



ICRC

Expert Meeting of 25 - 26 October, 2004

**Direct Participation in Hostilities
under International Humanitarian Law**

Background Paper

This background paper has been prepared by Nils Melzer for the October 25 - 26, 2004 Second Informal Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law" that will be held at the Netherlands Congress Center in The Hague. The aim of the background paper is to provide a non-interpretive summary of the responses received to a questionnaire that the participants were kindly requested to respond to in advance of the Expert Meeting. Nineteen experts responded to the questionnaire as of the date of completion of the paper. The paper has been written in a personal capacity and does not express, nor does it intend to express, the institutional position of either the International Committee of the Red Cross or the TMC Asser Institute on any aspect of the topics discussed.

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Introduction

1. The Questionnaire (Reason, Purpose and Scope):

At the First Informal Expert Meeting on "The Notion of Direct Participation in Hostilities under International Humanitarian Law" held in June 2003, many participants expressed the opinion that further clarification of the notion of "direct participation" would be facilitated by a discussion of concrete examples. In view of this request, a questionnaire comprising a non-exhaustive list of examples that may or may not be deemed to constitute "direct participation" (Part I), as well as a series of general questions on the issue (Part II), was drafted by the ICRC and sent to the experts for feedback.

The questionnaire was devised as a tool to provide content and structure for further expert discussion of and contribution to clarifying the notion of "direct participation". It was drafted with a view to helping the experts identify areas of agreement - or disagreement – with respect to both specific cases and to some of the general questions related to the notion of "direct participation". The questionnaire is thus a basis for discussion at the forthcoming Expert Meeting and is in no way meant to stifle or exclude questions, comments, opinions or proposals on any other legal or other issue that might be of relevance to clarifying the notion of "direct participation".

Where not indicated differently, all of the cases and behaviour described in the questionnaire are assumed to have been carried out for "reasons related to an armed conflict" ("nexus"). While "direct participation in hostilities" entails various legal consequences for the person(s) involved - including the possibility of penal prosecution - the questionnaire focuses exclusively on the two aspects directly relevant to the conduct of hostilities, namely on the *definition of the notion itself*, as well as on the ensuing *loss of immunity from direct attack*. As already mentioned, the list of cases and questions included is non-exhaustive.

2. Purpose of the Background Paper:

As of the date of completion of this Background Paper (October 10, 2004), nineteen experts had kindly provided responses to all or parts of the questionnaire. Some experts who did not respond explained that their abstention was due to the difficulty encountered in responding with a clear "yes" or "no" to many of the questions. Some experts felt that a response to some of the questions would depend on circumstances that were not described in the questionnaire and would thus require a great deal of speculation on their part. These arguments are gratefully acknowledged. Experts who did not respond to the questionnaire for whatever reason will, of course, have a full opportunity to express their views and opinions on the questions during the Expert Meeting itself. We look forward to their participation and contributions.

The purpose of the Background Paper, based on the written feedback received, is to provide the participants of the Second Informal Expert Meeting with a non-interpretive summary of the responses received to the questionnaire and to propose questions that would merit further discussion.

3. Methodology Used:

General: The structure of the Background Paper essentially follows the sections and subsections of the questionnaire. For each section and subsection, a brief and general **summary** of the results is provided. Where necessary, the summary is followed by a **note** providing more specific information on the positions and views given by the experts. Throughout the paper, special attention was paid to points of agreement between the experts, as well as to the points that remained controversial. In order to focus the discussions, further questions were added after some of the sections and subsections under the title **questions to be discussed**. The proposed questions are of a tentative and non-exhaustive nature and are open to amendment or modification.

Part I (Specific Categories of Situations): The first part of the questionnaire, which describes examples that may or may not be deemed to constitute "direct participation in hostilities", essentially required a "yes" or "no" answer. Therefore, for this part, the background paper primarily provides an overview of the number of positive ("yes") and negative ("no") answers received. Where a clear "yes" or "no" was not given and could not be implied, or where an expert abstained from answering a question altogether, his or her response was marked as "n/a" (no answer). Where an expert added a remark or a condition to his or her response (regardless of whether it was "yes", "no" or "n/a"), this was also noted in the paper. *A full numerical breakdown of the answers to each question in Part I of the questionnaire is made available in Part I of the Annex.*

Part II (General Questions): The second part of the questionnaire, which deals with more general questions on the *notion* of "direct participation in hostilities" (A.), and on the *loss of immunity from attack* due to such participation (B.), required narrative answers. Extreme care has been taken to faithfully present the opinions and views expressed by the experts on these complex questions. At the same time, difficult decisions had to be made in summarizing those positions, while at the same time maintaining both the *accuracy* and the *accessibility* of the large amount of information and the wide variety of opinions provided. This task has been undertaken in good faith and to the best of the author's abilities. The author would be grateful if any inadvertent inaccuracies that may have occurred were pointed out to him for correction. *A complete list of the narrative responses received to Part II of the questionnaire is made available in full text in Part II of the Annex.*

