and on their way back from, such military engagements, regardless of how many times the process was repeated. The point of the current treaty text was precisely to avoid the idea of "once a direct participant, always a direct participant". Had something else been intended, the provisions in question would have had to be drafted in a different way. Therefore, any approach aiming to justify continuous loss of protection for persons other than members of the fighting forces of the parties to the conflict clearly went beyond interpreting and clarifying the *lex lata* and amounted to a revision of positive IHL.

b) Evidentiary Problems

Several experts also emphasized that the proposed "continuous direct participation in hostilities"-approach raised insurmountable evidentiary problems. While attacks against military training camps or members of organized armed groups identifying themselves through uniforms or distinctive signs might be permissible even outside situations of actual combat, there could be no continuous loss of protection for civilians not currently engaged in any hostile act. For soldiers operating in the difficult circumstances of an armed conflict involving non-state actors it was simply impossible to know whether and, if so, how many times a particular civilian had directly participated in hostilities and whether he or she had a continuing intention to do so in the future. Attacks against presumed recurrent participants would have to be based entirely on speculative intelligence information, which was notoriously unreliable. Even if it were possible to

determine with a sufficient degree of reliability that a particular civilian had recurrently engaged in direct participation in hostilities, however, this determination did not provide a sufficiently reliable basis for the assumption that the person in question would necessarily do so again. Under IHL, continuous loss of protection regardless of actual direct participation in hostilities was only permitted for members of the organized fighting forces of a party to the conflict. Where such membership was doubtful, the person necessarily had to be presumed to be a civilian and, therefore, to lose and regain protection against direct attack according to the specific acts approach.

c) Undermining of Compromise Reached by the Expert Group

Furthermore, several experts stressed that the resurgence of the previously discarded "affirmative disengagement"-approach⁹ under the guise of the "continuous direct participation in hostilities"-approach undermined the carefully balanced interpretation of the existing law which had emerged from five years of expert discussion. In the course of the expert process, this expert group had recognized that it was not realistic to apply a "specific acts approach" to members of organized armed forces or groups belonging to a party to the conflict. Therefore, the functional "membership"-approach excluded this category of persons from the notion of "civilian" and, thereby, from the treaty rule requiring loss and regaining of protection in parallel with individual engagement in hostile acts amounting to direct participation in hostilities. To additionally introduce a concept of "continuous direct participation in hostilities" was unacceptable because it would entail continuous loss of protection even for persons who were not members of the organized fighting forces and who, therefore, should be regarded as civilians benefiting from the "specific acts"-approach foreseen in the treaty text. This was particularly dangerous in conjunction with the rejection by some experts of the idea that persons not entitled to protection against direct attack should be captured rather than killed, where this was possible without undue risk to the operating forces or the civilian population. If all of these approaches were combined, the result would be that, for example, persons supportive of an organized resistance movements in an occupied territory, who might not

⁹ For a discussion of the "affirmative disengagement"-approach, see Report direct participation in hostilities 2005, pp. 62 f.

have been engaged in direct participation in hostilities for several days or weeks, could simply be killed on sight without the faintest attempt at arresting them instead. Such an approach clearly could not serve as a basis for an agreed compromise emerging from this expert group. Instead, according to these experts, it simply had to be recognized that a civilian remained a civilian unless he or she became a member of the organized fighting forces of a party to the conflict through the continuous assumption of combat function, regardless of whether he or she had voluntarily joined or been forcibly drafted into service, and regardless of how long the ensuing membership lasted.

d) Risks Associated with the "Continuous Direct Participation in Hostilities"-Approach

Several experts expressed grave concerns over the significant practical risks associated with the "continuous direct participation in hostilities"-approach. While it could not be denied that the "revolving door"-mechanism invited a certain degree of abuse of civilian protection, and while it was not very satisfactory to tolerate recurrent direct participation in hostilities by civilians without continuous loss of protection, the specific acts approach had been adopted in the Additional Protocols because there simply was no alternative solution which could avoid such abuse without exposing the civilian population to unacceptable risks of erroneous and arbitrary targeting. In fact, even if the "continuous direct participation in hostilities"-approach might have theoretical merits, the practical danger of abuse associated with it was much more serious than that associated with the "revolving door" of protection, particularly if the decisive criterion for continuous loss of protection was a perceived "continuous intent" to directly participate in hostilities. Thus, it was absolutely conceivable that a civilian suspected of having participated in a hostile act several weeks earlier would simply be presumed to have an intention to do so again at some indeterminate point in the future and, based on the "continuous direct participation in hostilities"-approach, could now be regarded as a "recurrent participant" subject to direct attack on a continuous basis. As this example illustrated, the "continuous direct participation in hostilities"-approach effectively disposed of whatever safeguard IHL was supposed to provide against the arbitrary or erroneous targeting of civilians. But even in the unlikely event that "recurrent direct participants" could be reliably identified, such recurrent direct participation in hostilities did not necessarily

indicate a continuous allegiance to a particular party to the conflict. In the Central American civil wars in the 1980's, for example, it had been a common phenomenon that parts of the civilian population of small villages were forcibly drafted into service for a limited period of time by whatever fighting forces passed through. It was therefore not unusual for civilians to temporarily engage in direct participation in hostilities for various parties to an armed conflict within a relatively short period of time. As this example illustrated, it was extremely important to adhere to the "specific acts"-approach with regard to all persons who were not members of the organized fighting forces of the parties to the conflict. Finally, it had to be borne in mind that the usually inextricable intermingling of "recurrent direct participants" with the peaceful civilian population in the intervals between hostile acts entailed that the use of military means instead of law enforcement measures against them would inevitably endanger the entire civilian population and result in excessive "collateral damage".

3.3. Independent Organized Armed Groups

Some experts argued that the approach of the Interpretive Guidance was unsatisfactory because it entailed that any person who did not qualify as a member of the organized fighting forces of a party to an armed conflict must necessarily be regarded as a civilian subject to the "specific acts"-approach. Thereby, the Interpretive Guidance excluded the possibility of continuous loss of protection not only for civilians who directly participated in hostilities on a persistently recurrent basis, but even for organized armed groups which did not belong to a party to the conflict. Therefore, one expert proposed to reformulate the textbox of Section VII of the Interpretive Guidance as follows:

- a) Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities.
- b) However, a persistently recurrent mode of conduct amounting to direct participation in hostilities entails continuous loss of protection.
- c) Members of organized armed forces or groups belonging to a party to the conflict lose civilian protection for the duration of their membership.

Other experts responded that there was a more convincing solution for the issue of "independent" armed groups than the "continuous direct participation in hostilities"-approach. Clearly, in order to be able to speak of "direct participation in" hostilities, the existence of "hostilities" between the organized armed forces or groups of at least two "parties" to an armed conflict was a *conditio sine qua non*. Therefore, organized armed groups not belonging to an existing party to an armed conflict would either have to be regarded as civilian gangs of criminals or, if the intensity or duration of the fighting was sufficient, as independent non-state parties to a separate non-international armed conflict. As the functional membership approach applied to the fighting forces of all parties to any armed conflict, the fighting personnel of such "independent" non-state parties would be subject to loss of protection for the entire duration of their membership.

In this respect, the Organizers recalled that the phrase "direct participation in hostilities" was based on the concept of "hostilities", which did not include all organized forms of violence, but referred exclusively to the use of means and methods of warfare between parties to an armed conflict. Therefore, violence that amounted neither to the "conduct of" hostilities by one party to an armed conflict against another, nor to "direct participation in" hostilities occurring between such parties, could not be regarded as "hostilities" within the meaning of IHL. As soon as the concept of hostilities was detached from the armed struggle between the actual parties to an armed conflict and was extended, for example, to any armed violence involving at least one party to the conflict, it was no longer possible to distinguish the conduct of hostilities from other forms of violence, such as death, injury and destruction caused by looters, rioters, the mafia and common criminals.

