



ICRC

Summary Report

Direct Participation in Hostilities under International Humanitarian Law

Introduction

On June 2, 2003 the International Committee of the Red Cross - jointly with the TMC Asser Institute - organized a one-day informal expert seminar entitled "Direct Participation in Hostilities under International Humanitarian Law". Hosted by the TMC Asser Institute in The Hague, the meeting brought together almost 50 IHL and military experts from a range of geographic and professional backgrounds, as well as representatives of the ICRC and the TMC Asser Institute (the seminar agenda is attached to this report).

Prior to the meeting, the participants received a comprehensive background paper providing an overview of the outstanding legal issues related to direct participation in hostilities under IHL, as well as of the different positions currently taken in scholarly writing or state practice with respect to each of the topics on the agenda.¹ The background paper also included a preliminary list of questions for each topic intended to facilitate reflection prior to the meeting, which was envisaged as a brainstorming session. In addition to the topical queries, the participants were also specifically asked to share their views on three general questions:

1. Would it be useful and necessary to clarify the notion of "direct participation in hostilities" under international humanitarian law?
2. If so, what type of clarification would be most useful, i.e. a general legal definition or some other approach?
3. How should work on clarification of the concept of "direct participation", if found useful and necessary, be carried forward?

This aim of this report is to provide a summary of the debates and results of the informal expert seminar. For the sake of clarity, it will follow the order of the meeting and present: I) an overview of the applicable law, II) current challenges to the notion of "direct participation in hostilities", III) the legal consequences of a "direct participation", and IV) future steps.

¹ The background paper, drafted by Jean-François Quéguiner, was written in a personal capacity and did not express, nor did it intend to express, the institutional position of either the International Committee of the Red Cross or of the TMC Asser Institute on any of the issues examined.

I. Overview of the Applicable Law

The first meeting session focused on the law applicable to "direct participation" in hostilities. Participants highlighted that the determination of the status and protection of civilians directly participating in hostilities has been a constant concern throughout the history of the codification of international humanitarian law. They felt it was important to keep in mind the original meaning of this notion, as well as its historical roots, in order to ensure coherence of approach; they noted, consequently, that the discussions should not be confined only to the terms used in the 1977 Additional Protocols to the Geneva Conventions, but should also include the historical development of relevant treaty provisions and the evolution of customary law on the issue.

Based on this historical perspective, the participants considered what difference, if any, there was between the notions of "active" and "direct" participation in hostilities. Although the phrase "active part in the hostilities" used in article 3 common to the Geneva Conventions has evolved into "direct participation in hostilities" in the text of the 1977 Additional Protocols, the Commentary to Additional Protocol I (confirmed by the jurisprudence of the International Criminal Tribunal for the Rwanda) considered these two legal formulations to be synonymous.² The Preparatory Committee for the Establishment of an International Criminal Court, on the other hand, seemed to consider these two notions as distinct, at least in the specific context of the recruitment of children. The Preparatory Committee stated that: "*The words 'using' and 'participate' have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat*".

Some seminar participants were of the view that the dichotomy between "active" and "direct" participation could serve as a basis for distinguishing between two groups of civilians: those increasingly contributing to military support operations, and "pure" civilians, such as children, who must be protected under all circumstances and be totally divorced from any activities linked to military operations. Civilians belonging to the first group could be considered to be actively participating in hostilities and therefore be subject to the specific legal regime provided for in the Additional Protocols, such as loss of immunity from attack. This proposal did not meet with unanimous approval. Certain participants felt that a distinction between the two categories would be difficult to implement in an armed conflict situation. In addition, it was said that treating certain civilians as more "civilian" than others could eventually undermine the general protection afforded to civilians as such.³

The discussion then turned to identifying specific acts that could be deemed to fall within the notion of "direct participation" in hostilities. There was general agreement that civilians attacking or trying to capture members of the enemy's armed forces or their weapons, equipment or positions, or laying mines or sabotaging lines of military communication should be considered to be directly participating in hostilities. Along the same lines, no opposition was expressed to the view that intelligence gathering for military purposes would, under certain circumstances, also constitute direct participation in hostilities. Similarly, there were no objections to the proposition that civilians working in depots and canteens providing food and clothing for the armed forces or in factories producing weapons

² ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, Decision of 2 September 1998, § 629.