Abstentions: In interpreting the number of abstentions ("n/a") in the responses to a specific question it should be noted that two experts abstained from answering all of the questions in Part I of the questionnaire, while another four experts abstained from answering all of the questions in Part II. As explained by the experts in question, their abstention was motivated by reservations or difficulties relating to the whole part of the questionnaire (e.g. Part I: general difficulty to provide clear "yes" / "no" answers. Part II: lack of time for sufficient research on each question), rather than by reservations or difficulties generated by individual questions.

PART I. Specific Categories of Situations

Section 1:

Direct application of means of destruction or injury for reasons related to an armed conflict

Summary: The first category of examples describes situations where means of destruction or injury are directly applied against the adversary. These situations are further divided into four subsections. While the examples dealing with *explicit combat activities* (1.1.; 1.2.), remained relatively uncontroversial, considerable controversy was generated by the examples of activities *related* to the type of direct participation in hostilities (hereinafter: "DPH") described in the present section (1.3.), as well as by those describing violence committed in the framework of *civil unrest* (1.4.).

1.1. Direct and immediate application of kinetic, chemical, biological, electronic or any other means with the aim of diminishing the military capacity of an adversary.

This subsection did not give rise to any major controversy. Except in 2 cases, all of the provided examples were considered to constitute DPH by between 13 and 17 experts, with no more than 1 expert contending the contrary. No more than 5 experts abstained from responding.

Note:

- Interestingly, compared to kinetic (16 "yes"), chemical (17 "yes") and biological means (17 "yes"), the use of electronic means was considered to constitute DPH by only 14 experts (1 "no"; 4 "n/a"). One expert required that computer network attacks (CNA) qualifying as DPH must *result* in death, injury or physical damage, whereas another expert required that the CNA be carried out deliberately. Yet another expert clarified that a CNA qualifying as DPH but originating from the territory of a state uninvolved in the conflict would not necessarily justify a counter attack against that state under general international law. Finally, one expert contended that the question of qualification of CNA as DPH was not settled at this time and depended on the situation.
- The use of "any other" means was considered to constitute DPH by only 10 experts (4 "no"; 5 "n/a"). One expert clarified that "any other means" must be intended to kill, injure, capture or damage in order to qualify as DPH.
- Regarding the use of a civilian means of transportation to collide it with a military objective, one expert explained that more information was required to answer to this question, namely on whether the individual in question was acting alone.
- An unarmed physical assault against a soldier on leave was considered to constitute DPH by only 8 experts (6 "no"; 5 "n/a").
- One expert required that even an unarmed assault against a soldier on duty must be part of sustained and coordinated operations in order to qualify as DPH.

Questions to be discussed:

Is an act qualified as DPH by the means used to carry it out or by the results achieved?

(Is it conceivable that there are means, which due to their nature will not qualify as DPH, regardless of the results? Are there certain results - e.g. death, injury, physical damage - that qualify an act as DPH regardless of the means employed?)

For the qualification of an act as DPH does it matter whether the object or person targeted is a legitimate military objective? (See also section 6 below.)

1.2. Delayed, indirect or remote controlled application of kinetic, chemical, biological, electronic or any other means with the aim of diminishing the military capacity of an adversary.

This subsection did not give rise to any major controversy. Except in one case, all of the provided examples were considered to constitute DPH by between 14 and 17 experts with no more than 1 expert contending the contrary and no more than 5 abstentions.

Note:

- The use of any other means was considered to constitute DPH by only 10 experts (3 "no" and 6 "n/a").
- Two experts pointed out that more information was required to interpret the meaning of "indirect" application. Another expert explained that he preferred the adjective "active" (over "direct") participation in hostilities because indirect participation could also qualify.
- One expert required that DPH through "electronic" or "any other" means must result in death, injury or physical damage.
- On the issue of electronic interference with weapons systems, means of communications, means of transportation and electricity networks, one expert noted that it constituted DPH only if such interference was deliberate.
- One expert emphasized that the intent of diminishing the military capacity of the enemy was a critical element for the qualification of an act as DPH.

Questions to be discussed: (Same as 1.1. above.)

Is an act qualified as DPH by the means used to carry it out or by the results achieved?

(Is it conceivable that there are means, which due to their nature will not qualify as DPH, regardless of the results? Are there certain results - e.g. death, injury, physical damage - that qualify an act as DPH regardless of the means employed?)

