



ICRC

Fifth Informal Expert Meeting

The Notion of Direct Participation in Hostilities under IHL

Expert Comments & Elements of Response*

Concerning the Revised Draft of the Interpretive Guidance on
the Notion of Direct Participation in Hostilities

International Committee of the Red Cross

Geneva, 5 / 6 February 2008

* **Remark:** The present document was prepared by Nils Melzer, Legal Adviser at the Legal Division of the International Committee of the Red Cross (ICRC), in a personal capacity and does not express, or intend to express, the institutional position of the ICRC or its Legal Division on any aspect of the topics discussed. The summary of comments, as well as the preliminary elements of response, were written in good faith and to the best of the author's ability, but cannot claim to provide a detailed and complete overview of the opinions held by the experts, or to offer comprehensive and consolidated solutions for the various issues to be resolved.

Introduction

The purpose of the present document is to facilitate, focus and streamline the discussions at the Fifth Expert Meeting of 5 / 6 February 2008, which aims to bring this clarification process on the notion of “direct participation in hostilities” to a conclusion.

The document provides an overview of those issues, which continue to raise questions, concerns or disagreement among the experts, based on the written comments received from 26 experts between July and October 2007 on the Revised Draft “Interpretive Guidance on the Notion of Direct Participation in Hostilities” of 6 July 2007 (unless stated otherwise, all page numbers refer to this draft document). As it will not be possible to comprehensively address all of these issues during the 2008 Expert Meeting, the present document also offers preliminary “elements of response” and, where appropriate, proposals as to how the concerns in question could be adequately addressed.

For technical reasons, it was not possible to include the editorial and substantive comments made by four experts in “track-mode” directly in the text of the Draft Interpretive Guidance. However, the primary substantive concerns expressed by these experts were included based on the additional standard text-format comments submitted by them. All expert comments have been re-grouped under the 10 thematic Headings of the Draft Interpretive Guidance, plus an opening section on the “Introductory Paragraphs” of the Interpretive Guidance and a concluding section on “Comments of General, Formal or Editorial Nature”. [...] * Furthermore, the individual comments have been shortened and, where possible, merged with others in order to make the text more accessible to the reader. Thus, while every effort was made to faithfully capture and reflect the essence and personal character of each comment, the resulting summaries do not constitute textual quotes.

* **Note:** In order to exclude misunderstandings and facilitate the discussion, the comments in the original version of this Background Document had been left nominally attributed. As the expert process was conducted under the Chatham House Rule, all names have been replaced by anonymous references in this published version.

Introductory Paragraphs of the Interpretive Guidance	5
1. Trends Described in the Introduction	5
2. Terminology: Reference to “Secret Service” Personnel	5
I. The Concept of Civilian in International Armed Conflict	6
1. “Civilians / Combatants” vs. “Civilians / Armed Forces”	6
2. Mutual Exclusivity between “Civilians” and “Armed Forces”	7
3. Terminology: Describing the Link to a Party to the Conflict.....	8
4. Parallel International / Non-International Armed Conflicts	8
II. The Concept of Civilian in Non-International Armed Conflict	11
1. Continuous Loss of Protection for Members of Organized Armed Groups	11
2. Functional Membership Approach	13
3. Terminology: Reference to “Continuous” Combat Function	16
4. The Notion of “Irregularly Constituted” Armed Forces	17
5. Police and Armed Forces in Non-International Armed Conflict	18
6. Armed Groups as “Party” or “Armed Forces of a Party” to the Conflict	19
III. Private Contractors and Civilian Employees	20
IV. Direct Participation in Hostilities as a Specific Act	21
V. Constitutive Elements of Direct Participation in Hostilities	22
1. General Comments	22
2. Threshold of Harm.....	23
a) “Likely” vs “Intended” Harm	23
b) Qualitative Threshold	24
c) Quantitative Threshold (“Effective Control”)	25
d) Quantitative Threshold (Inter-Civilian Violence)	25
e) Quantitative Threshold (Hostage Taking).....	27
3. Direct Causation.....	28
4. Belligerent Nexus	29
5. Voluntary Human Shields	30
VI. Beginning and End of Direct Participation in Hostilities.....	32
VII. The Temporal Scope of the Suspension of Civilian Protection	34
VIII. Precautions and Presumptions in Situations of Doubt	37

IX.	Restraints on the Use of Force in Direct Attack	39
	1. Rejection of Standards and Concern over Consequences.....	39
	2. Rejection of Standards and Need for further Discussion.....	41
	3. Partial Support for the Proposed Standards.....	41
	4. Full Support for the Proposed Standards.....	42
	5. Terminology: Reference to “Arrest”	43
	6. Elements of Response and Proposed Way Forward.....	43
X.	Consequences of Regaining Civilian Protection	45
	Comments of General, Formal or Editorial Nature	46
	1. Proposed Disclaimers and General Remarks	46
	2. Structure, Form and Terminology	47
	3. Presentation of Dissenting Opinions etc.	47
	4. References to the Israeli “Targeted Killing”-Judgment	48
	5. Proposed Way Forward.....	48

Introductory Paragraphs of the Interpretive Guidance

1. Trends Described in the Introduction

One expert: The ambiguous situations created by “farmers by day and fighters by night” has marked situations of occupation and liberation wars throughout recent history. The framework defined for combatants in Article 44 [3] AP I aims to balance military and humanitarian concerns as much as possible. The confusion and uncertainty as to the implementation of the principle of distinction will occur only if the notion of "direct participation in hostilities" is interpreted to extend beyond the "tactical / geographical framework" expressed in Article 44 [3] AP I, for which the temporary loss of immunity set out in Art. 51 [3] AP I was designed. Outside this framework, the focus should be on targeting legitimate military objectives such as drones, computer systems, missile bases, ammunition trucks, the manufacture of weapons etc. and not necessarily the civilians operating these objectives.

One expert points out that the shift of military operations into civilian population centers is not a new phenomenon. What is new is deliberate use of urban areas to shield military objectives from attack - and, in particular, use of voluntary or involuntary human shields. Therefore, this issue (of human shields) should be highlighted in the introduction.

One expert acknowledges that there is a trend towards more civilian contracting, but clarifies that it is not necessarily the case that there has been a trend towards the “civilianization” of the armed forces (most notably because the contracted functions do not necessarily amount to direct participation in hostilities).