³ For the sake of convenience, this document will only use the term "direct" participation in hostilities, rather than the term "active" participation. This choice was made for purely practical reasons and should not be viewed as prejudicing any of the positions expressed.

platforms should, in principle, not be considered to be directly participating in hostilities. Further examples were cited.

There were intense debates, however, on the qualification of a number of ambiguous situations, such as a civilian driving an ammunition truck in a combat zone. This example was cited throughout the discussions, because it was considered symptomatic of the many and complex issues generated by the notion of "direct participation" in hostilities. Although participants agreed that the truck itself was clearly a military objective, there was no agreement on the lawfulness of directly attacking the driver. Some participants felt that the driver could not be directly targeted and that the legality of any attack on the truck, causing injury to the civilian driver, should be considered under the principle of proportionality. Others deemed that the civilian driver had forfeited his or her protection from attack for the time he or she was thus participating in hostilities and could be targeted if no other means to stop the delivery of the ammunition were available. One expert was of the view that the driver had lost his or her immunity from attack for good and could therefore be lawfully targeted even at home.

Other ambiguous situations were also discussed. Some experts noted that possession of arms could not constitute "direct participation in hostilities" on its own because international humanitarian law allowed certain categories of non-combatants to carry weapons (e.g. personnel belonging to medical units and establishments). Others pointed out that carrying an arm could, nevertheless, be relevant in certain circumstances, as demonstrated by the interpretation of the notion of "hostile intent" in the rules of engagement of several armed forces.

To list only a few of the other unclear situations that were also mentioned, it was noted that the bombing of radio or television stations - implying that these sites have a certain strategic value - led to the troubling question of whether the role played by journalists in the course of hostilities and/or their activities could, under certain circumstances, be considered "direct participation in hostilities". Along the same lines, the status of political figures was classified as potentially problematic given that they were generally civilians (unless also members of the armed forces), but that some of their activities could be considered as directly or indirectly contributing to the hostilities. Another example given was the status of a "voluntary" human shield. Participants concluded that more work was necessary in order to determine the exact legal qualification of the above-mentioned truck driver, as well as that of other individuals involved in ambiguous situations.

In the view of the participants, future work on clarifying the notion of direct participation in hostilities should aim at formulating a general definition of direct participation, accompanied by a non-exhaustive list of examples. Although an overwhelming majority supported the idea of drafting a non-exhaustive list, most also felt strongly that such an exercise should not be an end in itself. Any potential list should be used to identify criteria implementable on the battlefield and as an illustration of the general definition.

In order to compile such a list, it was suggested that the first step be identification of acts considered unambiguous at either end of the spectrum of participation (acts constituting direct participation on the one hand and those definitely not falling within that notion on the other), and to extract from such a list abstract criteria on the basis of which an act could be classified as falling into one or the other category. Secondly, it was suggested that the general definition then be refined by testing ambiguous cases against it.

Regardless of the method ultimately chosen to clarify the notion of "direct participation", the content of the debates revealed that participants considered three basic criteria as essential to prospective work. According to almost all of the participants, a process of clarification should:

- (a) ensure respect for the basic rules of international humanitarian law, in particular the general principle of distinction, which must not be undermined under any circumstances;
- (b) take into account practical aspects regarding the implementation of the notion of direct participation, including the means available for determining whether a civilian is directly participating in hostilities;
- (c) make sure that any prospective definition be compatible with, *inter alia*, the rules of international criminal law, in order to ensure its applicability in all the relevant legal regimes.

While accepting that any definition of direct participation in international armed conflicts would have an important function in determining direct participation in non-international armed conflicts, some experts noted that the definition of the notion should not necessarily be identical in both contexts. They underlined the particular importance of domestic, as well as human rights law, in non-international armed conflicts.