IV. Functional Membership Approach

Introductory Remarks

The functional membership approach has been discussed extensively in previous Expert Meetings, and a certain consensus had emerged among many of the participating experts with respect to this issue. Apart from the complete opposition voiced by a few experts to any form of membership approach, the written comments received from the experts revealed essentially three concerns, which remained to be addressed in this respect:

First, some experts argued that "individual" combat function was not a practicable basis for determining membership in an organized armed group but that other criteria should be used. Therefore, the organizers invited the experts to propose alternative, more practicable criteria for the determination of membership. However, the organizers recalled that it was important to avoid the significant risks inherent in a general membership approach, which had been rejected by the large majority of experts in the course of the process.

Second, some experts had expressed concern over the use of the adjective "continuous" in the phrase "continuous combat function". They feared that, if a person could qualify as a member of an organized armed group only if, and for as long as, he or she assumed combat function on a "continuous" basis, then any interruption of combat activity could arguably be interpreted to terminate membership in an armed group. Therefore, the organizers put the question to the experts whether this terminological concern could be adequately addressed by clarifying in the text of the Interpretive Guidance that the term "continuous" should not be understood as "without any interruption or interval whatsoever", but as "over an extended period of time".

Third, some experts had questioned the usefulness of the phrase "irregularly constituted" armed groups. The organizers recalled that, in the Interpretive Guidance,

the distinction between “regularly” and “irregularly” constituted armed forces or groups was made because of the different concepts of membership on which they were based. Membership in “regularly constituted” forces was generally based on formal incorporation, regulated in domestic law and evidenced by uniforms, insignia and equipment. These factors could 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 maintained 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 was not regulated in domestic law, was rarely based on an official act of integration other than taking up a certain function within the group, and was 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). The organizers invited the experts to express their opinion with regard to the chosen terminology.

Expert Discussion

1. **Appropriateness of the Membership Criterion**

1.1. **Danger Inherent in the Membership Criterion**

Several experts expressed great concern over the risks inherent in using the membership criterion as a basis of targeting decisions:

One of these experts was of the view that the entire membership approach had been invented *de lege ferenda* and could be based neither on treaty law, nor on the *travaux préparatoires* of the Diplomatic Conference of 1974-77. The Additional Protocols aimed to take into account guerrilla warfare by providing that military means and methods could

only be used against armed actors who distinguished themselves as a military unit during deployment, attack and withdrawal, but not when they intermingled with the civilian population. In order to avoid the use of military methods in civilian environments, the Protocol provided that the presence of combatants within the civilian population did not change the nature of the civilian population. The membership approach destroyed this delicate balance and, therefore, should be discarded altogether. But if a "membership"-approach was to be adopted, then membership had to be determined based on objective factors. Thus, if the person clearly identified himself as a member of the fighting forces by wearing a uniform, carrying weapons and living in military barracks it might be acceptable to attack him at any time. However, where the person in question was in a civilian environment, was not distinguishable from the civilian population and was not engaged in direct participation in hostilities, any kind of presumption of loss of protection based on subjective criteria would be unacceptable.

Another expert particularly objected to the use of the term "membership" as shorthand for "continuous combat function". In numerous conflicts around the world, civilians were regarded as "members" of an armed group and killed just because they were of the same religion or ethnicity as an armed group or belonged to a political party connected to that group. If the term "membership" was used in the Interpretive Guidance, there was a real danger that it would later be instrumentalized and abused to justify all kinds of atrocities, regardless of the clarifications made in the accompanying commentary of the Interpretive Guidance.

According to yet another expert, the fundamental problem was that the Interpretive Guidance adopted concepts and guidelines which introduced the logic of the conduct of hostilities into areas that were essentially regulated by human rights law. Thereby, the Interpretive Guidance seriously undermined the integrity of human rights law. Particularly in non-international armed conflicts, and especially in cases exemplified by the combatant rebel who left the mountains to visit his family in government-controlled territory, the membership approach could be misused to legitimize extra-judicial executions.

Several other experts insisted that, at this point in the expert process, the argument should no longer be about whether or not there should be an absolute membership

approach or no membership approach at all, options which had long been abandoned by the expert group. Instead, the discussion should focus on defining the proposed standard of combat function. It was also recalled that, whatever difficulties may be caused by the term "membership", it could not be denied that treaty IHL used it as a legal standard when they referred to "members" of the armed forces of a party to the conflict. One of these experts acknowledged, however, that it could be useful to clarify in the black letter text itself that "membership" meant "continuous combat function". Another expert also pointed out that the membership approach was not necessarily detrimental to the protection of civilians. The idea was to come up with a solution that reflected the realities of armed conflict. Soldiers of an organized armed force could not be regarded as civilians simply because they happened to belong to a non-state party to the conflict. A carefully limited membership approach which reflected this reality actually better protected peaceful civilians by distinguishing them from persons who failed to qualify as civilians.

1.2. Distinction of Organized Armed Groups by Level of Organization

One group of experts was of the view that a membership approach based on individual combat function created a misbalance between state and non-state armed forces and, therefore, was too narrow to be generally applied. According to this approach, members of state armed forces lost protection against direct attack irrespective of their individual function or activities, whereas organized armed non-state actors could only be targeted if they personally assumed combat function, even though, for the purposes of the conduct of hostilities, they fulfilled exactly the same role as a state army. It was therefore suggested that, where a group was strong and sophisticated enough to have a military wing, it should be sufficient to examine the function of the military wing as a whole and to treat each member of that wing as a legitimate target, regardless of individual function. Of course, all feasible precautions had to be taken in determining membership and, in case of doubt, the presumption of protection still applied, but these were questions of evidence. On the other hand, in the case of less sophisticated, more loosely organized armed groups without a distinct military element the examination of an individual's function within that group was the only way of avoiding erroneous targeting of persons who are not really fighters.

Another group of experts was of the opinion that the membership approach as defined in the Interpretive Guidance was appropriate only for symmetric armed conflicts between structured and organized armed forces and, therefore, was too wide to be generally applied. Admittedly, where the intention to directly participate in hostilities was declared with a level of clarity equivalent to wearing a uniform or distinctive sign, a limited membership approach based on the criterion of "continuous combat function" would be acceptable, always provided that the determination was made based on objective and unambiguous criteria which could be applied without the assistance of a judge or other legal expert. In reality, in many contemporary situations of non-international armed conflict and belligerent occupation, organized armed groups or resistance movements engaged in asymmetric guerrilla warfare against the armed forces of a state or an occupying power. In such situations, the appearance and level of organization of the groups in question simply did not allow for a reliable determination of membership, thus leaving no alternative to the specific acts approach. Even where individuals had recurrently engaged in hostile acts without continuous integration into an armed organization, any prediction as to whether they would do so again in the future would necessarily have to depend on unspecified subjective criteria or other unreliable sources.

2. Determination of Membership in the "Fighting Forces"

2.1. Distinction between Organized Armed Groups and Criminal Gangs

Some experts pointed out that a distinction must be made between armed groups belonging to a party to an armed conflict and criminal gangs. For instance, the mere fact that states resorted to military means against mafia groups or terrorist organizations did not make these organizations parties to an armed conflict. It was emphasized that the use of deadly force against criminal gangs, which are not party to an armed conflict, remains subject to the standards of law enforcement.