Proposed Way Forward: *These comments will be taken into due consideration in the final revision of the Interpretive Guidance.*

2. Terminology: Reference to “Secret Service” Personnel

Three Experts: The reference on (p. 4) to "secret service" personnel should be dropped or changed to "civilian intelligence personnel" or “paramilitary forces”. Generally, the phrase "other civilian government employees" is sufficient.

Proposed Way Forward: *This comment will be taken into due consideration in the final revision of the Interpretive Guidance.*

I. The Concept of Civilian in International Armed Conflict

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

1. "Civilians / Combatants" vs. "Civilians / Armed Forces"

Two experts, albeit for different reasons, propose a distinction between “combatants” and “civilians” rather than between “armed forces” and “civilians”.

One expert: The distinction between “combatants” and “civilians” better corresponds to the distinction between persons who are and, respectively, are not entitled to protection against direct attack, since some members of the “armed forces”, namely medical and religious personnel, also remain protected as non-combatants.

One expert: The basic dichotomy should not be between “civilians” (whether peaceful or directly participating in hostilities) on the one hand, and “members of armed forces” on the other, but between peaceful civilians on the one hand and combatants on the other. The category of “combatant” should include both lawful (i.e. members of armed forces plus *levée en masse*) and unlawful (i.e. all others who directly participate in hostilities, including those not belonging to a party to the conflict) combatants. As a compromise approach, he proposes that the distinction should simply be made between persons who are and, respectively, are not subject to attack.

Elements of Response: *The primary purpose of Section I is not to make a comprehensive distinction between persons who are or, respectively, are not entitled to protection against direct attack but, more precisely, to circumscribe the category of persons who are entitled to protection against attack “unless and for such time as they take a direct part in hostilities”. In the customary rule expressed in Articles 51 [3] AP I and 13 [3] AP II, this category of persons is described as “civilians”. While the terms “armed forces”, “combatant” and “civilian” are used and defined in treaty IHL, the term “unlawful combatant” is not and remains too controversial to serve as a basis for consensus. The view that persons, who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*,*

lose civilian status as soon as they directly participate in hostilities contradicts the definition of civilian expressed in Article 50 [1] AP I.

Proposed Way Forward: *It is proposed to retain the wording and argument of the Draft Interpretive Guidance and to reflect dissenting opinions on this point in the footnotes to the Commentary.*

2. Mutual Exclusivity between “Civilians” and “Armed Forces”

Three experts: The proposed interpretation of the categories of “civilian” and “armed forces” as both mutually exclusive (i.e. one excludes the other) and absolutely complementary (i.e. *tertium non datur*) in international armed conflict is not convincing or, at least, could be misunderstood as suggesting that any person not entitled to POW-status under GC III would necessarily have to be protected under GC IV, without taking into account possible exceptions based on nationality, geographic factors, or for reasons set forth in Article 5 GC IV. It is absurd that participants in a *levée en masse* respecting IHL should not be considered civilians, while those not respecting IHL should be deemed civilians.

One expert: It is systematically and politically impossible to separate the question of who is a civilian for the conduct of hostilities (Art. 50 [1] AP I) from the concept of who is a civilian once fallen into the hands of the enemy (Art. 4 GC IV).

Elements of Response: *It is important not to confuse the status of “civilian”, which affords protection against direct attack unless and for such time as a civilian directly participates in hostilities, and the status of “protected person” under GC IV, which affords protection against arbitrary exercise of power. The mutual exclusivity and absolute complementary of the categories of “civilian” and “armed forces” (except *levée en masse*), is expressly stated in Article 50 AP I, which incorporates and builds on the concepts underlying the GC and H IV R. Contrary to what its title suggests, GC IV does not tie its protection to “civilian” status but simply to the fact that persons are not protected under GC I-III and do not fall under any of the exception clauses provided in GC IV. Therefore, while civilians entitled to POW-status under Article 4 A [4], [5] GC III are not protected under GC IV, the concept of “protected persons” under Article 4 GC IV is not limited to civilians but may also include members of the armed forces who, for whatever reason, have lost their entitlement to POW-status. Thus, the distinction between “civilians” and “armed forces” for the purposes of the conduct of hostilities does not in all aspects correspond to that between “protected persons” (GC IV) and POW (GC III).*

Proposed Way Forward: *It is proposed to retain the approach chosen in the Draft Interpretive Guidance, as well as the express clarification that, in accordance with the scope given to this clarification process, the Interpretive Guidance focuses on clarifying the notion of ‘direct participation in hostilities’ for the purposes of the conduct of hostilities only and does not address the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty for reasons related to their involvement in hostilities (currently p. 8 of the Draft).*

3. Terminology: Describing the Link to a Party to the Conflict

Four experts: Phrases such as "belonging to", "under command responsible to", "in support of" and "attributability to" a party to the conflict each describe a distinct quality or degree of relationship between armed actors and a state. Therefore, in interpreting the notion of civilian, it is necessary to distinguish and employ these phrases accurately

Elements of Response: *In relation to organized armed forces or groups, the phrases "belonging to" and "under command responsible to", though not necessarily identical in scope, both indicate that such forces conduct hostilities "on behalf" of a party to the conflict and, therefore, would qualify as its "armed forces" under the definition expressed in Article 43 [1] AP. It would therefore be difficult to conclude that their conduct is not "attributable to" that party.¹ The phrase "in support of", on the other hand, is an indicator for belligerent nexus, and not for attributability, of the conduct in question.*

Proposed Way Forward: *The Interpretive Guidance will be reviewed with a view to ensuring accuracy and coherence in this respect.*

4. Parallel International / Non-International Armed Conflicts

Some experts comment on the category of "independent" armed groups, which resort to violence in a situation of international armed conflict without belonging to a party thereto.

¹ See Article 3 H IV: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces"

According to the Draft Interpretive Guidance, such groups must be regarded as civilians, unless the violence on their part reaches the threshold of non-international armed conflict:

One expert: The question whether a non-international armed conflict can exist simultaneously alongside an international armed conflict within the framework of a single armed confrontation (including in occupied territories) is not yet universally recognized, and that some scholars believe that any conflict which is international in nature should be regarded as an international armed conflict exclusively, even in the case of involvement of organized armed groups not belonging to a state party to that conflict. If the latter view were to prevail, provision would have to be made in the Interpretive Guidance that members of such armed groups are not regarded as civilians.