II. Current Challenges: Does the Law Correspond to Reality?

The second session was devoted to the notion of "direct participation in hostilities" in the context of contemporary armed conflicts. There was agreement that the recent evolution in strategic theories and military practice had clearly had an impact on the meaning of "direct participation". It was noted, for example, that the progressive disappearance of the battlefield in the traditional sense as the result of new methods of warfare rendered inoperative definitions based on a person's geographic proximity to a combat zone. Another related illustration given was the increased reliance of some countries on technologically advanced means of combat often resulting in asymmetric warfare.

One expert explained how a number of factors - notably the dependence of modern armies on technology combined with decreasing military budgets and the relative cost-efficiency of private companies - had led some countries to outsource some of their military activities. Contracts for the sale of arms, for example, are no longer limited to the simple purchase of a weapon but often, even during an armed conflict, include the maintenance and functioning of the system by the civilian employees of the seller. Such agreements raise legitimate questions regarding the status of the employees involved.

While civilians have always supported the armed forces in some form, new developments have placed civilian employees of those forces in positions vital to the success of combat operations. The civilian truck driver mentioned in the first session was thus, in further discussions, replaced with the civilian computer expert sitting in a remote location and participating in an integrated military operation by, for example, compiling and interpreting computer data, including for the purpose of verifying the military nature of a potential target. This and other examples provoked numerous observations and gave rise to a clear divergence

of views. As in the first session, the discussion revolved around the relative meanings given to combatants and civilians:

- One group of participants attempted to sub-categorize the different types of civilians that could be considered legitimate targets. Some suggested that being affiliated to a military structure could, for example, be a sufficient reason for being considered a legitimate target of attack. Other experts, however, deemed this "organic" criterion insufficient and noted that this approach would result in aberrations, such as treating the residents of a military college as legitimate targets. Although the notion of "quasi-combatant" was unanimously rejected, a "functional" approach, dependent on the type of activity undertaken by the civilian was proposed, but finally also refuted as not practical. Some participants felt that distinguishing between a weapons-system employee and a cook providing food to the armed forces when all were wearing uniforms would prove difficult.
- A second school of thought opposed the creation of sub-categories of civilians that could be targeted. Repeating the doubts voiced in the first session in regard to creating a dichotomy between civilians, it was asserted that the establishment of intermediary groups would negatively affect the implementation of the principle of distinction. Noting the danger in applying the same criteria to a civilian weapon-system contractor and to the case of already mentioned civilian truck driver, participants emphasized that similar discussions had already taken place during the negotiations of Additional Protocol I and that this debate had been resolved by relying on the defined notion of "armed forces". They, therefore, concluded that it was not necessary to create new legal categories. One expert noted, however, that relying exclusively on the notion of (being a member of the) armed forces would not solve all issues, as this concept embraced multiple legal sub-categories and was, in addition, only relevant in the context of international armed conflicts.
- Finally, some experts were of the view that the notion of civilians who accompany the armed forces without being a member thereof - set down in Article 4(A) § 4 of the Third Geneva Convention - could possibly provide a solution to this difficult issue.

In this context, the notion of Computer Network Attack (CNA) - tentatively defined as operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves⁴ - was briefly discussed. No objections were raised to the idea that a CNA could amount to an armed attack even though it did not imply the use of kinetic force. It was stressed that the determining factor was the effective or potential consequences of an attack and not the means or methods used.

There was no opposition either to the hypothesis that a CNA would be subject to IHL if it were either part of a "classic" conflict or a cyber war in which injury, damage or destruction were intended or foreseeable and reached a sufficient level of intensity to be qualified as an "attack". Finally, noting that most computer operators are civilians, participants emphasized that the crucial question remained the status of the individual conducting a CNA. The proposition that an attempt to neutralize an enemy network via a CNA could be considered "direct participation in hostilities" was not called into question.