2.2. Distinction between Parties to the Conflict and their Fighting Forces

Several experts also recalled that non-state parties to an armed conflict, similar to states, may consist not only of a military organization, but may also have a political or humanitarian wing, which constitutes part of the political enemy, but does not get directly involved in the conduct of hostilities. There was general agreement among the experts that, for targeting purposes, it is not the link to, or support for, a state or non-state party to the conflict which is decisive, but membership in the fighting forces of such a party. In this respect, the 2006 Draft Interpretive Guidance had proposed a distinction between "combatant" and "non-combatant" membership, which acknowledged that there could be persons who were members of an organized armed group without ever directly participating in hostilities such as, most notably, the full-time cook. According to most experts, such "non-combatant" membership was not sufficient to make the person lose civilian status or protection, which would necessarily require the actual assumption of a continuous fighting function ("combatant" membership). However, since this distinction had been discarded during the 2006 Expert Meeting, it was no longer possible to distinguish different types of membership. As a consequence, for the purposes of the conduct of hostilities, membership in an organized armed group had to be regarded as synonymous to membership in the fighting forces of a party to the conflict (i.e. the earlier concept of "combatant membership"), while persons assuming exclusively non-combatant function for the group had to be regarded as civilians accompanying the armed group without being members thereof. In other words, for the purposes of the principle of distinction, "membership in" or "affiliation with" an insurgency or opposition group *as a whole*, which constituted a non-state "party" to the conflict, did not necessarily imply loss of civilian status or protection and, therefore, had to be properly distinguished from membership in an organized armed group, which constituted the actual fighting forces or armed wing of such a party. Only the latter form of membership implied the assumption of a continuous combat function and, therefore, led to loss of protection for the duration of such membership.

2.3. Distinction between Fighting Forces and Accompanying Civilians

Several experts also emphasized the importance of distinguishing between the fighting forces and civilians which accompanied them in various non-combat functions. When armed groups passing through a village requisitioned young children to carry their weapons for few days or weeks, it could not be denied that these children supported the conduct of hostilities. However, as long as their activities did not amount to direct participation in hostilities, they remained entitled to protection against direct attack. Similarly, according to IHL governing international armed conflict, private contractors accompanying the armed forces remained civilians protected against direct attack unless and for such time as they directly participated in hostilities. Such persons ceased to be civilians only once they formally became members of the armed forces they accompanied, or for as long as they assumed a continuous combat function for them. As a matter of logic, the same must apply for persons accompanying non-state armed groups in non-international armed conflict. Indeed, it would be contradictory to automatically regard all persons accompanying armed groups in a non-international armed conflict as legitimate military targets, whereas contractors doing the same for armed forces in international armed conflict should remain protected against direct attack. In response, another expert suggested that the provision of any military or security related services to a party to the conflict should be regarded as equivalent to membership in its military wing or armed forces. Sometimes, services such as training and recruiting were more important for the whole military campaign than the actual conduct of concrete operations. Where such traditionally military functions were assumed by private contractors they could also be regarded as members of the military forces.

2.4. Combat Function vs Combatant / Non-Combatant Membership

Several experts pointed out that the term "membership" had a common meaning which was very different from the meaning given to the term in the Interpretive Guidance. Therefore, it was extremely dangerous to use the term "membership" in an armed group as equivalent to being a functional combatant. According to these experts, the distinction between "combatant" and "non-combatant" membership, which had been proposed in

the original draft Interpretive Guidance, should be introduced again instead of limiting the notion of membership to persons assuming a "continuous combat function". Without the distinction between "combatant" and "non-combatant" membership, the membership approach proposed in the Interpretive Guidance was likely to be misinterpreted as permitting the abusive targeting of any "member" – understood in the common sense of the term - of an organized armed group.

In this respect, the Organizers acknowledged that they had originally favoured the distinction between "combatant" and "non-combatant" membership but recalled that the use of the adjective "combatant" for non-state actors had been criticized by some experts because of the potential implications it may have with regard to status after capture. Therefore, an alternative proposal was made in the revised Interpretive Guidance, which restricted the very concept of "membership" to persons assuming a "continuous combat function" and, thereby, made essentially the same distinction without inviting misunderstandings regarding status after capture. The problem with defining "membership" as equivalent to assuming "continuous combat function" was that it did not correspond to the common meaning of "membership" and excluded "non-combatant" members, such as cooks, medical, religious and administrative personnel. The original approach, which had perhaps been discarded too quickly, was to adhere to a wider, more common notion of "membership" and then to distinguish between combatant and non-combatant members, again assuming that combatant members were those who assumed a continuous combat function.

One expert recalled that the "membership"-approach aimed to define a category of persons who directed, organized, coordinated or carried out activities amounting to direct participation in hostilities, whether full-time or part-time in parallel to perfectly ordinary jobs. Before such persons could be attacked, solid intelligence was required on their activities, identity and location. How this type of activity was labelled was less important as long as it was defined properly.

2.5. Material Scope of the Concept of Combat Function

General Observations: In very general terms, it was regarded as irrelevant for the existence of “membership” whether an individual member had joined state or non-state armed forces voluntarily or under pressure of a party to the conflict. It also remained undisputed that a fighter could not claim to be a civilian simply because, in addition to his combat function, he also assumed non-combat functions for a party to the conflict.

Combat Function and Direct Causation of Harm: Some experts held that, even if “combat function” could actually be identified, it was defined too narrowly in the Interpretive Guidance for it to serve as the only criterion for the determination of membership in an organized armed group. For instance, it was criticized that the notion of “combat function” as defined in the Interpretive Guidance was based on a concept of direct participation in hostilities which excluded capacity building, general preparations, and recruiting and training of armed personnel. This did not adequately address the fact that the fighting forces of most parties to an armed conflict comprised not only fighting personnel, but also persons who assumed exclusively non-fighting functions such as intelligence, logistics, internal security and command. Therefore, one expert suggested that the element of “direct” causation of harm should remain a prerequisite for loss of protection only for civilians, whereas the assumption of functions involving merely “indirect” participation in hostilities, such as military capacity building, training and recruiting, should be sufficient to give rise to membership in an organized armed group. In terms of structure, the Interpretive Guidance should reflect this logic by first defining the concept of “participation in hostilities” and only thereafter determining the “directness” of such participation. However, other experts rejected any exception from the “direct causation”-element, which constituted a prerequisite for direct participation in hostilities. As combat function referred to functions which involved direct participation in hostilities, it arguably covered command and control, direct logistical support and certain intelligence activities, but clearly did not include any kind of mere capacity building, whether through propaganda, recruiting or otherwise. According to the criteria proposed in the Interpretive Guidance, new recruits into the fighting forces lost protection already while they received general military training enabling them to directly participate in hostilities at a later stage. Conversely, persons engaged exclusively in the recruiting and training of military personnel did not lose protection, because the causation of harm to

the adversary remained indirect. To decide otherwise would lead to the absurd result that even a civilian professor engaged in recruiting instructors for the military academy of a state was assuming a combat function.

Law Enforcement and Combat Function: One expert observed that the Interpretive Guidance treated members of the police forces exactly like any other civilian. According to this expert, if a functional membership approach was to be adopted in the Interpretive Guidance, logic would require that police forces, whose functions included the arrest of criminals, including rebels, were not regarded as civilians. Therefore, contrary to the general presumption of civilian protection, police forces operating in a non-international armed conflict should normally be presumed to have a function which involved direct participation in hostilities, except where the state expressly declared that the function of certain police forces or units did not include the arrest of rebels.

2.6. Combat Function as Exclusive or Alternative Criterion for Membership

Several experts also argued that individual combat function alone could not serve as the only criterion to determine membership in an organized armed group and held that a broader range of criteria had to be taken into account. For instance, in practice, persons wearing enemy uniforms would generally be presumed to be legitimate targets without further enquiry. In the absence of uniforms it would have to be determined whether the persons in question carried weapons or a distinctive sign, whether they had a military command or an internal disciplinary system and, of course, what function they actually performed within the organized armed group.

2.7. Integration versus Combat Function

One expert held that, although it was difficult to draw the line as to who exactly should be regarded as part of the fighting forces of a non-state armed group, there was often some degree of commonality with the military structures of state armed forces. Clearly, the most difficult cases were persons who assumed functions for non-state groups

similar to the functions usually assumed by civilian contractors for states. Especially where non-state groups were not organized along traditional military lines, it could be extremely difficult to distinguish such persons from members of the group, which called for a particularly rigorous implementation of all feasible precautionary measures. Therefore, objective criteria were needed for the determination of whether someone could be regarded as "within" or "a member of" the fighting forces. Perhaps "being integrated" in an organized armed group would be a better criterion for membership than "assuming a combat function" for that group. Another expert questioned the added value of the alternative phrase of "being integrated". After all, when determining whether a person was actually "integrated" into the fighting forces of a non-state party to the conflict, it would again be necessary to determine the function assumed by that person for the group.