For the qualification of an act as DPH does it matter whether the object or person targeted is a legitimate military objective? (See also section 6 below.)

1.3. Activities related to the application of means of destruction or injury.

The answers to the questions of this subsection reflected considerable controversy. Only one of the questions generated relatively clear results, while all others gave rise to more differences of opinion.

Note:

- Threatening to engage in DPH, which 12 experts considered not to constitute DPH (2 "yes"; 5 "n/a"), was the only example in this subsection that produced relatively clear results. One expert explained his abstaining from answering this particular question by stating that the response depended on the circumstances. Another expert pointed out that while threatening did not constitute DPH, incitement would (see also responses to subsection 5.5. below).

All other questions gave rise to more differences of opinion:

- While the immediate preparation of an activity constituting DPH *with the intent* to personally participate in the prepared activities was considered to be DPH by 11 experts (4 "no"; 4 "n/a"), only 7 experts (7 "no"; 5 "n/a") contended the same even in *absence of such intent*. In this context, one expert also raised the question of the definition of "immediate" preparation.

- While deployment to the geographic location where an act constituting DPH is going to take place was considered to constitute DPH by 12 experts (4 "no"; 3 "n/a"), the return from the geographic location where these activities took place was slightly more contentious, with 11 experts (6 "no"; 2 "n/a") contending the same. One expert who tended towards considering that both the "deployment to" and the "return from" constitute DPH nevertheless cautioned that the response to this question may depend on the situation.
- Finally, the general (not immediate) planning or organizing of an act constituting DPH was considered to be DPH by 8 experts against 7 "no" and 4 "n/a". One expert contended that, as far as planning is concerned, it is necessary to distinguish between abstract/amorphous planning (which does not amount to "direct participation in hostilities") and concrete/detailed planning (which does).

Questions to be discussed:

Does every degree of involvement in the preparation, planning and organization of an act of DPH automatically also constitute DPH or can such involvement be too distant or indirect to justify loss of immunity from attack? Based on what criteria would the decisive distinction have to be made?

Should it make a difference that a person is *deploying* to or *returning* from DPH? Why?

Should it make a difference that a person intends to *personally* participate in DPH? Why?

1.4. Acts carried out during violent demonstrations and riots against authorities in control of a territory.

The answers to this subsection reflected a certain division of opinions. The consistent tendency was, however, not to consider acts of violence carried out in situations of civil unrest as DPH. With two exceptions, all situations were considered not to constitute DPH by 9 to 12 experts, with 2 and, in one case, 5 experts contending the contrary. There were between 5 and 8 abstentions. Only in one case were the opposing groups of equal size (sporadic but targeted use of firearms: 7 "yes"; 7 "no"; 5 "n/a") and only one example was considered to constitute DPH by a relative majority of experts (throwing of Molotov-cocktails and similar projectiles: 7 "yes"; 6 "no"; 6 "n/a").

Note:

- The *construction of roadblocks* and *destruction or looting of property*, for instance, was considered not to constitute DPH by 9 experts (2 "yes"; 8 "n/a"). One abstaining expert noted the critical importance of the element of intent.
- The *throwing of stones* was held not to constitute DPH by 12 experts (2 "yes"; 5 "n/a"). One expert held that the response to the question depended on the situation and pointed out that the throwing of a stone can result in serious injury or death and could even warrant the use of deadly force under more stringent domestic law.
- The *throwing of Molotov-cocktails* and *similar projectiles* was the only example which was considered to constitute DPH by a relative majority of experts (7 "yes", 6 "no", 6 "n/a"). One abstaining expert pointed out that the response to this question depended on the degree of the link with the hostilities and the means employed.
- Whereas the *shooting of firearms in the air* was considered not to constitute DPH by 9 experts (5 "yes"; 5 "n/a"), *individual and sporadic (but targeted) use of firearms* opposed equal groups of 7 experts each (5 "n/a"). One expert pointed out that the targeted use of firearms during civil unrest, while not constituting DPH, did not preclude the belligerent authority from using measures of law enforcement, including self-defence. One abstaining

expert reiterated that the response to this question depended on the degree of the link with the hostilities and the means employed. Another abstaining expert noted the critical importance of the element of intent and / or of the risk of death or serious bodily harm. Finally, one expert proposed that a distinction be made between riots taking place in the areas where actual hostilities are in progress (and where riots can hardly be distinguished from hostilities) and those taking place elsewhere (where riots would have to be seen below the threshold of DPH).

Questions to be discussed:

Is there a threshold at which acts carried out during violent civil unrest related to a situation of armed conflict may be qualified as DPH or must such situations always be handled according to law enforcement principles, including the use of lethal force in self-defence?