⁴ For a definition of CNA and relevant references, see SCHMITT, M., "Wired warfare: Computer network attack and *jus in bello*", *IRRC*, June 2002, Vol. 84 (846), p. 367 (and note 5).

Another current challenge to the notion of "direct participation in hostilities" briefly mentioned at the seminar arises from the fight against terrorism. The debate focused on whether the use of force against transnational non-state actors could qualify as armed conflict (international or non-international). One participant asserted that although operations by non-state actors (such as September 11, 2001) could be considered as armed attack, they could not qualify as armed conflict. This participant noted that existing international humanitarian law treaties did not govern the relationship between states and transnational non-state actors, adding that law-enforcement rules could be applied, but were not always appropriate to the particular situation.

According to the same expert, the lacuna in legal regulation in relation to the "war against terrorism" could potentially be filled by reference to the underdeveloped law of self-defense. This proposition was met with the objection that self-defense was a *ius ad bellum* concept and not a criterion relevant to the conduct of hostilities. In sum, the few seminar interventions that made explicit reference to the fight against terrorism essentially recapped the main lines of the debate on this topic that have emerged since September 11, 2001.

The distinction between direct participation in hostilities and individual self-defense was also raised in the debate. All the experts who spoke on the subject stressed that individual civilians using a proportionate amount of force in response to an unlawful and imminent attack against themselves or their property should not be considered as directly participating in hostilities.

III. Legal Consequences of Direct Participation in Hostilities

The third session examined the legal consequences of direct participation in hostilities with a particular focus on three issues: 1) loss of immunity from attack, 2) the legal regime applicable in case of capture and, 3) lack of immunity from prosecution.

1) Loss of Immunity from Attack (Targeting)

Bearing in mind that combatants have the right to directly participate in hostilities and do not, consequently, enjoy immunity from attack, the question was asked whether an attack on individual members of the armed forces while they were on leave, holiday or on assigned duties unrelated to the armed conflict would be lawful. The experts tended to agree that, since members of the armed forces are entitled to take up arms any time, consequently, for the duration of an armed conflict, they could be targeted in all the circumstances mentioned above, and in addition, when they are sleeping. Certain participants, however, nuanced this affirmation by recalling that the principle of "least harm" prohibited attacks on persons if less lethal alternatives were available.

The situation, however, was viewed as more complex as regards civilians - generically labeled "unlawful combatants" or "unprivileged belligerents" - who take a direct part in hostilities. According to articles 51 § 3 of Additional Protocol I and 13 § 3 of Additional Protocol II, civilians lose their immunity from attack, but only "for such time" as their direct participation lasts. How to determine the duration of direct participation provoked considerable debate at the seminar. In this respect, some participants emphasized that the planning phases of a military operation should be included in the definition of an armed

attack. The majority of the participants focused, however, on issues arising from the "revolving door" interpretation, under which civilians can reclaim the benefit of immunity from attack as soon as they have dropped their arms.

Some experts said that the notion of combatant should be defined broadly to include civilians participating in hostilities in order to avoid the possibility of an individual moving from combat operations to civilian status depending on the activities conducted by him or her at a particular time. They felt that whether "lawful" or "unlawful", such individuals should be deemed combatants and could therefore always be a legitimate target of attack. This view was strongly contested by others, who emphasized that such an interpretation would undermine the protection provided to civilians by the principle of distinction. They further added that such an interpretation could not be defended by the invocation of military necessity, because individuals could be neutralized - through arrest for example - from the moment they have dropped their arms.

The debate also covered the so-called "membership approach" to armed groups, generating very divergent positions among participants. It was generally acknowledged that, even in international armed conflicts, persons who are not members of the armed forces within the meaning of Article 43 of Additional Protocol I may, nevertheless, belong to an armed group using military force on a regular basis. The question was therefore asked whether belonging to a group directly participating in hostilities could be deemed a sufficient criterion for loss of immunity from attack. According to many of the experts, such an approach could not be justified either on the basis of the plain language of the Geneva Conventions or of Additional Protocol I, nor on the legislative history of the relevant provisions.