2.8. Combat Function as a Collective or Individual Trait

Preference for Collective Approach: One group of experts favoured an understanding of "combat function" as a collective trait attributed to an organized armed group as such rather than an individual characteristic attributed to each member. Thus, one expert recalled that, in any armed conflict, only a minority of the armed forces were actually engaged in active combat, while the majority assumed purely supportive roles. Therefore, "combat function" was useful only as a criterion which characterized a group, but not an individual. In the view of this expert, any person who belonged to an organized armed group should be treated as a member, regardless of whether his personal function was that of a sniper, cook, planner, recruiter or driver of an ammunition truck. Slightly more nuanced, several experts stressed that it was not always practicable to distinguish between civilians and military forces based on individual combat function. Arguably, such individual determination was necessary where a group had distinct military and civilian branches or wings. But once there were sufficient indicators, such as the carrying of uniform, that an individual belonged to the armed forces of the enemy, it did not have to be examined whether the individual function of that person included direct participation in hostilities or exclusively office work, cooking or other non-combat activities. For example, in operational practice, it was often known that a particular terrorist group, as a whole, assumed combat function. But the names and functions of

the targeted individuals could rarely be determined until their bodies were collected. Such operations were conducted in factual circumstances very different from those prevailing in an occupied territory or in street-to-street fighting, where the membership and functional roles of individuals in an armed organization could actually be identified. This reality must be taken into account if the Interpretive Guidance should remain relevant also to twenty-first century warfare against transnational terrorist organizations. In conclusion, some of these experts suggested that a workable alternative to individual “combat function” would be to allow the presumption that anyone belonging to the armed forces of an organized opposition group also assumes combat function.

Preference for Individualized Approach: Another group of experts criticized the idea that “combat function” should be an exclusively collective trait of an armed group as a whole. According to one expert, individual combat function remained the right criterion because it ensured that, even once an organized armed group had been identified, it was still necessary to decide whether the individuals to be attacked were civilians or fighting members of the group. Several experts recalled that one of the great achievements of the past four Expert Meetings had been the clear distinction between organized and unorganized armed actors. Thus, civilians who do not, or only from time to time, take a direct part in hostilities, lose their protection against direct attack only for such time as their participation lasts. Organized armed actors, on the other hand, were said to lose protection for the entire duration of their membership. A compromise had also emerged in past Expert Meetings that, in the absence of a formal notion of membership based on legislation and incorporation comparable to state armed forces, membership in non-state armed groups had to be determined based on the criterion of individual combat function. At the same time, these experts recognized that, in operational reality, the determination of individual combat function could not realistically require the identification of each person's social security number, name, job description and state of mind. Where it was evident from factors such as the nature, activities and uniforms of a group that every member assumed a function which could be expected to involve combat activities, it was unnecessary to examine whether, how often and how regularly each member actually directly participated in hostilities. Even in such a case, however, it would at some point have to be determined which individuals actually were members of the group. It should therefore be recognized that the “individual function” approach was not necessarily more “individualized” than the “group function” approach.

Conclusion: The conceptual difference was that the attribution of combat function to a group identified the “armed forces” of a party to the conflict, whereas the attribution of combat function to a person identified the individual “members” of these armed forces. As the textbox of Section II of the Interpretive Guidance was perceived as unclear and potentially confusing, the Organizers were encouraged to clarify the text accordingly. Ultimately, what was decisive for the present purposes was the identification of objective criteria by which the actual fighting forces of a party to the conflict could be reliably distinguished from those accompanying such forces without having a fighting function. From a military perspective, there simply was no legitimate reason to target such persons.

3. "Continuous" Combat Function

Several experts made comments or proposed clarifications regarding the term “continuous” which, in the Interpretive Guidance, was used in conjunction with the criterion of combat function. One expert held that the notion of "continuous" combat function should not be understood to indicate that each member necessarily carried weapons on a continuous basis but, rather, that each member had a continuous contingent liability to directly participate in hostilities whenever needed or called upon. While the organized armed group had a continuous function to use military force, individual membership in that group entailed the continuous contingent requirement to directly participate in hostilities from time to time. When determining membership in operational practice, it had to be taken into account that the notion of "organized armed group" was a theoretical construct which could take a variety of different forms on the ground.

Another expert feared that qualifying the functional membership approach with adjectives such as "continuous" (function) and "regular" (direct participation in hostilities) would mean that a cook, who had received training and weapons but who only periodically directly participated in hostilities, could not be regarded as assuming a combat function. Therefore, this expert proposed to define the notion of combat function

more widely, namely as including not only the combatants themselves but also those supporting combatant operations. Yet another expert proposed that it would perhaps be useful to use the phrase "recurrent direct participation in hostilities" instead of "continuous combat function".

The Organizers agreed that the word "continuous" should not be understood to indicate that the activities inherent in continuous combat function had to be carried out "non-stop", "all the time", or "without any interruption or interval whatsoever". In the Interpretive Guidance, the term was used to avoid continuous loss of protection for persons who directly participated in hostilities on a merely sporadic basis and outside the framework of a lasting role within an armed organization. In finalizing the text of the Interpretive Guidance, care would therefore have to be taken to find a wording that best reflected this intention.

4. "Irregularly Constituted" Armed Groups

Several experts made comments or proposed clarifications with regard to the use of the notion of "irregularly constituted" armed groups. Thus, some experts observed that, according to the textbox of Section II of the Interpretive Guidance, members of state armed forces, dissident armed forces or other organized armed groups under a command responsible to a party to the conflict were not civilians, regardless of their direct participation in hostilities. This appeared to include full-time cooks who never took a direct part in hostilities. The combat function test, which excluded the full-time cook, on the other hand, appeared to apply only to members of an "irregularly constituted" armed force. If the term "irregularly constituted armed forces or groups" was intended to be synonymous to "dissident armed forces or others organized armed groups", it was better to use exactly the same wording for both.

Other experts rejected the reference to a concept of "irregularity", which was foreign to IHL. For these experts, it was self-evident that dissident armed forces and other non-state armed groups were of "irregular" nature, particularly given that their conduct of hostilities could not be based on an entitlement from their government. The paragraph

on "irregularly constituted" armed forces tried the impossible task of finding common language for situations that were much too diverse to be brought under one formulation. As it was not up to the ICRC to categorize all the particularities of internal armed conflict, it would be best to simply delete the entire passage.

The Organizers reacted by offering the following clarification: Dissident armed forces, being state armed forces turning against the state, were by their structure still "regularly constituted" forces and could include formal "members" who did not assume combat function, such as cooks, administrative, medical and religious personnel. If the logic of individual "combat function" were applied to them, such non-combatant personnel could no longer be regarded as "members" of the fighting forces, but would now become "civilians". However, the full-time cook of a state armed force, who was a target, could hardly be said to become a civilian just because his forces now turned against the government. So therefore the criterion of combat function should be limited to "irregularly constituted" forces, that is to say, forces which never had a regular structure comparable to state armed forces in the first place.

In response, one expert suggested that the textbox of Section II could perhaps be simplified. Instead of introducing the notion of "irregularly constituted armed forces or groups", it could simply clarify state that "organized armed groups" comprise only those persons who assume a continuous combat function, while membership in "dissident armed forces" and "state armed forces" could be determined on the basis of formal membership. Another expert suggested that, alternatively, the textbox of Section II, which was clearly inspired by the wording of Additional Protocol II, could also be based on the text of Article 3 common to the Geneva Conventions. Thus, instead of distinguishing "state armed forces, dissident armed forces and other organized armed groups," a simple reference could perhaps be made to the "armed forces" of the parties to the conflict, accompanied by the clarification that membership in these armed forces was based on combat function.