If yes, what are the decisive criteria?

- The targeted use of force by the demonstrators?
- The organised use of force by the demonstrators?
- The means and the kind of force used (stones, Molotov cocktails, firearms)?
- The motivation for and aim of the use of force?
- The gravity of the harm likely to be inflicted?
- Others?

**Section 2:
Establishment and exercise of control over military personnel, objects and territory for reasons related to an armed conflict**

Summary: The second category of examples describes situations where control is established and exercised over military personnel, objects and territory. These situations are further divided into four subsections.

The first two subsections (2.1.; 2.2.), describing the establishment and exercise of control by physical or electronic means over personnel, objects, computer networks and territory used by the adversary, remained relatively uncontroversial. A certain controversy was, however, generated by the described seizing of control over financial assets of the adversary (2.3.), and considerable controversy by other activities (threats, preparation, deployment etc.) *related* to the type of DPH described in the present section (2.4.).

2.1. Capturing or otherwise seizing physical control over military personnel of an adversary or their equipment, or over buildings or territory controlled by them.

This subsection did not give rise to any controversy. All of the provided examples were considered to constitute cases of DPH by majorities of between 12 and 17 experts with no more than 1 expert contending the contrary.

Note:

- One expert stated that whether or not the seizing of control over buildings or territory controlled by an adversary constituted DPH depended on the reaction of the adversary.
- Another expert stated that while the forcible seizing of equipment from combatants would constitute DPH, petty larceny of relatively insignificant items or the acquisition or abandoned equipment would not. The same expert contended that the qualification of establishing physical control over buildings as DPH depended on the nature of the buildings. Finally, this expert also asked what exactly was meant by "seizing physical control over territory" as formulated in the question.

2.2. Electronically seizing control over remotely guided weapons, weapons carriers or computer networks used by the adversary.

This subsection did not give rise to any major controversy. All of the provided examples were considered to constitute cases of DPH by 14 or 15 experts with no more than 1 expert contending the contrary.

Note:

- One expert stated that the electronic seizing of control over weapons and weapons carriers constituted DPH only when such control was established in order to subsequently *use* them and not when the aim was merely to *incapacitate* them.
- One expert also contended that the seizing of control over computer networks must result in *death, injury or physical damage* in order to qualify as DPH.
- Another expert emphasized that there was no difference between electronic and other methods of seizing weapons.

2.3. Electronically or physically depriving an adversary of access of his financial assets or resources by seizing control over bank accounts, cash reserves etc.

The answers to these questions reflected a certain controversy. While a majority of 11 experts held that physically or electronically seizing control over the financial assets of the adversary did not constitute DPH, 5 experts contended the contrary and 3 abstained from answering.

Note:

- One expert cautioned that the electronic deprivation of an adversary of his financial assets or resources could only constitute DPH if tied to the critical element of intent.
- Another expert, while considering that the described activities did not constitute DPH, proposed a distinction between ordinary financial resources and e.g., the national mint or gold reserves, for which the response to these questions will be different.

Questions to be discussed:

As the above described activities do not directly cause death, injury or physical damage, what are the criteria qualifying or disqualifying them as DPH?

If such activities do indeed constitute DPH, how can they be distinguished from hostile economic activities that would not constitute DPH?

2.4. Activities related to the establishment and exercise of control over personnel and objects used by the adversary.

The answers to the questions of this subsection reflected considerable controversy (see also 1.3. above). Only one of the questions generated relatively clear results, while all others gave rise to more differences of opinion.

Note:

- Threatening to engage in an act of DPH, which 11 experts considered did not per se constitute DPH (3 "yes"; 5 "n/a"), was the only example in this subsection that produced relatively clear results. One expert explained his abstaining from answering this particular question by stating that his response depended on the circumstances. Another expert pointed out that while threatening did not constitute DPH, incitement would constitute DPH (see also responses to subsection 5.5. below). Another expert, who favoured qualifying threats as DPH, cautioned that such qualification required that such threats result in reasonable belief of serious injury, death, or destruction of protected objects.