The situation was less clear in the context of a non-international armed conflict. In the absence of a definition of "combatant" or of "armed forces", some experts underscored that there were additional legal arguments and practical justifications that could be used to sustain a collective approach in this context. They suggested that, for example, membership in a military organization could result in loss of immunity from attack as long as the organization functioned like a military unit. A few of the experts, who did not support the membership approach, suggested that an alternative might be to rely on the common law notion of "conspiracy". This idea was not further elaborated; one expert simply further noted that this notion could be extremely broad in scope.⁵

The experts agreed that combatants could undertake lawful attacks involving the use of military force in the context of an armed conflict and that in other situations - including internal disturbances and tensions - traditional law-enforcement rules governed the use of lethal force, including that used in personal self-defense. Some participants did, however, highlight that standards regulating the use of force in situations of occupation differed from

⁵ The notion of conspiracy can be defined as "a combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act, or some act which is lawful in itself, but becomes unlawful when done by the concerted action of the conspirators, or for the purpose of using criminal or unlawful means to the commission of an act not in itself unlawful"; cf. BLACK'S Law Dictionary, West Publishing Co., St. Paul, Sixth Edition, 1990, p. 309. On the basis of jurisprudence adopted by United States courts, the Dictionary further notes (p. 310) that "a conspiracy may be a continuing one; actors may drop out, and others drop in; the details of operation may change from time to time; the members need not know each other or the part played by others; a member need not know all the details of the plan or the operations; he must, however, know the purpose of the conspiracy and agree to become a party to a plan to effectuate that purpose".

those applicable in situations of internal violence. They noted that the precise moment when the level of hostilities might trigger the application of conduct of hostilities rules in a situation of occupation was unclear and that - according to the spirit of the Fourth Geneva Convention at least - occupying powers were generally supposed to ensure security by means of law-enforcement measures (arrest, internment and trial for criminal offences). In that respect, one expert wondered whether new rules would be necessary, since the law of occupation had been drafted for transitional periods while practice demonstrated that such situations could last for decades.

2) *Legal Regime Applicable upon Capture*

The legal regime applicable to the capture and detention of civilians who have taken a direct part in hostilities raised some difficult questions, in particular regarding the scope of application of the Fourth Geneva Convention. Some experts - basing themselves *inter alia* on the *travaux préparatoires* of the Fourth Convention and a literal interpretation of Articles 50 § 1 and 45 § 3 of Additional Protocol I - were of the view that persons who do not fall within the scope of the Third Geneva Convention were necessarily protected by the Fourth Convention (provided the nationality criteria of Article 4 of GC IV were met). According to those experts, possible civilian engagement in violence (as saboteurs, for example) is implicitly acknowledged in certain provisions of the Fourth Geneva Convention, including articles 5 and 68. Others, however, contested this interpretation, arguing that civilians directly participating in hostilities constituted a *de facto* "intermediate" category covered by neither of the two above-mentioned Conventions.

But, even those who denied the applicability of the Fourth Geneva Convention to civilians directly participating in hostilities recognized that no individual could be left without protection. There was general agreement that Article 75 of Additional Protocol I, at a minimum, covered individuals captured in the context of an international armed conflict. In addition, many were of the view that any person, whether captured in an international or a non-international armed conflict or in any other situation, was protected by non-derogable human rights. In this respect, it was noted that if the *lex specialis* rule could be construed as regulating the interplay between human rights law and international humanitarian law in the context of the conduct of hostilities, this was not the case regarding the law applicable to the protection of an individual in enemy hands.

The question of the relationship between human rights law and international humanitarian law was also mentioned in the specific context of internment of civilians. None of the experts challenged the fact that internment could be one of the legal and practical consequences of direct participation in hostilities by civilians. Nor was it contested that such a measure could only be taken if absolutely necessitated by state security, and if security could not be guaranteed by the application of less rigorous means.