One expert: If the Israeli-Palestinian conflict is regarded as an international armed conflict, and Palestinian groups as independent resistance groups in an occupied territory, the question arises as to who is the other party to the international armed conflict.

One expert: The earlier stages of the conflict in Afghanistan and, more recently, the conflict between Israel and Hezbollah in south Lebanon, illustrated that sustained military operations can be carried out by and against independent armed groups which are not (necessarily) acting on behalf of a state. It would seem bizarre to qualify such organized armed groups as “civilians”, or to say that IHL does not accommodate the parallel existence of international and non-international armed conflicts side by side.

One expert expresses particular support for the distinction made between the “parties” to the conflict and their “armed forces”, the continuous taking into account of law enforcement in situations of armed conflict, and of the conclusion that hostilities with an independent armed group may constitute a separate, additional non-international armed conflict.

Elements of Response: *Where part of the civilian population engages in organized armed violence without supporting one of the state parties to the surrounding international armed conflict, they can hardly be regarded as "taking part" in pre-existing hostilities between these parties (belligerent nexus). In the absence of belligerent nexus to the existing hostilities, it should be determined whether the intensity of violence reaches the threshold required for a separate non-international armed conflict, and whether the militant segment of the population can be regarded as the armed forces of a party to that conflict. If this is not the case, the conduct in question must be regarded as civilian unrest and would have to be dealt with under standards of law enforcement and self-defense. The alternative concept of "continuous" direct participation in hostilities may appear more appealing at first sight, because it permits to circumvent the test of whether violence on the part of "independent" armed actors reaches the threshold required for a non-international armed conflict. In doing so, however, it also removes whatever safeguards IHL may have provided to prevent the*

arbitrary use of military force against groups which, for lack of organization, means or belligerent nexus, cannot be regarded as equivalent to the armed forces of a party to the conflict, and whose members should therefore be dealt with in accordance with the standards of law enforcement or individual self-defense, unless and for such time as they actually take a direct part in hostilities (e.g. drug cartels, mafia and other criminal gangs, violent political, religious or anti-globalization protest groups, but also private security personnel). While the parallel existence of international and non-international armed conflict in the same operational context may give rise to a number of questions, which require detailed legal analysis, the phenomenon as such is neither new nor uncommon on a global scale and has not created legal or operational problems which cannot be effectively addressed under the existing frameworks.

Proposed Way Forward: *In accordance with the elements of response, it is proposed to retain the approach of the Draft Interpretive Guidance and to adequately reflect dissenting opinions and other concerns expressed in the footnotes to the Commentary.*

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

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

1. Continuous Loss of Protection for Members of Organized Armed Groups

Several experts have addressed the fact that the Interpretive Guidance conceives members of organized armed groups of parties to non-international armed conflicts as “continuous military targets” regardless of whether they are, at the time of attack, directly participating in hostilities:

One expert: The rationale underlying the Additional Protocols is that members of organized armed groups become a military objective when they distinguish themselves by congregating in a military formation, or by deploying to, or undertaking a military operation. In view of Article 50 [3] AP I, however, “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. Thus, on the “micro level”, individual members of armed groups present among the civilian population do not constitute a military objective that can be targeted by military means. But they can be pursued through law enforcement means, which are the only ones adapted to a civilian population environment. The approach proposed in the Draft Interpretive Guidance goes against this *ratio legis* of the Additional Protocols and undoes the delicate balance, which these instruments strove so hard to reach, and which remains the applicable law.

One expert: Depending on the character of the non-state party, it may not be adequate for all non-international armed conflicts. Where members of non-state armed groups possess a relatively high degree of military organization and assume functions equivalent to combatants, they should be excluded from civilian protection. Where the non-state party is

less organized, it may be more appropriate to regard every person other than government armed forces as a civilian subject to the rule on “direct participation in hostilities”. The ensuing problem of reciprocity is inherent in such situations and cannot be resolved. In any case, however, persons who do not belong to an organization of a party to the conflict are always civilians, even if they fight regularly.

One expert: The restriction of the Interpretive Guidance to “the analysis and interpretation of IHL only” is problematic in view of the fact that it extends its conclusions to situations that may be regulated primarily by human rights law. For example, the conclusion that members of “groups belonging to a party to the conflict lose civilian protection for the duration of their membership” could be interpreted to allow for those “members” to be shot on sight in situations amounting to extrajudicial executions under human rights law. If the proposed Interpretive Guidance is to be a useful tool in contexts of non-international armed conflict, which are mostly of low intensity or geographically localized within a country, it would therefore be necessary to harmonize the text in this respect.

One expert: The exclusion of members of irregular armed groups from the concept of civilians is dangerous and not fully compatible with the letter of the law. More conform to the letter, context and spirit of IHL (or, at least, of AP I and II) is probably the position that everyone who lacks combatant status is a civilian benefiting from the rule on direct participation in hostilities, even though it may raise the practical problems mentioned in the Interpretive Guidance and may contradict the wording of Article 3 GC I-IV. Overall, the approach proposed in the Interpretive Guidance is probably the only viable solution to avoid an extensive interpretation of the “direct participation in hostilities” rule, which would threaten all other civilians.

Three experts express support particularly for the proposed exclusion of members of non-state armed groups from the civilian category rather than applying the alternative approach of “continuous” direct participation in hostilities, particularly as the alternative approach might not only give rise to legal, practical and operational confusion, but also negatively affect essential standards of humanitarian protection.

One expert: Just as in international armed conflict, the dichotomy should not be between “civilians” and “armed forces” but between “civilians” and the category of “fighters” which, according to the San Remo Manual on non-international armed conflict, excludes any person directly participating in hostilities from the category and protection of “civilian”.

Elements of Response: *The structure and logic of IHL strongly suggest a distinction between the organized armed forces or groups of the parties to the conflict, which lose protection against direct attack for as long as they assume that function, and armed actors directly participating in hostilities on a spontaneous, sporadic or unorganized basis, which*

lose protection only for the duration of specific acts amounting to such participation. Such a distinction also appears indispensable for the protection of civilians from erroneous, arbitrary or unnecessary attacks. Treaty texts and state practice neither support the extension of the “specific acts”-approach to all armed actors other than state armed forces, nor the extension of continuous loss of protection to spontaneous, sporadic or unorganized participants. The distinction between organized armed actors with a strong and recognizable military organization and less sophisticated, more loosely organized armed groups would be de lege ferenda but does not seem to have a sufficient basis in the lex lata of IHL. The fact that organized armed actors lose protection for as long as they assume combat function does not dispense those attacking them: (a) from their duty to take all feasible precautions to minimize and, in any event, avoid erroneous or incidental harm to peaceful civilians, particularly in situations where such armed actors intermingle with the civilian population; (b) from the presumption of civilian protection in case of doubt; and (c) from further restrictions that may arise under other applicable normative frameworks of international law.