5. Concluding Remarks by the Organizers

The Organizers expressed their great appreciation for the useful discussion on the functional membership approach. While the wording of the textbox of Section II of the Interpretive Guidance seemed to have caused a certain amount of confusion, and while continuing divergences of opinion had to be acknowledged, there also seemed to be a consolidated agreement among the experts that not every person somehow associated with an organized armed group could automatically be targeted at all times. Nor would it be realistic to require an elaborate assessment of every individual's mind, function and job description before targeting decision can be taken. In conjunction, these observations reflected the basic consensus which had emerged during the expert process concerning the need for a restricted membership approach. It would therefore be important to adjust the wording of the Interpretive Guidance so as to better reflect these concerns.

V. Substantive Scope: Inter-Civilian Violence

Introductory Remarks

The first issue on the agenda for this Working Session concerned the "threshold of harm" that was required in order for an act to qualify as direct participation in hostilities. According to the Interpretive Guidance, the required threshold of harm would most commonly be reached by adversely affecting the military operations or military capacity of a party to the conflict or, alternatively, by inflicting death, injury or destruction on persons or objects "not under effective control of the acting individual". As part of the "threshold of harm" criterion proposed in the Interpretive Guidance, "effective control" basically meant that a person was "in the hands of a party to the conflict". The criterion aimed to distinguish "hostilities", and direct participation therein, from the use of force in exercise of authority over persons "in the hands of" a party to the conflict. For example, while the killing or mistreating of civilian internees was prohibited under IHL, it did not, without more, amount to direct participation in hostilities. Therefore, if the guards in question were civilians, they might be guilty of war crimes but did not necessarily become legitimate targets. In the expert comments, this view had been challenged particularly for contexts where inter-civilian violence involved large-scale war crimes, genocide or crimes against humanity. According to some experts, where such atrocities constituted part of the war-strategy, they should be regarded as direct participation in hostilities, regardless of whether they caused specifically military harm to the enemy, and regardless of whether the victims were "in the hands of" the perpetrators.

The Organizers also asked the experts to express their views with regard to the persisting divergence of opinion as to the qualification of voluntary "human shielding" and of hostage taking as direct participation in hostilities, particularly where such activities did not directly cause harm of a specifically military nature. In this context, the Organizers recalled that hostage-takings were those situations where lethal force was most liberally used even in peace-time policing, but that this did not mean that hostage taking necessarily had to qualify as "direct participation in hostilities".

Expert Discussion

1. The Constitutive Element of "Threshold of Harm"

1.1. Function of the Criteria of "Effective Control" / "in the Hands of..."

While it was generally agreed that direct participation in hostilities had to be distinguished from civilian policing and ordinary crime, such as bank robberies, several experts questioned why the use of force against a person under "effective control" or, respectively, "in the hands of" should automatically be excluded from the notion of hostilities. In the view of these experts, the criterion of "belligerent nexus" was sufficient to establish the necessary connection between an act of violence and the conduct of hostilities. If necessary, this could be clarified by replacing the words "not under the effective control of the acting individuals" with the words "in connection with the armed conflict". For example, while there would be no belligerent nexus where civilian prison guards killed prisoners under their supervision for purely private motives, the existence of a belligerent nexus could not be disputed where the same prisoners were killed as part of military operations designed to support one party by harming another. Where the killing of civilians had a belligerent nexus, it was unconvincing to refuse a qualification as direct participation in hostilities simply because the victims had been captured before they were killed. According to one of these experts, this approach was particularly problematic in the hypothetical case where persons assumed the continuous function to kill civilians or hostages captured by an organized armed group. Since the Interpretive Guidance limited the concept of membership in organized armed groups to persons assuming a combat function, and since killing civilians "in the hands of" did not qualify as direct participation in hostilities, such persons could not be regarded as members of the group. This illustrated that defining membership based on the definition of direct participation in hostilities became a vicious circle. Another expert suggested that, instead, the Interpretive Guidance could build on Article 1 [2] AP II and exclude riots, sporadic acts of violence and other acts of similar nature, from the notion of hostilities.

In response, the Organizers explained that the distinction proposed in the Interpretive Guidance reflected the classic division of IHL in the "law of The Hague", which regulated the conduct of hostilities, and the "law of Geneva", which regulated the treatment of persons in the hands of a party to the conflict. Obviously, IHL governing the conduct of hostilities was relatively permissive with regard to the use of armed force. The rules regulating the treatment of persons detained for reasons related to an armed conflict essentially constituted a law enforcement regime regulated by IHL. In principle, the exercise or abuse of such law enforcement authority was not part of the conduct of hostilities. Thus, while a civilian involved in the bombardment of a purely civilian area without any military impact would clearly be regarded as directly participating in hostilities and lose protection against direct attack, this probably was not the case where civilian guards abused civilian internees under their supervision. Even the execution of prisoners, whether unlawful or pursuant to a death sentence passed after a fair trial, generally would not lead to loss of protection against direct attack under the rule of IHL on "direct participation in hostilities". The analysis would be different only where the conduct in question directly harmed the military operations or military capacity of a party to the conflict, such as, for example, the continued internment of prisoners of war. In all other cases, however, the use of force against civilians exercising or abusing law enforcement authority would have to be based on a legal basis other than "direct participation in hostilities", such as self-defence or defence of others. The Organizers also recalled that the "belligerent nexus"-criterion alone was not sufficient for the qualification of an act as direct participation in hostilities but that, additionally, the two criteria of "threshold of harm" and "direct causality" must be fulfilled. For example, it was generally recognized that producing ammunition in an arms factory, the belligerent nexus of which could not be disputed, did not amount to direct participation in hostilities because there was no "direct" causation of harm. It was therefore important to recall that not every activity undertaken in support of the hostilities or the war effort necessarily also amounted to "direct" participation in hostilities.

1.2. Relevance in Large-Scale Atrocities

One group of experts held that inter-civilian violence should always be regarded as direct participation in hostilities: (a) where it constituted an integral part of the hostilities

between the involved parties, (b) where the actual aim of the armed conflict was to inflict systematic large-scale harm on another group of civilians or (c) where such violence amounted to crimes against humanity or war crimes. As examples of such situations, these experts mentioned the 1995 Srebrenica massacre and, more generally, the ethnic cleansing in the former Yugoslavia, in Rwanda and in the Sudanese Darfur. In the view of these experts, the qualification of inter-civilian atrocities as direct participation in hostilities should not depend on whether it adversely affected the military operations or capacity of a party to the conflict and should not be excluded simply because the victims were "in the hands of" the perpetrators. Instead, the qualification of such large-scale inter-civilian atrocities as direct participation in hostilities was necessary in order to provide intervening armed forces of the United Nations or third states with a legal basis for the use of such force as was required to prevent the crimes in question. According to one expert, the bombing by NATO of Serb police forces in Kosovo indicated that the latter were either regarded members of the armed forces or as civilians directly participating in hostilities, or that their involvement in the ongoing ethnic cleansing was otherwise considered to provide a legal basis for the resort to armed force. In the view of these experts, the concept of "defence of others" was not a satisfactory legal basis for the use of force against civilian perpetrators of large-scale atrocities, because it was rooted in law enforcement standards, which basically required a "capture rather than kill"-approach. Moreover, under the criminal law justification of "defence of others", direct attacks against the perpetrators would be prohibited as soon as there no longer was an immediate necessity to use armed force, such as, for example, in the withdrawal phase after an attack on a village. These parameters were not practical where the circumstances required the conduct of military operation in order to come to the assistance of a population finding itself under threat of being slaughtered.