All other questions gave rise to more difference of opinions:

- The immediate preparation of an act of DPH *per se* was considered to constitute DPH by 10 experts (5 "no"; 4 "n/a"). In this context, one expert again raised the question as to the definition of "immediate" preparation. Another expert, who favoured qualifying immediate preparation as DPH, cautioned that such qualification required that the acts in question result in reasonable belief of serious injury, death, or destruction of protected objects.
- While deployment to the geographic location where an act constituting DPH is going to take place was considered to constitute DPH by 11 experts (5 "no"; 3 "n/a"), the return from the geographic location where these activities took place was more contentious, with only 9 experts contending the same (7 "no"; 3 "n/a").
- Finally, general (not immediate) planning of DPH was considered not to constitute DPH by 7 experts (6 "yes"; 6 "n/a"), whereas for the general (not immediate) organizing this ratio changed to 7 "yes"; 6 "no"; 6 "n/a". One expert contended that, while general planning did not constitute DPH if it remained purely theoretical or hypothetical, such planning would constitute DPH if it were subsequently to be carried out. Another expert contended that, as far as planning is concerned, it is necessary to distinguish between abstract/amorphous

planning (which does not amount to "direct participation in hostilities") and concrete/detailed planning (which does).

Questions to be discussed: (Same as 1.3. above.)

Does every degree of involvement in the preparation, planning and organization of an act of DPH automatically also constitute DPH or can such involvement be too distant or indirect to justify loss of civilian immunity? Based on what criteria would the decisive distinction have to be made?

Should it make a difference that a person is deploying to or returning from DPH? Why?

Should it make a difference that a person intends to personally participate in DPH? Why?

**Section 3:
Intelligence activities for reasons related to an armed conflict**

Summary: The third category of examples describes various intelligence activities and is further divided into four subsections. Overall, the answers to all of the subsections reflected a certain controversy, whether they concerned the gathering, processing and transmission of intelligence data (3.1.), the transmission of military orders (3.2.), the marking of likely targets on the ground (3.3.) or, again, other activities (threats, preparation, deployment etc.) *related* to the type of DPH described in the present section (3.4.).

3.1. By whatever means, providing, gathering, analysing and transmitting intelligence data.

The answers to this subsection reflected a certain diversity of opinion. Except for the two cases related to the *gathering* of intelligence, the other examples were considered not to constitute DPH by a relative majority of between 8 and 12 experts.

Note:

- The most controversial examples clearly concerned the *gathering* of intelligence by acting as a lookout or through unauthorized access to computer networks used by an adversary, which were both considered to constitute DPH by 9 experts (against 7 "no"; 3 "n/a", and 6 "no"; 4 "n/a" respectively). One expert favouring the qualification of electronic intelligence gathering as DPH cautioned that such qualification might perhaps depend on the situation.
- On the other hand, in spite of a few views to the contrary, a relative majority of experts considered that it did not constitute DPH to merely *provide* (4 "yes"; 8 "no"; 7 "n/a"), *analyze* (3 "yes"; 10 "no"; 6 "n/a") and *transmit* (4 "yes"; 10 "no"; 5 "n/a") already available information useful for military operations. One expert noted that the mere provision of information constituted DPH only when this was a *deliberate* act, and not when it was incidental, an opinion shared by another expert with respect to the analyzing and transmitting of intelligence data. Finally, one expert emphasized that the term "providing information" was overly broad, so that its qualification as DPH depended on the situation.
- Furthermore, the *launching* into orbit of *navigation satellites* was considered not to constitute DPH by a majority of 12 experts (5 "yes"; 2 "n/a"), while only a relative majority said the same for *reconnaissance satellites* (9 "no", 6 "yes" and 4 "n/a"). One expert qualifying the launching of satellites as DPH clarified that such qualification required that the satellites in question were destined for military use.
- *Remote control* from the ground and the *maintenance* of *satellites* once in orbit was held not to constitute DPH by 9 experts (against 6 "yes" and 4 "n/a") and 10 experts (against 5 "yes" and 4 "n/a") respectively. One expert clarified that his "yes" to this and the previous question applied only to reconnaissance satellites. Another expert explained that his "yes" to the questions regarding satellites were conditional on the fact that the act be carried out deliberately, with the aim of assisting military operations.

Questions to be discussed:

What would be the decisive criteria for qualifying an intelligence activity as DPH? The military value of the information to be collected? Other?

In view of the stage of development / complexity of modern communication systems, how can *intelligence gathering* activities constituting DPH and undertaken by those means be distinguished from the use of modern communication systems for other purposes (e.g. personal)?

3.2. By whatever means, the transmission of operational military orders.

Regarding this issue a majority of 11 experts considered the transmission of operational military orders to constitute DPH, 4 experts did not and 4 abstained. One expert noted that, to be considered as DPH, such transmission must have been done with the intent to help military actions. Similarly, another expert required that such transmission be carried out knowingly and wilfully for it to qualify as DPH, while yet another expert contended that the response to this question depended on the situation.

3.3. By whatever means, the marking of likely targets on the ground.

This question generated a certain disagreement, as 12 experts considered that the marking of likely targets on the ground constituted DPH, while 3 experts did not and 4 abstained. No further comments were made in this regard.