Proposed Way Forward: *It is proposed to retain the approach chosen in the Draft Interpretive Guidance and to reflect the expressed concerns on this point in the footnotes to the Commentary.*

2. Functional Membership Approach

Several experts discuss the appropriateness of determining membership in organized armed groups based on individual combat function:

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

be a basis for targeting alternative to membership, because these concepts seem to be very closely linked, and the “continuous direct participation” approach helpfully permits appropriate weighing of temporal and functional considerations.

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

One expert also favors a group approach rather than one based on individual function. While it is often difficult to determine membership, some groups may wear uniforms or other distinctive signs facilitating their identification. Overall, a more reasonable and operationally practicable approach would be to allow the membership approach but to fall back onto the individual function test in case of doubt. A membership approach would not necessarily have to embrace anyone associated with the group but could be more narrowly defined. If combat function is relied on, the term and its relation to the notion of “direct participation in hostilities” should be better defined and explained in the text.

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

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

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

One expert, while not rejecting the functional determination of membership, suggests that it should include not only direct combat or assistance thereto, but also more general activities not necessarily related to concrete acts and operations – such as military training (both

instructors and trainees), recruiting of combatants, manufacturing, procuring and storing arms, devising military strategies, etc. Consequently, any activities which are either "security-related" or "military" in nature, including all military "capacity-building", should lead to loss of civilian protection.

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

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

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

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

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

3. Terminology: Reference to “Continuous” Combat Function

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

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

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

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

4. The Notion of “Irregularly Constituted” Armed Forces

One expert: Doubts as to the use of the notion of “irregularly constituted armed forces”. As far as “State Armed Forces” (pp. 17 ff.) are concerned, the concept of “irregularly constituted armed forces” is not of assistance in the context of IHL, because the definition of armed forces depends on functional criteria and rather than regularity under domestic law. Decisive is whether there has been an explicit or implicit authorization to use of methods and means of warfare by the respective government, regardless of whether this occurred in accordance with domestic law. “Non-State Armed Forces” (pp. 18 ff.), on the other hand, are by their nature irregularly constituted. Therefore, the text should only use “organized armed groups”.

One expert also requests clarification as to the purpose of the definition of “irregularly constituted armed forces” and as to the consequences of membership therein.

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

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

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

One expert: The position on police forces in non-international armed conflict (pp. 17 f.) should be clarified. The proposed text is not clear as to whether all armed police forces should come within the definition of “armed forces” or only those actually incorporated into the armed forces, and what would be the solution for police forces, which are only armed in specific circumstances, or for (unarmed) police operating alongside an armed response unit.

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

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

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

6. Armed Groups as “Party” or “Armed Forces of a Party” to the Conflict

One expert: While it is understood that Article 3 GC I-IV refers to “each Party” to a non-international armed conflict, it remains unclear which entity or group actually constitutes the non-state “party”. The validity of the statement that “the notion of ‘organized armed group’ cannot be equated with that of a ‘party’ to the conflict as a whole” (p. 22) is doubtful. Where an organized armed group is fighting against the government without being associated to a “political wing” or any other entity, it is conceivable that this group is identical with the “non-state party”. The Interpretive Guidance should clarify which entity/party is the addressee of the responsible command over the armed group in such cases.

One expert emphasizes the importance of adequately distinguishing between membership in the political or other part of the movement, which is a “party to the armed conflict”, and membership in the “armed group”. While it is difficult to see how anyone could be a member of an armed group and not be a lawful target, someone who “supports” a political movement or who even “supports” the armed group is not, therefore, a “member” of the armed group. The “membership” in the armed group would be determined largely by the function those persons perform. Of course, this does not exclude that civilians directly participate in hostilities on an individual bases.

One expert particularly supports the distinction between the “parties” to the conflict and their “armed forces”.

Elements of Response: While the distinction between the “parties” to an armed conflict and their “armed forces” is indispensable in conceptual terms, it admittedly cannot be excluded that, in exceptional circumstances, a party to the conflict consists exclusively of its own armed forces, for example where dissident armed forces turn against their government without creating a “political” or “civilian” wing.² The purpose of the distinction between the party and its armed forces is to make clear that persons do not become continuous targets because of their affiliation with, or support for, a “party” to the conflict, but because of their membership in the “armed forces” of such a party.

Proposed Way Forward: It is proposed to review the text of the Interpretive Guidance with a view to ensuring clarity in this respect.

² See, for example, the facts underlying the *La Tablada (Abella)* Case of the Inter-American Commission on Human Rights (Case 11.137, Report No 55/97).

III. Private Contractors and Civilian Employees

Private contractors and employees of a party to an armed conflict who qualify as civilians under international humanitarian law are entitled to protection against direct attack unless and for such time as they directly participate in hostilities, even where their activities or location may expose them to an increased risk of incidental death or injury.

One expert: The Interpretive Guidance should not speculate as to whether or not the qualification of civilian contractors as mercenaries under Article 47 AP I is "*likely to remain rare*" (p. 26), but should limit itself to substantive considerations. After all, states party to AP I will simply have to apply Article 47 AP I whenever its conditions are fulfilled.

One expert: Private contractors and civilian employees qualifying as civilians accompanying the armed forces under Article 4 [4] GC III or as civilian crew members of the merchant marine or civil aircraft of a party to the conflict under Article 4 [5] GC III "are" (and not: "may be", p. 24) entitled to prisoner of war status in the event of capture.

One expert: Unless police action properly so called is in question, private contractors protecting military objectives against crime or violence lacking belligerent nexus should not be described as engaged in "law enforcement" (p. 24, n 58), but, rather, in "self-defense".