The discussion, however, did not focus on the nature of the activities that would be considered so prejudicial to the external or internal security of a state as to justify deprivation of liberty, but rather on the scope of rights in internment. Some participants suggested that the provisions of article 5 of the Fourth Geneva Convention could not be read today as if there had been no development in human rights law since the adoption of the four Conventions over

50 years ago. It was thus noted the right of *habeas corpus*⁶ remained fully applicable during detention and internment, as was the case with the right of all interned persons to access to a lawyer, to family and medical personnel within days of internment.

Some experts also underlined that there was a presumption of POW status in case of doubt about the status of a person who had taken part in hostilities in international armed conflict. They added that any decision on this issue should not depend on statements of an executive power, but should be made by a competent tribunal within the meaning of Article 5 of the Third Geneva Convention.

3) *Lack of Immunity From Prosecution*

Under international humanitarian law combatants in international armed conflict cannot suffer penal consequences for having directly participated in hostilities - or for lawful acts of war they may have committed during such participation - and they benefit from POW status in case of capture. The seminar participants agreed that even though it was not a violation of international humanitarian law for a civilian to fight for his or her country, the lack of combatant or POW status implied that the person was not protected from prosecution under the relevant national laws. No one contested that direct participation in hostilities by a civilian could not be considered as a war crime.⁷

Some experts added that prosecution for an act of hostility conducted by a civilian not benefiting from combatant or POW status should be clearly grounded in national law, as required by the non-derogable principle of legality found in several human rights treaties and in international humanitarian law. Even those who questioned the non-derogable character of this right nevertheless acknowledged that a civilian captured after direct participation in hostilities enjoyed the benefit of basic judicial guarantees provided notably by customary international law.

Finally, some experts recalled that even though civilians directly participating in hostilities could be prosecuted under domestic law regardless of whether they had respected the laws of armed conflict, the practice of granting amnesty to individuals who had taken up arms has emerged, notably through peace treaties.⁸ It was suggested that granting the broadest possible amnesty at the end of active hostilities could serve as an effective incentive to encourage civilians who took a direct part in hostilities to respect and ensure respect for international humanitarian law. Along the same lines, an expert also proposed *de lege ferenda* that parties to an armed conflict should refrain from pronouncing death sentences against

⁶ The right of *habeas corpus* in general is defined as “a variety of writs (...) having for their object to bring a party before a court or judge”. In common usage, and in the specific context mentioned above, these words are used to mean the *habeas corpus ad subjiciendum* defined as “a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained”. The purpose of this writ is to test the legality of the detention or imprisonment and not whether the person detained is guilty or innocent. For the definition cf. BLACK’S Law Dictionary, *ibid.*, p. 709.

⁷ The term “war crime” - sometimes used in domestic law in a generic sense to qualify any violation of international humanitarian law - is restricted here to its modern meaning, i.e. a serious violation of international humanitarian law leading to the possible application of the principle of universal jurisdiction.

⁸ In that respect, note that article 6 § 5 Additional Protocol II stipulates that: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”.

civilians who had directly participated in hostilities, provided they had respected the basic norms of international humanitarian law.

IV. The Future of the Notion of "Direct Participation in Hostilities": Would Clarification be Useful?

The fourth session was devoted to a discussion on the need or feasibility of embarking on a process of clarification of the notion of "direct participation in hostilities" and, if there was agreement on that point, on how work should be taken forward.

The common view was that the notion of "direct participation in hostilities" did not lend itself to a new normative codification but that further research, aimed at more precisely delineating the content of this notion, and its legal consequences, would be extremely useful. The experts were unanimous about the need for a follow-up meeting and provided ideas on the course to be pursued. Some experts suggested that the ICRC engage in *soft law* development, while others proposed that the clarification process be undertaken by means of an electronic conference. In short, the experts clearly pronounced themselves in favor of clarifying the notion of "direct participation in hostilities".

