



ICRC

Overview of the ICRC's Expert Process (2003-2008)

1. The Issue of Civilian Direct Participation in Hostilities

The primary aim of international humanitarian law (IHL) is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.

Recent decades have seen this pattern change significantly. A continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict. Moreover, military operations have often attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations. All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces - unable to properly identify their adversary - run an increased risk of being attacked by persons they cannot distinguish from the civilian population.

This trend has emphasized the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do not participate directly in hostilities and civilians "directly participating in hostilities." Under IHL, the notion of "direct participation in hostilities" describes individual conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants.¹ Derived from Article 3 common to the Geneva Conventions, the notion of "direct" or "active" participation in hostilities is found in multiple provisions of IHL. Despite the serious legal consequences involved, however, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities.

2. Key Legal Questions

In 2003, the International Committee of the Red Cross (ICRC) initiated a process of research and expert reflection on the notion of "direct participation in hostilities" under IHL. The aim was to clarify three questions under IHL applicable in international and non-international armed conflicts:

- Ø Who is considered a civilian for the purpose of conducting hostilities and, therefore, must be protected against direct attack "unless and for such time as they directly participate in hostilities"?
- Ø What conduct amounts to direct participation in hostilities and, therefore, suspends a civilian's protection against direct attack?
- Ø What modalities govern the loss of civilian protection against direct attack (including its duration; the precautions and presumptions to be observed in situations of doubt; the restraints imposed on the use of force against lawful targets; and the consequences of restoring civilian protection)?

The process examined these questions for the purposes of the conduct of hostilities only and did not, or only very marginally, address the legal regime applicable in the event of capture or detention of persons having directly participated in hostilities. Moreover, while the analysis was conducted under IHL only, the resulting conclusions and recommendations remain without prejudice to questions which may arise related to direct participation in hostilities under other applicable branches of international law, such as human rights law or the law governing the use of interstate force (*jus ad bellum*).

¹ Art. 51(3) Additional Protocol I; Art. 13(3) Additional Protocol II; Rule 6, Henckaerts, Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC, 2005).

3. Expert Meetings

Five informal expert meetings were held in The Hague and in Geneva between 2003 and 2008. Each meeting brought together 40 to 50 legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations, all of whom participated in a personal capacity: The *first expert meeting*, held in The Hague on 2 June 2003, laid the foundations for the research and led to the unanimous conclusion that the notion of direct participation in hostilities required further interpretation and that the ICRC should take the lead in this process.² The *second expert meeting*, held in The Hague on 25 and 26 October 2004, delved deeper into the topic on the basis of an extensive questionnaire, which was distributed to the experts before the meeting and which focused on a wide range of practical examples and theoretical issues.³ The *third expert meeting*, held in Geneva from 23 to 25 October 2005, addressed some of the most complex legal issues relating to the topic, such as the implications of membership in organized armed groups during non-international armed conflicts as regards the applicability of the rule on direct participation in hostilities, the duration of the loss of protection, and the presence of private contractors and civilian employees in conflict areas.⁴ Following these meetings, the organizers prepared a draft "Interpretive Guidance" document on the notion of direct participation in hostilities for discussion during the *fourth expert meeting*, which was held in Geneva on 27 and 28 November 2006.⁵ The comments received during that meeting led to a revised version of the document, which was submitted to the experts for written comments in July 2007. Based on these comments, a concluding *Fifth Expert Meeting* was held in Geneva on 5 and 6 February 2008, which addressed the most important legal questions that still remained controversial within the expert

² See the following materials: Agenda DPH 2003; Background Doc. DPH 2003 (Quéguiner): "Direct Participation in Hostilities under IHL"; Report DPH 2003.

³ See the following materials: Agenda DPH 2004; Questionnaire DPH 2004; Background Doc. DPH 2004 (Melzer): "Direct Participation in Hostilities under IHL"; Executive Summary Background Doc. 2004; Expert Paper DPH 2004 (Bothe): "Direct Participation in Hostilities in Non-International Armed Conflict"; Expert Paper DPH 2004 (Schmitt): "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees"; Report DPH 2004.