Elements of Response: *In principle, agreement with all three comments. It is doubtful, however, whether civilian contractors who directly participate in hostilities without being authorized to do so by the contracting state would necessarily retain entitlement to POW-status afforded to them under Article 4 [4] or [5] GC III.*

Proposed Way Forward: *These comments will be taken into due consideration in the final revision of the Interpretive Guidance. The issue of potential loss of entitlement to POW-status under Article 4 [4] or [5] GC III does not need to be addressed or resolved in the Interpretive Guidance, and it may be sufficient to review the formulation with a view to avoiding misunderstandings.*

IV. Direct Participation in Hostilities as a Specific Act

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

One expert: While defining direct participation in hostilities by way of "specific acts" is not an unreasonable interpretation of the treaty text, this approach has proven to be of little value in practice. Another equally valid interpretation is to conceive of "participation" in terms of the mindset and the status of the participator, which would be consistent with other related concepts in IHL. A soldier is targetable because his Army has decided to fight. A member of an armed group is targetable because he has decided to join the group and the group has decided to fight. And an individual is targetable because he has individually decided to fight. Criteria for determining targetability become increasingly rigorous and are most rigorous for the individual - but this is a matter of evidence, not of targetability. Just like an Army's enemy status is not determined by constant action, neither should an individual's status as directly participating in hostilities require constant activity. It is a function of a constant intent to participate that is evidenced by qualifying acts.

Elements of Response: As far as IHL is concerned, loss of civilian protection against direct attack is not tied to “intent”, but to actual “conduct” (including concrete preparatory measures) amounting to direct participation in hostilities, or to functional “membership” in armed forces or groups.

Proposed Way Forward: It is proposed to retain the “specific acts” approach for civilians directly participating in hostilities in conjunction with the “functional membership” approach for members of organized armed groups and to reflect dissenting opinions in the footnotes to the Commentary of the Draft Interpretive Guidance.

V. Constitutive Elements of Direct Participation in Hostilities

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

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

1. General Comments

One expert suggests that, in the interest of analytical clarity, the analysis in Section V should be re-organized so as to first analyze what is considered "Participation in Hostilities", which includes the two requirements of "threshold of harm" and of "belligerent nexus", and then to separately analyze the requirement of "direct causality", which determines whether such participation must be regarded as "direct" or "indirect".

One expert disagrees with, and recommends deletion of, the text "the prevailing view nevertheless appeared to be that any civilian known to be present in a military objective had to be taken into account in the proportionality equation" (p. 42, n 131). It is extraneous to the discussion of the expert group and could be replaced by the statement that civilians directly participating in hostilities "do not have to be taken into account in the proportionality assessment when other military objectives in their proximity are attacked" (p. 5, n 2).

Elements of Response: *The proposed structural re-organization of Section V will be taken into due consideration.*

The expert discussion on the question as to whether civilians known to be present in a military objective have to be taken into account in the proportionality assessment is an

important part of the Interpretive Guidance, because it helps to distinguish the prohibition of direct attacks against civilians from the principles governing the causation of incidental civilian deaths. The view that “peaceful” civilians present in or around military objectives do not have to be taken into account in the proportionality assessment has no basis in treaty law and squarely contradicts the unqualified duty of belligerents to avoid and, in any event, minimize incidental harm to civilians not directly participating in hostilities, as well as the prohibition of attacks likely to cause excessive incidental harm (Articles 51 [5] (b), 51 [8] and 57 AP I).

Proposed Way Forward: *The proposed structural re-organization of Section V will be taken into due consideration in the final revision of the Interpretive Guidance.*

It is proposed to retain the wording of n 131 of the 2007 Draft Interpretive Guidance and to more clearly reflect the dissenting opinion on this point in the same footnote.

2. Threshold of Harm

a) “Likely” vs “Intended” Harm

Two experts: The word "likely" in the textbox of Section V should be replaced by the word "intended". Decisive is not what *may* happen but what is *intended* to happen. Therefore, emphasis should be placed on the motivation of the acting persons as deduced from the objective nature of his or her act. Moreover, the Interpretive Guidance should clarify that attempts, planning and masterminding hostile acts should be regarded as reaching the required threshold of harm.

Elements of Response: *The word "likely" in the textbox of Section V should not be replaced by the word "intended", because the threshold of harm is an objective criterion. In identifying “direct participation in hostilities” for the purposes of targeting, subjective “intent” can be said to be relevant only in the objectivized form of “belligerent nexus”. The word “likely” is sufficient to include attempts, planning and masterminding of hostile acts in the concept of “direct participation in hostilities”, provided that such conduct may be reasonably expected to “directly” cause harm reaching the required threshold and has a “belligerent nexus” as set out in Section V of the Interpretive Guidance.*

Proposed Way Forward: *It is proposed to retain the word “likely” in the textbox of Section V of the Draft Interpretive Guidance, to clarify the text in light of the provided Elements of Response, and to reflect dissenting opinions on this point in the footnotes to the Commentary.*

b) Qualitative Threshold

One expert remains concerned with including the removal of mines as an example of direct participation in hostilities. As a minimum, this example should be complemented by another example clarifying that the removal of mines for purposes of self protection or humanitarian de-mining, although potentially harmful to a party to the conflict, would lack the required belligerent nexus.

One expert expresses concerns about the dogmatic statement that “guarding captured military personnel of the adversary” (pp. 35, 46 and n 95) reaches the required qualitative threshold of harm. This statement should be more nuanced, because a distinction may be necessary between guarding captured personnel in the front line and in POW camps, which may be located thousands of miles from the battlefield.

One expert argues that the qualitative threshold of harm should also include acts, which enhance the military capability of a party to the conflict, such as military training or recruiting. The words “adversely affect” should be revised accordingly or be interpreted as including such acts.

Elements of Response: *It may be useful to introduce additional examples illustrating and differentiating the interplay of the elements of “threshold of harm” and of “belligerent nexus” in the context of de-mining, as well as the elements of “threshold of harm” and of “direct causation” in the context of guarding captured military personnel.*

Acts which enhance the military capability of one party to the conflict without directly causing harm to another (military training, recruiting, armament, research, financial support etc.), should not be regarded as meeting the threshold because they are not necessarily part of the hostilities and can even occur in peace-time.

Proposed Way Forward: *Additional examples will be introduced as explained above. It is proposed to retain the interpretation of “belligerent nexus” as requiring design not only to support one party to a conflict, but also to directly harm another and to reflect dissenting opinions on this point in the footnotes to the Commentary.*

c) Quantitative Threshold (“Effective Control”)

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

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

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

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

d) Quantitative Threshold (Inter-Civilian Violence)

One expert sees a certain contradiction in prohibiting direct attacks against the perpetrators of grave violations of IHL against the civilian population based on the argument that these crimes are not part of the hostilities, while at the same time allowing the recourse to armed force against the same perpetrators in self-defense or under law enforcement standards. This approach would appear to justify the use of armed force against persons protected against direct attack, which would otherwise constitute a violation of IHL. It would perhaps be

more convincing to regard war crimes against persons in the hands of a party to the conflict as “direct participation in hostilities” justifying direct attacks against the perpetrators. In the same context, it should be recalled that the genocidal campaigns carried out by the Nazis and Rwandan extremists were based on the qualification of Jews and Tutsis as “enemies of the state” the elimination of which was part of the war.