The ICRC used the opportunity of the expert meeting to briefly present some of its own thinking on preliminary elements that could possibly serve as a starting point for a future general legal definition of the notion of "direct participation in hostilities". In offering a set of elements having emerged from its internal thought-process, the ICRC made very clear that these elements were not tendered as a basis of negotiation, nor did they necessarily reflect the institutional position of the ICRC; the purpose was only to get on the spot, initial reactions from the experts that could assist the ICRC's Legal Division in further refining its internal reflection on the issue.

In that respect, the following four preliminary elements - limited to situations enshrined in article 2 common to the four Geneva Conventions - were thought to cumulatively describe behavior of civilians that could constitute 'direct participation in hostilities', thus rendering them temporarily military targets:

1. The person (committing the act) does not enjoy immunity from criminal prosecution for mere participation in hostilities;
2. The act is committed in relation to an armed conflict or occupation (situation triggering applicability of IHL);
3. The act is objectively, by its nature and purpose, directly causing or directly likely to cause harm to persons or objects belonging to the adversary or the civilian population;
4. The expected danger cannot likely be neutralized by any other than military means.

While some experts expressed a reluctance to comment on a definition they did not have time to fully study, others did provide initial, very useful comments. The fourth element in particular raised strong discussion from some who judged it to be non-operational and difficult to integrate in the military rules of engagement. The exact meaning of expressions like 'armed conflict', 'directly causing', 'directly likely to cause' and the notion of 'harm' used in the second and third element also raised some concerns. Observations were also made on the first element considered by one expert as circular and not particularly helpful in precisely defining the content of direct participation. More generally, some experts noted that the four

suggested elements did not refer to any temporal restriction on direct participation in hostilities nor did they solve the crucial question as to whether immunity (or loss of immunity) against attack was due to a specific status or the exercise of a particular activity. Finally, experts queried whether it would be possible to formulate a comprehensive definition applicable in both international and non-international armed conflicts. In summary, the experts considered these four elements as an interesting basis for further discussion but felt that more reflection was required.

Conclusion

Although probably too short in view of the multiplicity and complexity of the issues raised, the one-day meeting allowed for a first informal brainstorming session on the notion of "direct participation in hostilities". The variety of opinions expressed confirmed the perception that a unanimous interpretation of this legal concept does not exist and that much work is needed.

In answer to the three overarching questions posed by the ICRC at the outset of the meeting, the participants were virtually unanimous. It was clearly felt, as mentioned above, that the notion of "direct participation in hostilities" requires further clarification. The process of clarification could be facilitated by the compilation of non-exhaustive list of acts clearly considered to be covered or as falling outside the notion of "direct participation". Such a list should be accompanied by a general legal definition. The ICRC was deemed as the natural organization to lead the process and was encouraged to find the best way to continue the challenging and important process it had begun in cooperation with the TMC Asser Institute. Given the encouraging results of the meeting, the ICRC intends to continue expert consultations, including the organization of a follow up expert meeting in 2004.



'Direct Participation in Hostilities' under International Humanitarian Law

Agenda of the Meeting

8: 45 am - 9: 00 am

Welcome and registration

9: 00 am - 9: 15 am

Opening remarks by:

**Avril Mc Donald, Head, Section IHL/ICL, T.M.C. Asser Institute
Jean-Philippe Lavoyer, Head of the Legal Division, ICRC**

PART I (9: 15 am - 12: 40 pm)

The notion of 'direct participation in hostilities' in IHL

Chair: Jean-Philippe Lavoyer, Head of the Legal Division, ICRC

First session: Overview of applicable law

Based on the 1949 Geneva Conventions - where it was used for the first time - the notion of 'direct participation in hostilities' reappears frequently in the 1977 Additional Protocols to the Conventions. However, the treaties do not provide a definition of this legal concept. The aim of this session will be to examine the meaning of 'hostilities' and 'direct participation' and to identify the differences in their content in the context of international and non-international armed conflicts, based on concrete examples. The discussion would also focus on whether it is feasible or useful to lay down criteria for defining 'direct participation in hostilities' and, if so, what such criteria could be (types of activity, duration?). It would also address questions such as - is the notion of 'direct participation in hostilities' only applicable to individuals or can it also apply to armed groups? If a category of civilians who contribute to the military effort but do not directly participate in hostilities is mapped out, the session would then also examine which norms are applicable to this particular group.