⁴ See the following materials: Agenda DPH 2005; Background Doc. DPH 2005, WS I (Melzer): "Residual Issues from the Questionnaire"; Background Doc. DPH 2005, WS II (Melzer): "Constitutive Elements of Direct Participation in Hostilities"; Background Doc. DPH 2005, WS III (Melzer): "Direct Participation in Hostilities and Membership in Organized Armed Groups"; Background Doc. DPH 2005, WS IV (Melzer): "Temporal Scope of Direct Participation in Hostilities"; Background Doc. DPH 2005, WS V (McDonald): "Individual Contractors and Civilian Employees"; Expert Paper DPH 2005 (Parks): "Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces"; Expert Paper DPH 2005 (Gillard): "Private Military/Security Companies: the Status of their Staff and their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations"; Report DPH 2005.

⁵ See the following materials: Agenda DPH 2006; Background Doc. DPH 2006 (Melzer): "Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities"; Report DPH 2006.

group.⁶ A detailed record of the topics addressed and the wide variety of views expressed during the expert discussions is provided in the proceedings, which include working agendas, background documents, expert papers and comprehensive reports for each expert meeting.⁷ In order to encourage open discussion on politically sensitive issues, the expert meetings were conducted under the so-called "Chatham House Rule", which provides that the identity of the speakers, or of any other participant, may not be revealed without their consent. As there was no unanimous consent among the experts, it was decided that no list of participating experts would be published.

4. The ICRC's Interpretive Guidance

Based on a thorough evaluation of the expert discussions and further internal research and analysis, the ICRC finalized its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law".⁸ The Interpretive Guidance does not endeavour to change existing IHL, but provides the ICRC's recommendations as to how IHL relating to the notion of "direct participation in hostilities" should be interpreted in contemporary armed conflict. The Interpretive Guidance is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. It endeavours to propose a balanced and practical solution that takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL. The responsibility for the Interpretive Guidance is assumed by the ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of IHL. While the Interpretive Guidance is not legally binding, the ICRC hopes that it will be persuasive to States, non-State actors, practitioners and academics alike and that, ultimately, it will help better protect the civilian population from the dangers of warfare.

⁶ See the following materials: Agenda DPH 2008; Background Doc. DPH 2008 (Melzer): "Revised Draft Interpretive Guidance on the Notion of Direct Participation in Hostilities"; Background Doc. DPH 2008 (Melzer): "Expert Comments & Elements of Response Concerning the Revised Draft of the Interpretive Guidance on the Notion of Direct Participation in Hostilities"; Report DPH 2008.

⁷ See NN 2 - 6 above. All materials produced in the course of the expert process have been published online at: www.icrc.org and are also available on a DVD attached to the hardcopy publication of the ICRC's "Interpretive Guidance" (see N 8 below).

⁸ See: The ICRC's "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" (Geneva: ICRC, 2009), hereafter: "Interpretive Guidance".

Note: While the following Sections provide a broad overview of the substantive conclusions reached in the Interpretive Guidance, they cannot replace a careful study of its full text.

5. Who is a civilian for the purposes of the principle of distinction?⁹

In situations of armed conflict, a basic distinction must be made between members of State armed forces or organized armed groups (whose function it is to conduct hostilities on behalf of the parties to an armed conflict) from civilians (who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic, or unorganized basis). In essence, all persons who are not members of State armed forces or of organized armed groups belonging to a party to an armed conflict are civilians and, therefore, must be protected against direct attack unless and for such time as they directly participate in hostilities.

In international and non-international armed conflicts, State armed forces include all organized armed forces, groups or units under a command responsible to a State party to the conflict. In non-international armed conflicts, organized armed groups constitute the armed forces of a non-State party to the conflict. It can be difficult to tell the difference between members of organized armed groups and the civilian population. Civilians may support armed groups in many different ways including, at times, by directly participating in hostilities on a spontaneous, sporadic or unorganized basis. Civilians cannot become members of an organized armed group, however, unless they assume a continuous combat function (i.e. a continuous function involving their direct participation in hostilities).