Another group of experts was of the opinion that civilians engaged in large-scale atrocities against civilians finding themselves "in their hands" should not, without more, be regarded as taking a direct part in hostilities. More precisely, in order for the exercise or abuse of authority over such persons to qualify as direct participation in hostilities, it would have to directly cause harm of a military nature to a party to the conflict. According to these experts, it was very important to distinguish the conduct of hostilities from the exercise or abuse of physical authority over persons, as well as from war crimes, crimes against humanity and genocide. After all, the conduct of hostilities was not necessarily

criminal, and international crimes did not necessarily have to be committed as part of the conduct of hostilities or within the context of an armed conflict. While direct participation in hostilities entailed loss of protection against direct attack, international crimes entailed punishment following a fair trial. It therefore was important to recognize that civilians did not become legitimate military targets "simply" by committing war crimes, but only where their conduct actually constituted an integral part of armed confrontations between parties to an armed conflict or, in the words of treaty IHL, where it amounted to "direct participation in hostilities". Similarly, a widespread, systematic "attack" against a civilian population as understood in the context of crimes against humanity was not necessarily synonymous with an "attack" defined by IHL for the context of the conduct of hostilities.¹⁰

According to these experts the fact that, in principle, the exercise or abuse of authority over persons was not covered by the concept of direct participation in hostilities did not mean, however, that there was no legal basis for the use of force against the perpetrators of large-scale atrocities against persons finding themselves in their hands. First of all, where such atrocities were carried out by the organized fighting forces of a party to the conflict, including various kinds of armed militias, the perpetrators could be directly attacked regardless of whether the atrocities amounted to direct participation in hostilities. Moreover, as illustrated by the discussion surrounding the bombing of the railway lines leading to the concentration camp of Auschwitz during the Second World War, there may also be legal bases for the use of armed force against persons and objects not qualifying as military objectives, although based on stricter standards than those permitted by the law governing the conduct of hostilities. Most importantly, where the killing of an attacker was absolutely necessary in defence of self or others against a direct threat to life, both human rights law and domestic criminal law provided a justification for the use of lethal force. According to some experts, a separate legal basis for the United Nations and third states to come to the assistance of the victims of large-scale atrocities could also be found in the *jus ad bellum*.

¹⁰ See Article 49 [1] AP I: ' "Attacks" means acts of violence against the adversary, whether in offence or in defence'.

The Organizers thanked the experts for this discussion and stated that they would revisit this part of the Interpretive Guidance with a view to clarify its logic and language in light of the comments which had been made.

1.3. Likelihood of Harm vs Intent to Harm

One expert suggested that it might be preferable, in the "threshold of harm"-element for the qualification of an act as direct participation in hostilities, to replace the objective test of "likely" to cause harm with a subjective test of "intended" to cause harm. In response, the Organizers pointed out that the word "likely" in the Interpretive Guidance did not introduce a probability test that required near certainty, but that the term was simply meant to indicate that soldiers could not be required to postpone their reaction to direct participation in hostilities until the expected harm had actually materialized. Therefore, wherever a civilian had a subjective "intent" to cause harm that was objectively identifiable, there would also be an objective "likelihood" that he or she would cause such harm. The expert who had made the relevant suggestion found this explanation satisfactory but recommended that the Organizers clarify the commentary of the Interpretive Guidance accordingly.

2. The Constitutive Element of "Belligerent Nexus"

With regard to the constitutive element of "belligerent nexus" proposed in the Interpretive Guidance, which required that an act of direct participation in hostilities be "designed to support a party to an armed conflict by harming another", one expert questioned whether the phrase "by harming another" was actually necessary in view of the preceding two elements of "threshold of harm" and "direct causation". According to this expert, compared to the kind of warfare that would have been typical for the 18th, 19th and 20th centuries, contemporary asymmetric warfare was no longer characterized by the constant aim of the involved parties to defeat the opposing armed forces. A second expert proposed that the words "...by harming another" be amended to state "...by harming another *or others*", because the victims could well be unrelated to a party to the

conflict. A third expert recognized that the intent to harm one party to the conflict was essential to the concept of direct participation in hostilities but questioned the other component of "belligerent nexus", namely whether it was necessary to require that an act of direct participation in hostilities be undertaken "in support of a party to the conflict". After all, it was conceivable that a civilian wanted to harm one party to an armed conflict without intending to support another.

In response to these experts, the Organizers explained that the purpose of defining the "belligerent nexus" of an act in terms of its "design to support one party by harming another" was precisely to prevent that harm caused to a party to the conflict for reasons unrelated to the conduct of hostilities would be qualified as direct participation in hostilities and lead to a military response. For example, civilians throwing stones or Molotov-cocktails during riots and demonstrations might cause serious destruction, injury and even death, but would still have to be regarded as forms of civil unrest rather than as part of the conduct of hostilities. Of course, this was a difficult area with plenty of borderline-cases, but the main characteristics and the very essence of "hostilities" was that they were intended not only to cause harm to a government or other collective entity, but to do so as part of an ongoing armed conflict in which one party was supported against the other. Lastly, one expert suggested that the same result could be achieved by expressly excluding riots, sporadic acts of violence and other acts of similar nature from the notion of direct participation in hostilities, which would reflect the generally recognized distinction made in Article 1 [2] AP II.

3. Hostage Taking

3.1. In Favour of a Qualification as Direct Participation in Hostilities

According to one group of experts, in some armed conflicts, hostage-taking constituted one of the most efficient methods of warfare. Therefore, where such conduct had a "belligerent nexus", namely where hostages were taken in order to support one party to the conflict by harming another, hostage-taking should be regarded as direct participation in hostilities. Thus, the determination whether a hostage-taking amounted to

direct participation in hostilities required a nuanced analysis in light of the specific circumstances. For example, the purpose of recent hostage-takings in Iraq or in Afghanistan had been to cause the withdrawal of the international contingents involved in the respective conflicts. They intended to directly influence the conduct of hostilities and, therefore, should be regarded as direct participation in hostilities, even if they were carried out by persons who had to be regarded as civilians because they were not members of the organized fighting forces of a party to the conflict. The qualification of hostage-takings as direct participation in hostilities became more difficult where the primary motivation was to generate income for the funding of the conduct of hostilities and became almost impossible where persons were kidnapped for purely criminal purposes, simply because it was a lucrative thing to do. The qualification of hostage-taking as direct participation in hostilities had nothing to do with its unlawfulness under IHL, but with its link to the hostilities. Thus, even police forces could be regarded as directly participating in hostilities, for example where they operated as part of a coordinated military operation or where they arrested a fighting member of an opposing armed force or group.

As far as the "threshold of harm" was concerned, several experts held that the mental and military harm caused by hostage-taking was not less serious than the harm resulting from killing, injuring or ill-treating civilians. Lastly, concerning the requirement of "direct causation", several experts found it unconvincing and overly technical to say that the harm resulting from hostage-taking was caused only "indirectly" because, before the harm could materialize, the opposing party still needed to decide to comply with the demand of the hostage-takers. According to these experts, it was the very essence of hostage-takings and human shielding to directly influence the decisions of the opposing party to the conflict with regard to the conduct of hostilities, wherefore the causation of harm should be regarded as being of "direct" nature as well. In any case, these experts were of the opinion that law enforcement standards governing the use of force in self-defence and defence of others were insufficient for military operations against hostage-takers, because these standards did not allow the use of lethal force to prevent or interrupt a hostage taking already in the planning, preparatory and deployment phase.

3.2. Rejecting a Qualification as Direct Participation in Hostilities

Another group of experts was of the opinion that hostage-taking should not, in and of itself, amount to direct participation in hostilities. As previous expert discussions had shown, the lawfulness or unlawfulness of civilian conduct under IHL was irrelevant for its qualification as direct participation in hostilities. These experts recalled that, what was regarded as an unlawful hostage-taking by one party to the conflict might well be considered as a legitimate capture by the other. These experts also rejected argument that hostage-taking must qualify as direct participation in hostilities simply because of its increased effectiveness compared to traditional military operations. Otherwise organized resistance movements could justify attacks against citizens and civilian police belonging to an occupying power based on the argument that arrest, interrogations and the digging of wells and the construction of settlements constituted a much more important contribution to a belligerent occupation than actual military operations.