- 9: 15 am - 9: 35 am** **Background Presentation**
Horst Fischer, Academic Director of the Institute for International Law of Peace and Armed Conflict, Ruhr-Universität, Germany; Professor of IHL, Leiden University, the Netherlands
- 9: 35 am - 9: 45 am **Commentator**
Charles Garraway, Colonel, ALS 2, Directorate of Army Legal Services, United Kingdom
- 9: 45 am - 10: 45 am **Discussion**
- 10: 45 am - 11: 00 am Coffee break*

Second session: Current challenges: does the law correspond to reality?

Contemporary conflicts pose special challenges in relation to the notion of 'direct participation in hostilities'. Examples are the increased intermingling of armed groups with the civilian population, the lack of identification of those taking a 'direct part in hostilities', and questions related to measures that could be taken to ensure the protection of those who do not directly participate in hostilities. An additional issue is how to distinguish a police from a military operation and the rules governing use of force in these respective situations. Another current challenge is the so-called 'privatisation' of armed forces and how the rules apply to outsourced employees of private companies. The second session would focus on these and other current points of tension in the implementation of the notion of 'direct participation in hostilities', as well as on possible solutions.

- 11: 00 am - 11: 20 am** **Background Presentation**
Michael Schmitt, Professor of International Law, George C. Marshall European Center for Security Studies, Germany
- 11: 20 am - 11: 30 am** **Commentator**
Hans-Peter Gasser, former Legal Advisor, ICRC
- 11: 30 am - 12: 40 pm** **Discussion**

12: 40 pm - 14: 00 pm Lunch

PART II (14: 00 pm - 17: 30 pm)
The consequences of direct participation in hostilities

Chair: Maria Nybondas, Researcher, T.M.C. Asser Institute

Third session: Legal consequences of direct participation in hostilities

Civilians directly participating in hostilities are traditionally considered as having waived their immunity from attack, thus becoming legitimate targets of attack for the time of their

participation, both in international and non-international armed conflict. In international armed conflict, what is the scope of protection enjoyed by individuals who directly participated in hostilities and fell into the power of the enemy: what is the applicability of the fourth Geneva Convention and of the first Additional Protocol in such cases? What is the field of application of article 5 of the fourth Geneva Convention? Are individuals who participated in hostilities always subject to criminal prosecution? Finally, in non-international armed conflict, how does the absence of combatant status affect the treatment and protection of persons who have directly participated in hostilities and have fallen into enemy hands? What are the applicable norms? Are individuals who participated in hostilities always subject to criminal prosecution? Do the questions posed above need to be analysed from a different perspective? The third session of the Expert Meeting would be devoted to an examination of these and other issues.

14: 00 pm - 14: 20 pm

Background Presentation

Louise Doswald-Beck, Secretary-General, International Commission of Jurists

14: 20 pm - 14: 30 pm

Commentator

William K. Lietzau, Special Assistant to the General Counsel, U.S. Department of Defense

14: 30 pm - 15: 45 pm

Discussion

15: 45 pm - 16: 15 pm Coffee break

Fourth session:

The future of the notion of direct participation in hostilities: is more law necessary?

The purpose of the last session would be to summarize the debate and, in particular, to determine what, if any, further steps are needed in order to clarify the notion of 'direct participation in hostilities'.

16: 15 pm - 16: 30 pm

Summary of proceedings

Avril Mc Donald, Head, Section IHL/ICL, T.M.C. Asser Institute

16: 30 pm - 16: 45 pm

Future steps

Jelena Pejic, Legal Advisor, ICRC

16: 45 pm - 17: 30 pm

Discussion