One expert argues that violence directed against the civilian population should be regarded as a form of direct participation in hostilities where it is organized or incited and follows a systematic pattern, particularly where it constitutes one of the principal “war aims” of one or more of the parties to the conflict. This should be made clearer in the Interpretive Guidance (see pp. 44 and 46, text after n146).

One expert, while generally supportive of the proposed approach, also asks whether actions by civilians directed against the civilian population should not exceptionally be regarded as direct participation in hostilities where they are directly related to the core issue in the conflict, such as ethnic violence, suicide bombers targeting particular religious groups in order to incite unrest and frustrate governmental military efforts.

Elements of Response: *There is no reason why it should not be permissible to use armed force against persons protected against direct attack under the (stricter) standards governing law enforcement operations and individual self-defense. Conversely, to regard all war crimes against persons “in the hands of” a party to the conflict as “direct participation in hostilities” justifying direct attacks against the perpetrators would disregard that loss of protection against direct attack due to direct participation in hostilities is a measure of military necessity and not a criminal sanction. The fact that violence directed against the civilian population follows a systematic pattern or constitutes one of the principal “war aims” may be relevant for its qualification as a war crime, crime against humanity or even genocide, but has no influence on its qualification as part of the hostilities. A priori, armed force used to prevent civilians from carrying out acts of violence against persons finding themselves “in their hands” would have to be governed by the standards of law enforcement or self-defense.*

Proposed Way Forward: *It is proposed to retain the strict separation in the Interpretive Guidance between “direct participation in hostilities”, which leads to loss of protection against direct attack, and other conduct, which may be prohibited and even criminalized under international law and may justify the use of force under standards of law enforcement and self-defense, but which does not render those responsible legitimate military targets.*

e) Quantitative Threshold (Hostage Taking)

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

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

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

3. Direct Causation

One expert expresses doubts as to whether the element of "causal proximity" is interpreted widely enough. As far as "individual acts" are concerned, the requirement that the harm be caused "directly" should not entail that the following examples fall outside the scope of direct participation in hostilities: (a) training someone to carry out a specific harmful act; (b) supplying someone with an improvised explosive device (IED) for subsequent positioning; (c) acts which do not necessarily cause direct harm but prevent gaining military achievements, such serving as a lookout to spot arriving forces of one party to the conflict and notifying the other. Concerning acts, which are an integral part of a coordinated military operation, the suggested differentiation between training for a concrete military operation and general training of personnel seems unconvincing, because the training given by an expert instructor (e.g. in laying mines) may directly cause harm to the adversary without being linked to a specific operation and, therefore, should be regarded as direct participation in hostilities.

One expert points out that, in some jurisdictions, "aiding and abetting" is a theory of liability that might result in conviction for the underlying crime. As the relevant reference (p. 40) may cause confusion, and as the point of the discussion is made with regard to the standard of "indirect causation", this reference should be deleted.

Elements of Response: *According to the elements identified in the Interpretive Guidance, and depending on the concrete circumstances, "training someone to carry out a specific hostile act", and "supplying someone with an improvised explosive device for subsequent positioning" may qualify as concrete measures preparatory to a specific hostile act, and "serving as a lookout to notify a party to the conflict of arriving forces" may constitute an integral part of a coordinated military operation, both of which would amount to direct participation in hostilities. Conversely, general training given by an expert instructor (e.g. in laying mines), though eventually harmful, lacks sufficient causal proximity. This would be irrelevant, of course, where such instructors also assume a combat function involving acts which do qualify as direct participation in hostilities.*

There is no need to maintain the reference to "aiding and abetting".

Proposed Way Forward: *It is proposed to retain the strict interpretation of the element of "causal proximity" as requiring a "direct" causal link between the act in question and the harm likely to result: (a) from that act or (b) from a concrete and coordinated military operation of which that act constitutes an integral part.*

It is proposed to delete the reference to "aiding and abetting" from the Interpretive Guidance.

4. Belligerent Nexus

One expert: The discussion on the distinction between “objectivized” and “subjective” intent is confusing and should be clarified. What the text seems to be trying to convey does not point to the “objectivized intent” of the actor as the decisive criterion, but to the subjective perception of the individual observing the actions as to belligerent nexus (and the reasonableness thereof).

One expert argues that, if the word “likely” in the heading to Section V is replaced by word “intended”, the detailed analysis of intention under the “Belligerent Nexus” element would no longer be necessary. While the intent to adversely affect the military operations or capacity of a party to the conflict remains relevant, the requirement of general nexus (p. 43), as opposed to belligerent nexus (pp. 44-46), would be sufficient. Moreover, while the concept of “objectivized” intent is correct, it should refer to the intention to cause the adverse affect, and the relevant analysis should be integrated into the analysis of the “threshold of harm”.

One expert, while not necessarily disagreeing with the analysis and distinction between “hostile intent” and the concept of direct participation in hostilities, points out that state practice is not entirely consistent with the proposed approach. In some contexts, “shoot to kill” zones were established following re-location of the civilian population, as were curfews during which there was a presumption of insurgent status.

Elements of Response: For the reasons set out in the Interpretive Guidance, the element of “belligerent nexus” should not be replaced by “general nexus” and should not refer to the “subjective intent” of the acting civilian. Also, it would appear that the described presumption of insurgent status in “shoot to kill”-zones or during curfews is not so much a question of objective qualification of the targeted person’s behavior, but of whether appropriate precautionary measures commensurate with these “shoot to kill”-regimes are taken.

Proposed Way Forward: It is proposed to maintain the element of “belligerent nexus” as described in the Interpretive Guidance, and to review the passage on the distinction between “objectivized” and “subjective” intent with a view to clarifying the argument and avoiding confusing language.