According to these experts, the difficulties arising with regard to the qualification of hostage-taking as direct participation in hostilities was symptomatic of the broader challenge posed by this clarification process. Between the two extremes of an absolutely peaceful civilian and a full-blown combatant there was a wide range of activities which could be carried out in an endless variety of circumstances. As the principle of distinction required a clear distinction between military objectives and persons and objects protected against direct attack, however, a bright line necessarily had to be drawn somewhere in these millions of shades of grey. Consequently, wherever that line was drawn it introduced a degree of artificiality, particularly when comparing activities falling just above and, respectively, just below the established threshold. Clearly, in the case of captured military personnel, there was no question that the threshold of harm was reached, regardless of whether they were treated as hostages. Where civilians took other civilians as hostages for reasons related to the conflict, such as to achieve the withdrawal of the opposing armed forces, there certainly was a "belligerent nexus" and, at least, an attempt to adversely affect the military operations of a party to the conflict, which would fulfil the required "threshold of harm". The problem was that, if the opposing party to the conflict chose to ignore the pressure generated by the hostage-takers, the hostage-taking could not, in and of itself, "directly" cause the desired withdrawal.

4. Voluntary Human Shielding

4.1. In Favour of a Qualification as Direct Participation in Hostilities

In the view of one group of experts, civilians serving as voluntary human shields were clearly directly participating in hostilities. One of these experts even argued that voluntary human shields should not be regarded as civilians at all because they had obviously taken the decision to abandon their civilian role and take on a combatant role. These experts rejected the argument made in the Interpretive Guidance that, from an analytical perspective, the decision not to attack a military objective "shielded" by civilians was generally "self-inflicted" and not "directly" caused by the presence of voluntary human shields. On the contrary, if the human shields were sufficiently numerous, an attack against the shielded objective would have to be expected to cause excessive "collateral damage" and would be prohibited as a matter of law. Therefore, the decision of the adversary not to attack should be regarded as "directly caused" by the presence of the voluntary human shields. Moreover, as far as the "threshold of harm" was concerned, civilians could be much more effective in preventing an air-attack on a particular objective by serving as voluntary human shields than, for example, by use of short-range surface-to-air missiles, particularly where attacking airplanes flew in high altitudes. It would be contradictory to regard the use of a completely ineffective weapon as direct participation in hostilities while granting protection to persons whose methods were very effective in preventing attacks. According to one of these experts, in order to avoid that the presence of voluntary human shields would complicate the situation it was important to be able to attack them already when they approached the military objective to be shielded.

Another expert held that the basic principle of distinction not only obliged armed forces to limit their attacks to military objectives, but also obliged civilians not to get involved in the fighting. If the Interpretive Guidance failed to take a firm position against voluntarily human shielding it would encourage the practice and, thereby, slowly disintegrate the fundamental principle of distinction. In any case, it was important for the Interpretive Guidance to expressly recognize the cases in which voluntary human shielding could amount to direct participation in hostilities.

Several experts who regarded voluntary human shielding as direct participation in hostilities recognized that the practical difficulty of determining whether or not human shields acted voluntarily gave rise to legitimate concerns. However, this was a factual problem that could not be resolved by changing the law but had to be taken into account when taking precautionary measures in implementing the law. While there were clear cases in which civilian activists openly declared their intention to travel to conflict areas and serve as voluntary human shields, these experts agreed that, in case of doubt, civilians must be presumed to be involuntary human shields who did not directly participate in hostilities. One expert also contended that children lacked the ability to voluntarily decide on their actions and, therefore, should never be considered as voluntary human shields. Another expert also recalled that, according to the principles developed in Section IX of the Interpretive Guidance, the force used against civilians directly participating in hostilities must also be reasonably necessary in the circumstances. Therefore, the fact that civilians served as voluntary human shields did not necessarily mean that they could be killed without further considerations.

Concern was also expressed with regard to the argument that the standard of excessiveness of the principle of proportionality in attack was flexible enough to take into account the voluntary nature of the presence of the civilians. One expert held that, even though it would be logical to flexibilize the standard of "excessiveness" in the proportionality assessment, such an approach could not be derived from existing IHL. Another expert cautioned that the Interpretive Guidance created a dangerous precedent when it opened the door to speculations over the varying "value" or "weight" of different categories of human beings in the proportionality assessment.

4.2. Rejecting a Qualification as Direct Participation in Hostilities

Another group of experts recognized that the problems caused by voluntary human shielding had to be adequately addressed, but insisted that it should qualify as direct participation in hostilities only where all three constitutive elements proposed Section V of the Interpretive Guidance were fulfilled. As previous expert discussions had shown, it was dangerous to base entitlement to and loss of protection against direct attack on

subjective intent. In practice, it was very difficult for the attacker to determine the motivation behind the presence of civilians in the vicinity of military objectives and to determine whether they qualified as voluntary or involuntary human shields or as uninvolved bystanders. Therefore, loss of protection should depend exclusively on objective criteria. According to these experts, the requirement of "direct causation" of harm would be overstretched if every activity aimed at, or succeeding in, preventing an attack against a particular military objective were automatically to be regarded as direct participation in hostilities. For example, it would be unacceptable to directly attack a legal expert or humanitarian activist based on the argument that he intended to hinder military operations simply because he or she publicly stated that it would be unlawful to attack a particular objective. The qualification of voluntary human shielding as direct participation in hostilities would also lead to the absurd result that the involved civilians could be directly attacked instead and independently of the military objectives they were trying to protect, as well as when they were "deploying to" or "returning from" the shielded military objective. So far, there had been no convincing counter-argument to the position that the very description of the activity in question as "human shielding" already excluded its qualification as direct participation in hostilities. After all, human shields were unanimously understood as persons trying to protect a military objective with their own legal entitlement to protection against direct attack. Therefore, it was impossible for civilians to assume the role of human "shields" if they were regarded as having lost their entitlement to protection against direct attack due to direct participation in hostilities.

Although these experts recognized that there was a difference between voluntary and involuntary human shields, they insisted that this difference would have to be resolved based on the standard of "excessiveness" of the principle of proportionality. One expert further elaborated this approach as follows: Where civilians *involuntarily* served as human shields, they had to be taken fully into account in the proportionality assessment. As it was a war crime to force civilians to shield military objectives, it could even be argued that ignoring their presence in the proportionality assessment amounted to a form of reprisal against civilians. The weight given to *voluntary* human shields in the proportionality assessment should be nuanced in light of the concrete circumstances. Even not taking them into account at all would be preferable to qualifying their conduct as direct participation in hostilities and making them legitimate military targets independent from the shielded military objectives.

VI. Concluding Session

Introductory Remarks

The Organizers stated that the substantive objective set out in the beginning of this Expert Meeting, namely to reach a package which can be commonly shared, seemed to be within reach despite the remaining divergences of opinion. Even with regard to Section IX of the Interpretive Guidance, which certainly raised the most difficult theoretical questions during this Expert Meeting, the discussions generated several compromise proposals, which could serve as a basis for a comprehensive solution. In the concluding working session of this Expert Meeting, the experts were invited to express their opinion with regard to the way forward, particularly with regard to the form which the final documents resulting from this expert process should take, the extent to which - and the way in which - the divergence of opinions should be reflected, as well as any other issues related to bringing this expert process to a conclusion.