3.4. Behaviour *related* to intelligence activities.

Similar to subsections 1.3. and 2.4. above, this subsection generated considerable controversy. *Abstentions:* As in 1.3 and 2.4 above, the present questions concerned only those examples which had been considered to constitute DPH in the preceding subsections (i.e. "yes" answers). The relatively high number of abstentions in this subsection is thus probably explained by the relatively high proportion of "no" answers received in the preceding subsections.

Note:

- The immediate preparation of an act of DPH was considered to constitute DPH by 10 experts (3 "no"; 6 "n/a"). In this context, one expert again raised the question as to the definition of "immediate" preparation.¹ One expert supporting the majority opinion cautioned that the response to this question may depend on the situation.
- Interestingly, here, both deployments to the geographic location where an act constituting DPH is going to take place and the return from that geographic location were also considered to constitute DPH by 9 experts (5 "no"; 5 "n/a").
- Finally, general (not immediate) planning or organising of activities constituting DPH almost equally divided the experts: Both general planning and general organizing were considered to constitute DPH by 7 experts (against 5 "yes"; 7 "n/a", and 6 "yes"; 6 "n/a" respectively). One expert reiterated that general planning would not constitute DPH as long as it remained purely theoretical or hypothetical, but such planning would constitute DPH if it were subsequently to be carried out. Another expert supporting the majority opinion cautioned that the response to these questions could depend on the situation. Finally, one expert reiterated that, as far as planning is concerned, it is necessary to distinguish between abstract/amorphic planning (which does not amount to "direct participation in hostilities") and concrete/detailed planning (which does).

Questions to be discussed: (Same as 1.3. above.)

Does every degree of involvement in the preparation, planning and organization of an act of DPH automatically also constitute DPH or can such involvement be too distant or indirect to justify loss of civilian immunity? Based on what criteria would the decisive distinction have to be made?

Should it make a difference that a person is deploying to or returning from DPH? Why?

Should it make a difference that a person intends to personally participate in DPH? Why?

¹ See 1.3. and 2.4. above.

**Section 4:
Support activities for reasons related to an armed conflict**

Summary: This fourth category of examples describes various support activities to armed forces and groups and did not give rise to any major controversy. Except for one case, all of the examples described in the four subsections were considered not to constitute DPH by a majority of between 10 and 16 experts against very few contrary opinions. In fact, 11 of 28 examples were not considered to constitute DPH by any of the experts, while the remaining examples were considered to constitute DPH by up to 3 experts only and, in the case of voluntary human shields, by 6 experts.

4.1. Providing material such as weapons, ammunition, explosives, armoured vehicles, military computer programs etc. to armed forces or groups.

This subsection did not give rise to controversy. All of the specific examples were considered not to constitute DPH by a majority of between 10 and 15 experts, with no more than 3 experts contending the contrary. Between 3 and 6 experts abstained.

Note:

- One expert clarified that his "yes" to all questions in this subsection required that the relevant acts were carried out knowingly and wilfully, while another expert cautioned that the responses to the questions in this subsection would probably be geographically dependent.
- Regarding the examples of *logistical transport, hiding and stockpiling*, one expert clarified, that the material itself may nevertheless represent a military target. One abstaining expert explained that the answer to these questions depended on the circumstances.
- Concerning the question of scientific research, development, production and maintenance, an abstaining expert noted that these activities could constitute DPH if they were carried out deliberately, in relation to military operations.

4.2. Providing general supplies and services needed for military operations (such as electricity, fuel, generators, construction material, finances and financial services) to armed forces or groups.

This subsection did not give rise to controversy. All of the specific examples were considered not to constitute DPH by a majority of between 14 and 16 experts with no more than 1 expert contending the contrary and no more than 4 experts abstaining.

Note:

- One expert who contended that "sale to" and "purchase for" armed forces or groups of the described material constituted DPH clarified that such behaviour must be carried out knowingly and wilfully.
- One expert pointed out that qualifying the payment of "war taxes" as DPH would place the whole civilian population at risk due to the fact that civilians already pay either income taxes to governments or often have contributions extorted from them by insurgents (which could both be used to finance hostilities). Another expert, while emphasizing that the payment of "war taxes" did not constitute DPH, pointed out that the financing of terrorism is now subject to a special regime set up under Chapter VII of the UN Charter by the Security Council.

4.3. Providing non-medical life sustaining commodities (such as food, water, hygienic products, clothing, blankets) to armed forces or groups.

This subsection did not give rise to major controversy. Almost all of the specific examples were considered not to constitute DPH by a majority of 16 experts, with no expert contending the contrary and 3 experts abstaining.