5. Voluntary Human Shields

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

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

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

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

One of these experts supports this conclusion with the following six arguments: (1) To qualify as direct participation in hostilities, an act must directly (and physically) cause harm to the enemy or its military operations. Similar to a propaganda speaker trying to convince enemy forces to surrender, retreat or not to attack, voluntary human shields try to hinder the enemy to attack through moral and legal ways, but not through physical impediment of an attack. Conversely, a group of women blocking a road in an attempt to hinder tanks from attacking enemy forces would have to be regarded as directly participating in hostilities because they are at least trying to physically impede a military operation. (2) If the theory qualifying voluntary human shields as “unlawful” combatants or civilians directly participating in hostilities were correct, their presence would have no legal or moral impact on the ability of the enemy to attack the shielded objective and, therefore, cannot possibly amount to direct participation in the hostilities. (3) The purpose of qualifying voluntary human shields as “unlawful” combatants or civilians directly participating in hostilities is to allow direct attacks against the shielded objective despite the presence of the human shields. The logical (albeit absurd) consequence of such qualification would be, however, that it would become lawful for the enemy to kill every human shield individually through snipers without even attacking the military objective. (4) The distinction between voluntary and involuntary human shields is based on a factor which may be important in criminal law and law enforcement operations, but is irrelevant in hostilities. Members of state armed forces are legitimate military targets irrespective of whether they volunteer or are forced to join the forces and to attack the enemy. (5) The distinction voluntary and involuntary human shields cannot reliably be made by a pilot or soldier launching a missile on a military objective surrounded by civilians. Even

more difficult is the question of whether persons can be regarded as “voluntary” human shields if they are persuaded or misled to act through (false) propaganda, peer pressure or threats on the part of neighbors, employers or family, if they are not aware that the object constitutes a military objective, or if they are voluntarily crossing a strategically important bridge for other reasons. (6) There is a danger that the notion of voluntary human shields is abusively extended to everyone voluntarily being present in the vicinity of a military objective, thus entailing that the requirements of proportionality and precautions would rarely be respected when preparing an attack. Even apart from deliberate abuse, it is often difficult and controversial to distinguish cases of human shields from cases of simple lack of precautions.

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

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

VI. Beginning and End of Direct Participation in Hostilities

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

One expert: The statement that a preparatory measure qualifying as direct participation in hostilities does not need to be "strictly indispensable" for the execution of a subsequent hostile act contradicts the need to define such preparatory measures narrowly.³ Furthermore, in order to avoid what might be regarded as an instant death penalty for previous conduct, it may be preferable to refer to loss of protection until the "end of", rather than during the "return from", an operation.

One expert: The discussion on deployment and return and the temporal scope of direct participation in hostilities confirms the idea of a "revolving door" of protection, which should be unambiguously rejected. Instead, it should be decisive whether it may reasonably be concluded that the civilian in question will again directly participate in hostilities.

One expert expresses concern regarding the interpretation of "storing and hiding of weapons" as the end-point of direct participation in hostilities. Instead, the ongoing act of concealing a weapon may arguably amount to direct participation in hostilities or, at least, constitutes evidence of an ongoing association with military operations and, therefore, implies an intention to continue to be something other than a peaceful civilian.

One expert also argues that the qualification of deployment and return as direct participation in hostilities should be based on the intention of the acting persons as deduced from the objective circumstances. Accordingly, a person who returns to his home following direct participation in hostilities and stashes away a shotgun may be presumed to return to peaceful civilian life, whereas this is not the case if the same person returns home and stashes away an RPG. Furthermore, measures preparatory to acts qualifying as direct participation in hostilities may also independently amount to direct participation in hostilities, even without being linked to a specific act. For instance, a civilian handing out weapons

³ Exact quote: "Conversely, it is neither necessary nor sufficient for a qualification as direct participation in hostilities that a preparatory measure occurs immediately before or in close geographical proximity to the execution of a specific hostile act, or that it be strictly indispensable for its execution."

should be considered to directly participate in hostilities where it is clear that these weapons will probably be used against approaching armed forces.

Elements of Response: *According to Section V of the Interpretive Guidance, specific acts can amount to direct participation in hostilities provided that, inter alia, they are “likely to cause” harm reaching the required threshold. It is not required that the harm in question could not occur but for the specific act in question. The same logic should apply to preparatory measures, particularly in view of their often collective character. The terminology of “return from” is taken from the Commentary, which recalls that, during the course of the discussions at the Diplomatic Conference of 1974 to 1977, several delegations indicated that “hostilities” included preparations for combat and return from combat.⁴ On the “revolving door” of protection, see discussion Section VII (Temporal Scope).*

The mere “storing and hiding of weapons” does not, in and of itself, “directly” cause harm reaching the threshold required for a qualification as direct participation in hostilities. Therefore, such conduct should lead to loss of protection only where it constitutes an integral part of an ongoing military operation amounting to direct participation in hostilities, or where the circumstances are such that this particular conduct, in conjunction with other factors, constitutes reliable evidence that a persons assumes a combat function (which must involve acts that do amount to direct participation in hostilities). In the absence of combat function, it is not the subjective “intent” to carry out a hostile act in the future, but only the initiation of measures preparatory to a concrete hostile act, which lead to loss of protection prior to the execution of the act in question.

Proposed Way Forward: *It is proposed to retain the wording “return from” in the Interpretive Guidance and to clarify that it should be interpreted to cover the period until the “end of” a particular military operation or, at least, of the individual involvement therein.*

It is further proposed to retain the approach chosen in the Draft Interpretive Guidance, namely that the qualification of an act as “direct participation in hostilities”, including preparatory measures, “deployment to...”, “return from...” and specific acts such as the storing and hiding of weapons, should not depend on subjective intent, but exclusively on the three cumulative elements of “threshold of harm”, “direct causation” and “belligerent nexus”.

⁴ Commentary Articles 43 AP I, § 1679; Commentary Article 51 AP I, § 1943; Commentary Article 13 AP II, § 4788.

VII. The Temporal Scope of the Suspension of Civilian Protection

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

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

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

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

The requirement to base the determinations on "concrete, objectively verifiable facts" sets a very high threshold which too often may be unrealistic due to the dynamics and uncertainties inherent in armed conflicts.

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

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

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

The obvious lack of fail-safe criteria for the determination of "membership" in non-state armed groups does not justify sacrificing the integrity of IHL by rejecting the "revolving door"

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

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

VIII. Precautions and Presumptions in Situations of Doubt

All 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.