Expert Discussion

There was general recognition on the part of the experts that the ICRC was free to choose the way in which it wanted to assist states in interpreting the provisions on direct participation in hostilities and that the ICRC, and not the expert group, would have to assume the ultimate responsibility for the position taken in the final version of the Interpretive Guidance. However, in view of the continuing divergences of opinion on issues such as the revolving door of protection, voluntary human shields and the membership approach, the final version of the Interpretive Guidance could not necessarily, or not fully, be based on "the teachings of the most highly qualified publicists of the various nations", which Article 38 [1] (d) ICJ Statute referred to as "subsidiary means for the determination of rules of law". In terms of form, the experts made the following proposals:

1. ICRC Position without Dissenting Opinions

One group of experts recommended that the final version of the Interpretive Guidance should be limited to expressing the ICRC's position and that the dissenting opinions should not be reflected at all. While the participating experts should be named in a list annexed to the Interpretive Guidance, and while the methodology followed in the expert process should be adequately explained, the ICRC's substantive position reflected in the Interpretive Guidance should not be diluted with references to dissenting opinions, whether in the footnotes or in an Annex. This would be more intellectually honest than trying to base the Interpretive Guidance on some form of consensus, which did not exist. After all, the ICRC was the internationally recognized "Guardian of IHL" and was mandated to assist States in clarifying the meaning of certain provisions of IHL. Accordingly, States as well as non-state actors were primarily interested in the ICRC's opinion on the issue of "direct participation in hostilities" and not in the consent or dissent of individual experts. In order to be credible and receive the appropriate level of attention, therefore, the Interpretive Guidance would have to carry the imprimatur of the ICRC. If the dissenting opinions were overemphasized, the Interpretive Guidance would create more confusion than clarity as to the actual opinion of the ICRC. The Interpretive Guidance should reflect divergences of opinion only to the extent that the ICRC was not sure of its own position on a particular question. The participating experts remained free to publish their own opinions in academic law journals. In sum, according to these experts, the Interpretive Guidance should have very few footnotes and no Appendix at all but, instead, a strong and comprehensive explanatory commentary in order to render the document understandable and user-friendly to operational forces. The practical meaning of phrases such as "effective control" or "in the hands of", for example, must be adequately explained and illustrated, wherever possible with references to the Geneva Conventions and to the Commentaries.

2. Final Summary Report

Another group of experts was of the opinion that the Interpretive Guidance would lose much of its practical value and usefulness if the dissenting opinions and the different approaches expressed in the course of the past five years were not reflected in the final documents resulting from this expert process. If the Interpretive Guidance reflected only the ICRC's position without outlining at least the main topics where there were differences of opinion, the entire Interpretive Guidance might ultimately be regarded as a purely theoretical or academic product without any practical relevance whatsoever. Clearly, this would seriously undermine the value of the document. These experts agreed that it was important not to overload the Interpretive Guidance with lengthy diversities of opinion, whether in the main text or in the footnotes. In any event, footnotes did not provide sufficient space to fully reflect the divergence of views expressed during the discussions. For example, in stating that there was "wide" agreement or a "prevailing" view and describing dissenting views with references to "one expert" and "another expert", the Interpretive Guidance suggested that, of the entire group of 40 experts, only two or three experts disagreed and that those who remained silent agreed with the "prevailing" view. Therefore, footnotes were not the right place to reflect dissenting opinions. Moreover, the present format of a streamlined Interpretive Guidance accompanied by five separate Expert Meeting Reports was not user-friendly, as certain issues were discussed in several different reports. Therefore, next to the Interpretive Guidance, there should be a single document capturing the entire discussions held during the expert process.

More concretely, according to these experts, the final version of the Interpretive Guidance should be accompanied by a "companion document", namely a Final Summary Report bringing all diverging opinions expressed during the expert process together in a single document. The Interpretive Guidance itself could be streamlined and limited to interpreting the notion of "direct participation in hostilities" from the ICRC's perspective. Where there were major disagreements, the footnotes of the Interpretive Guidance could simply refer back to the Final Summary Report without going into detail. This Final Summary Report, in turn, should not go into every detail of the discussions held during the Expert Meetings, but should only point out to what extent there had been

significant dissent on the part of the experts with the views that were ultimately retained in the final version of the Interpretive Guidance, for example on topics such as the revolving door of protection, voluntary human shields, and the membership approach. While the Final Summary Report should be based on, and refer back to, the five comprehensive Expert Meeting Reports, it should not reflect past discussions that had become irrelevant for the final version of the Interpretive Guidance. After all, a comprehensive record of the discussions would remain available in the five Expert Meeting Reports.

3. Comprehensive Expert Meeting Reports

Yet another group of experts was not convinced that it was necessary to undertake the enormous effort of drafting a Final Summary Report in addition to the Expert Meeting Reports, particularly as the latter already provided a complete picture of the discussions, including the dissenting opinions. While these experts agreed that the Interpretive Guidance should be limited to reflecting the ICRC's position and should not be overloaded with dissenting opinions, they preferred to retain and improve the present format of an Interpretive Guidance accompanied by five comprehensive Expert Meeting Reports. Accordingly, the Interpretive Guidance should give a single consistent and coherent line of thought with regard to all issues addressed, whereas the five Expert Meeting Reports should provide a comprehensive overview of the wide variety of views expressed on all topics discussed during the expert process. The footnotes of the Interpretive Guidance should indicate where there had been major disagreement between the experts, but not in a comprehensive manner. At the most, the footnotes should briefly indicate the various substantive positions and provide precise references as to where in the Expert Meeting Reports the discussions on the topic in question were recorded. One of these experts suggested that, alternatively to a Final Summary Report, each expert could also be given 500 words in an additional Annex to comment on points they felt very strongly about.

4. Organizers' Concluding Remarks

The Organizers acknowledged that the main responsibility for the Interpretive Guidance would have to be assumed by the ICRC and not by the expert group. In this respect, the Organizers recalled that this expert process had been conducted under the responsibility of the ICRC's Department of International Law and Cooperation within the Movement and that, therefore, the form and presentation of the final Interpretive Guidance and reports would also depend on the degree of institutional backing it would receive from the ICRC as a whole. In any case, however, fairness and transparency required that the disagreements between the experts were taken into due consideration and remained adequately reflected in the final documents resulting from this process. While it was clear that the Interpretive Guidance should not be overloaded with dissenting opinions, it was probably necessary to indicate in the footnotes where there had been great differences of opinion within the expert group. These footnotes could possibly be limited to references indicating the precise passages where the relevant discussions were recorded in the Expert Meeting Reports. The Organizers took note that the Interpretive Guidance should be as straightforward as possible and should clearly reflect the ICRC's position on the issue of "direct participation in hostilities". Clearly, however, even a streamlined final version of the Interpretive Guidance would remain an academic document on a difficult and complex topic. Therefore, it would have to be explored how the extremely valuable results of this expert process could be rendered more operational, whether for states, non-state armed actors or even ICRC staff working in the field.

In terms of process, the Organizers proposed to draft a comprehensive, thematically structured report reflecting the wide variety of opinions that had been expressed during this Expert Meeting. As in previous years, the draft report would be transmitted to the participating experts to make sure the discussion was well reflected. Subsequently, a final version of the Interpretive Guidance would be drafted based on all five Expert Meeting Reports, as well as on the written comments that were made by the participating experts throughout the process. The final draft of the Interpretive Guidance would be transmitted to the experts for a last round of comments limited to questions of form and the correction of errors and misunderstandings. The ICRC would also have to determine whether an additional Final Summary Report should be drafted to summarize

the divergences of opinion that remained relevant once the final version of the Interpretive Guidance had been adopted. Hopefully, all of these steps would be completed within a relatively short timeline allowing a publication of the complete proceedings of the expert process, including the final version of the Interpretive Guidance, by the end of 2008.

In conclusion, the Organizers thanked the participating experts for their continuous readiness to contribute with their experience and expertise to this clarification process throughout the past five years and expressed their conviction that the resulting documents would do justice to the collective efforts of this group and would honour the values and larger purpose for which IHL stands, namely to find a equitable balance between the legitimate interests involved in armed conflict in the name of the overarching principle of humanity.