Note:

- It should nevertheless be noted that the pattern was slightly different for the *provision of accommodation* (14 "no"; 1 "yes"), *shelter* (13 "no"; 1 "yes") and *hiding places* (10 "no"; 4 "yes") to armed forces or groups. Abstentions increased to 4 or 5 experts for these questions. One expert favouring that all three examples be qualified as DPH clarified that such a qualification would require that the relevant acts were carried out knowingly and wilfully.
- One expert also clarified that civilians working in canteens and depots on military bases assumed the risk of collateral effects of lawful enemy attacks on those bases even though their activity did not qualify as DPH.

4.4. As a civilian, through physical presence voluntarily shielding military objectives against attacks (voluntary human shield).

This example was the only one to provoke a considerable disagreement. Although a majority of 8 experts considered that such behaviour did not constitute DPH, 6 experts contended the contrary and 5 abstained.

Note:

- One abstaining expert and one of the experts who considered that voluntary shielding did not constitute DPH both pointed out that the shielded military objective in any event remained a military target.
- One abstaining expert also stated that voluntary human shielding generally did not constitute DPH, but cautioned that the response to this question may depend on the situation. Voluntary human shields thus assume the risk of collateral effects of lawful enemy attacks on the shielded objects.

Questions to be discussed:

What are the arguments / criteria for considering that the voluntary shielding of a military objective constitutes DPH?

**Section 5:
Affiliation to armed forces or groups directly participating in an armed conflict**

Summary: The fifth category of examples describes different qualitative degrees of affiliation to armed forces or groups, where necessary separating situations of international and non-international armed conflict.

While the subsections dealing specifically with international armed conflict (5.1.; 5.2.) remained relatively uncontroversial, those dealing specifically with non-international armed conflict (5.3.; 5.4.) did not always generate clear majorities.

The subsequent subsections on political, moral and other support (5.5.), as well as on civilian employees and contractors (5.6.), provoked little disagreement. The last subsection (5.7.), however, on how the decision-making role of political and religious leaders should be qualified, generated considerable controversy.

5.1. In an international armed conflict, accompanying armed forces of a party to the conflict without otherwise participating in the hostilities.

The accompanying of armed forces of a party to the conflict was unambiguously found not to constitute DPH by a majority of 14 experts (0 "yes"; 5 "n/a").

5.2. In an international armed conflict, regardless of personal behaviour, membership in an armed group not belonging to a "party" to the conflict. Accompanying such an armed group without otherwise participating in the hostilities.

While membership *per se* in an armed group not belonging to a party to an international conflict was considered not to constitute DPH by 8 experts (2 "yes"; 9 "n/a"), this majority increased to 13 experts (0 "yes"; 6 "n/a") for the mere accompanying of such an armed group.

Note:

- One expert contended that the qualification as DPH of the mere accompanying of such an armed group depended on the circumstances.
- Another expert noted that membership in an armed group not belonging to a party to the conflict constituted DPH only if that group was engaged in hostilities against a party to the conflict.
- Finally, one expert pointed out that the accompanying of such an armed group by civilians would not render these forces / military objectives immune from attack and would put the civilians at risk from the effects of the hostilities.

5.3. In a non-international armed conflict, does membership in *regular* or *dissident armed forces* render a person a permanent military target, regardless of personal behaviour? If yes, is this because he is *not a civilian*, or because such membership *per se* represents "direct participation" thus *suspending* civilian protection? Does accompanying such armed forces without otherwise participating in the hostilities constitute "direct participation"?

Some of the questions in this subsection did not generate clear majorities. Relatively clearly, though, membership in *regular* armed forces was said to render a person a permanent military target by a majority of 12 experts (2 "no"; 5 "n/a"), and the same conclusion was reached for membership in *dissident* armed forces by 10 experts (4 "no"; 5 "n/a").

Seven of these experts (3 "no"; 9 "n/a") contended that this was the case because the person in question was not a civilian in the first place, whereas the other 4 (5 "no"; 10 "n/a") considered

that membership in regular or dissident armed forces qualified *per se* as DPH, thus leading to the loss of protection.

The mere accompanying of regular or dissident armed forces was clearly considered not to constitute DPH by 12 experts (0 "yes"; 7 "n/a").

5.4. In a non-international armed conflict, does membership in an armed group *other than regular or dissident armed forces* render a person a permanent military target, regardless of personal behaviour? If yes, is this because he is *not a civilian*, or because such membership *per se* represents "direct participation" thus *suspending* civilian protection? Does accompanying such an armed group without otherwise participating in the hostilities constitute "direct participation"?