One expert, while not objecting to the operative text, hesitates to accept the textbox of Section VIII. Although the formulation is a logical consequence of the preceding sections, it still does not reflect the law properly. If taken at face value, this formulation obliges the armed forces to verify, first, whether a person is a civilian and, second, whether that civilian is directly participating in hostilities. Rather, they are obliged to take all feasible precautionary measures in determining whether a person is a legitimate military target either by membership in organized armed forces or groups or by direct participation in the hostilities.

One expert, recommends that the Interpretive Guidance should clarify that situations of doubt as to the identity of the adversary are particularly frequent in non-international armed conflict and the perceived "hostile attitude" of civilians towards armed forces involved in counter-insurgency operations is, in fact, more often fear of insurgent retaliation than genuine hostility.

One expert suggests that, with regard to the level of certainty that can be reasonable achieved in situations of doubt, the test of "reasonable belief" could be used, which finds support in *Prosecutor v. Gali*,⁵ as well as in many domestic jurisdictions, and which constitutes an objective test allowing for an honest but mistaken belief.

Elements of Response: *In principle, agreement with all three comments. Section VIII of the Draft Interpretive Guidance precisely intends to recall the obligation of belligerents to take all feasible precautionary measures in determining whether a person has lost protection against direct attack either through direct participation in hostilities or through membership in organized armed forces or groups.*

⁵ ICTY, *Prosecutor v. Stanislav Galic*, Judgement 5 December 2003 (Trial Chamber). § 50: "The Trial Chamber understands that a person shall not be made the object of attack when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the potential target is a combatant".

Section VIII bases the proposed standard of doubt on “the level of certainty that can reasonably be achieved in the prevailing circumstances”, which would appear to correspond to the proposed standard of “reasonable belief” used in the criminal proceedings of the ICTY and the IMT.⁶

Proposed Way Forward: *All three comments essentially correspond to the intended message of the Interpretive Guidance and will be taken into due consideration in its final revision.*

⁶ UNWCC, *Wilhelm List Case*, p. 69: “We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time [...].[...] It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made”.

IX. Restraints on the Use of Force in Direct Attack

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

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

1. Rejection of Standards and Concern over Consequences

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

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

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

2. Rejection of Standards and Need for further Discussion

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

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

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

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

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

3. Partial Support for the Proposed Standards

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

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

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

4. Full Support for the Proposed Standards

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

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

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

5. Terminology: Reference to “Arrest”

One expert urges caution and discretion in using the term “arrest” when military forces are conducting military operations. Very rarely do military forces “arrest” persons as that term is used in domestic law enforcement operations. To use the term without precision will serve to confuse the distinction between armed conflict operations and law enforcement operations. This, in turn, will lead to confusion about what legal framework applies, i.e. domestic law, IHL (LOAC) or human rights law. Most, if not all, military operations taking place in an armed conflict will not be law enforcement operations, and IHL will be the only or predominant legal framework.

6. Elements of Response and Proposed Way Forward

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

While “direct participation in hostilities” remains a technical term of IHL, and while the substantive legal analysis reflected in the Interpretive Guidance remains limited to the rules and principles of IHL, it cannot be ignored that, within the parameters of positive IHL, the consequences tied to civilian direct participation in hostilities may additionally be influenced by other international normative frameworks, which may be applicable in a particular context.

Whereas it would exceed the scope of this expert process to express its views as to how these normative frameworks may interact with IHL, or to what extent such interaction may further restrict the kind and degree of force which is permissible in a particular attack, it should be recalled that other applicable normative frameworks must be taken into consideration when determining the precise conditions and modalities which govern the loss of civilian protection in a particular context.

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

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

X. Consequences of Regaining Civilian Protection

The fact that persons have regained civilian protection against direct attack does not exempt them from prosecution for violations of domestic and international law, which they may previously have committed.

One expert recalls that the Interpretive Guidance focuses on the protection of civilians from direct attack and does not deal with other lawful measures (such as detention and prosecution) taken by States against non-state actors unlawfully participating in hostilities. The Guidance may be subject to misinterpretation unless significant effort is made to distinguish between the authority of States to lawfully target individuals and its authority to take lesser measures. The Guidance should clearly state that direct participation in hostilities may also subject the participants to detention and prosecution while also noting that, under the law of armed conflict, states have greater scope to detain individuals than they do to attack them directly. The Guidance should make clear that the direct participation in hostilities-test does not limit the lawful authority of states to take other measures against non-state actors. Failure to clarify this aspect may have the inadvertent effect of encouraging direct attack upon civilians taking a direct part in hostilities.

One expert: Section X raises the question of status upon capture. While it is acknowledged that the draft focuses only on the rules governing the issue of targeting, and not on the rules relevant in case of capture and detainment, it is important to bear in mind the relationship and mutual influences between both areas of law. Accordingly, it is also necessary to explore questions regarding the status of civilians and members of organized armed groups that are captured and detained in the course of hostilities.

Elements of Response: Agreement with the requested clarification as to the law enforcement authority of states.

In accordance with the scope given to this clarification process, questions regarding the status after capture of civilians and members of organized armed groups should not be addressed in the Interpretive Guidance.

Proposed Way Forward: The proposed clarifications with regard to the continuing law enforcement authority of states will be taken into due consideration in the final revision of the Interpretive Guidance.

Comments of General, Formal or Editorial Nature

1. Proposed Disclaimers and General Remarks

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

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

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

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

2. Structure, Form and Terminology

One expert suggests that it may be useful to number the paragraphs of the main text.

One expert believes the study would have been clearer if it had treated as international and non-international armed conflict in two separate sections. As non-international armed conflict has many unique characteristics, discussing international and non-international armed conflict in such close proximity to one another or in an overlap does not contribute to the study's overall clarity.

One expert believes it is a mistake to refer to persons as "military objectives". The capture or attack of a civilian who is taking a direct part in hostilities is covered by Article 51 [3] AP I, while the same acts against an object are covered in Article 52 [2] AP I. There intentional separation of the two should be preserved.

3. Presentation of Dissenting Opinions etc.

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

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

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

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

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

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

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

Several experts react to the references made in the Interpretive Guidance to the so-called “Targeted Killing”-Judgment of the Israeli Supreme Court:⁷

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

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

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

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

5. Proposed Way Forward

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

⁷ Israeli Supreme Court, *The Public Committee Against Torture et al. v. The Government of Israel et al.* (HCJ 769/02), Judgment of 14 December 2006.