6. What conduct amounts to direct participation in hostilities?¹⁰

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict. In essence, persons can be said to directly participate in hostilities when they carry out acts aiming to support one party to the conflict by directly causing harm to another, either by directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity.

⁹ See: Interpretive Guidance (N 8 above), Sections I-III.

¹⁰ See: Interpretive Guidance (N 8 above), Sections IV-VI.

Military harm may be caused, for example, by capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example through sabotage, erecting road blocks or interrupting the power supply of radar stations. Interfering electronically with military computer networks and transmitting tactical targeting intelligence for a specific attack are further examples. The use of time-delayed weapons such as mines and booby-traps, or remote-controlled weapon systems such as missiles and unmanned aircraft, also "directly" causes harm to the enemy and, therefore, amounts to direct participation in hostilities. "Indirect" participation in hostilities, on the other hand, contributes to the general war effort of a party, but does not directly cause harm and, therefore, does not entail loss of protection against direct attack. This would generally include, for example, the production and shipment of weapons and ammunition, the construction of roads and other infrastructure, and financial, administrative or political support.

The difference between "direct" and "indirect" participation can be difficult to establish but is vital. For example, the delivery by a civilian truck driver of ammunition to a shooting position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities. Transporting ammunition from a factory to a port far from a conflict zone, however, is too remote from the actual use of that ammunition to be considered as "directly" causing harm. Although the ammunition truck remains a military objective subject to attack, driving it would not amount to direct participation in hostilities and, therefore, the civilian driver could not be targeted separately from the truck.

Moreover, not all violence or harm occurring in an armed conflict is necessarily part of the hostilities. In order to amount to direct participation in hostilities, a violent act must not only be objectively likely to directly cause harm, but it must also be specifically designed to do so in support of one party to an armed conflict and to the detriment of another. Potentially harmful acts that do not amount to direct participation in hostilities are, for example, violent political demonstrations, ordinary robberies and looting, or the blocking of a road by refugees or other fleeing civilians trying to escape the effects of the hostilities.

7. What modalities govern the loss of protection against direct attack?¹¹

a) *Temporal scope of the loss of protection:* While members of organized armed groups belonging to a party to the conflict lose protection against direct attack for the duration of their membership (i.e., for as long as they assume a continuous combat function), civilians lose

¹¹ See: Interpretive Guidance (N 8 above), Sections VII-X.

protection against direct attack for the duration of each specific act amounting to direct participation in hostilities. This includes preparations and geographical deployments or withdrawals constituting an integral part of a specific hostile act.

b) *Precautions and presumptions in situations of doubt:* In order to avoid the erroneous or arbitrary targeting of civilians, parties to a conflict must take all feasible precautions in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

c) *Restraints on the use of force against legitimate military targets:* Loss of protection against direct attack – whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed group) – does not mean that the persons concerned fall outside the protection of the law. Even attacks against legitimate military targets are subject to legal constraints, whether based on IHL, or on other branches of international law, such as human rights law. Any military operation must comply with the rules of IHL, which prohibit or restrict certain means and methods of warfare. Moreover, the principles of military necessity and humanity require that no more death, injury, or destruction be inflicted than is necessary to achieve a legitimate military purpose in the prevailing circumstances. While combatants cannot be required to subject themselves or the civilian population to additional risk in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her the chance to surrender where there manifestly is no need for lethal force to be used.

d) *Consequences of regaining civilian protection against direct attack:* When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack. IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, such participation does not in itself constitute a war crime. However, civilians having directly participated in hostilities can be prosecuted for any offence that they may have committed under domestic law even if, in doing so, they did not violate IHL. Moreover, just as is the case for combatants, civilians having directly participated in hostilities can be prosecuted for any violation of IHL. The fact that civilians regain full protection against direct attack when they cease to directly participate in hostilities does not rule out the use of necessary and proportionate force against them in accordance with law enforcement standards. The same is true of members of organized armed groups after they cease to assume their continuous combat function.