Contrary to membership in regular or dissident armed forces, membership in *other armed groups* was said not to render a person a permanent military target by a majority of 11 experts (3 "yes"; 5 "n/a").

One of the three experts contending the contrary said that this was the case because the person in question was not a civilian in the first place (2 "no"; 16 "n/a"), while 3 other experts considered that membership in an armed group qualified *per se* as DPH, thus suspending civilian protection (1 "no"; 15 "n/a").² In this regard, one of the 3 experts cautioned that the response depended on the situation, holding that it was not clear what exactly is intended or meant by the described category of "other armed groups".

The mere accompanying of armed groups was again clearly considered not to constitute DPH by the same majority of 12 experts (0 "yes"; 7 n/a) as in subsection 5.3. above.

One expert who refrained from answering the questions in this subsection noted that DPH depended on the implication of the armed group in the hostilities.

Questions to be discussed:

Why does membership in a *regular or dissident armed forces* engaged in non-international armed conflict render a person a permanent military target (according to the majority of responses received in the previous subsection), while membership in an *armed group* does not (according to the majority of responses received in this subsection)?

If membership in an armed group does not render a person a permanent military target, can the "revolving door" phenomenon be avoided?

5.5. Political, moral and other support for armed forces or groups.

The only controversial examples in this subsection concerned acts of motivating and preparing others to engage in DPH. While *recruiting* and *inciting* others for DPH was considered not to constitute DPH by a majority of 8 and 9 experts (5 and 4 "yes" respectively, and 6 "n/a"), the *training* of others for DPH was considered to constitute DPH by relative majority of 7 experts against 6 "no" and 6 abstentions.

All other examples were considered not to constitute DPH by a clear majority of 15 or 16 experts against 0 "yes" and no more than 4 "n/a".

One expert cautioned that the qualification of all the described examples depended on the situation, except the case of *expressing sympathy* for an adversary, which did not constitute

² In answer to this question, one expert who said that membership in an armed group did not render a person a permanent military target nevertheless responded to the following question (which was meant to be answered only by those who positively responded to that same first question).

DPH. According to this expert, *inciting* others to engage in DPH would probably not constitute DPH (e.g., a parent encouraging a son or a daughter to join the military).

Questions to be discussed:

Why does "recruiting" for DPH, according to the majority opinion, not constitute DPH, while "training" does? What is the qualitative difference between these two actions?

5.6. Civilian employees and contractors.

The questions in this subsection generated fairly little disagreement. The only activities of civilian employees or contractors that were found to constitute DPH by a majority of experts were the providing of security for military personnel and objects against military operations (12 "yes; 3 "no"; 4 "n/a").

Furthermore, the *rescue of military personnel* was held to constitute DPH by 5 experts (against 3 "no"; 11 "n/a"). Two experts specified in different words that rescue operations for the exclusive purpose of humanitarian assistance to military victims did not constitute DPH, whereas rescue operations for missing or lost military personnel did. Another expert concurred, stating that if the objective of the operation was to rescue a wounded soldier it did not constitute DPH, but if it was to avoid the capture of military personnel it did. Yet another expert contended that rescue operations for both military personnel and civilians would constitute DPH if the rescue takes place in territory not controlled by the rescuing party. According to one expert, the qualification of rescue operations benefiting civilians as DPH depended on the category of civilians to be rescued.

One expert also pointed out that the qualification as DPH of civilian intelligence activities in enemy or occupied territory would depend on the situation.

Finally, the provision of *security for civilian infrastructure* with war-sustaining value against military operations was held not to constitute DPH by 9 experts against a relatively strong minority of 5 experts and 5 abstentions. One expert pointed out that the qualification of such security services as DPH would depend on the situation.

All other described activities of civilian employees or contractors, including the (re) construction of military and dual-use infrastructure, were held not to constitute DPH by a clear majority of between 10 and 16 experts, with no more than 2 contending the contrary and 2 to 8 abstentions.

Questions to be discussed:

What are the criteria qualifying rescue operations by civilians for military personnel as DPH? Does it make a difference whether the personnel to be rescued is "hors de combat" or is lost or missing?

What are the criteria qualifying the provision of security for objects as DPH? The qualification of the objects in question as military targets? The nature of the threat (common crime or military operations) against which security is being provided? Other?

5.7. Leadership or responsibility for armed forces or groups.

The issue dealt with in this subsection is whether and to what extent the decision-making activities of political, religious and military leaders can be qualified as DPH. Except for the decision-making activities of military leaders, which were in all cases considered to constitute DPH by majorities of 14 or 16 experts with no more than 1 contending the contrary and no more than 4 abstaining, this was the most controversial subsection.

Political leaders: The experts were almost equally divided on whether the decisions of political leaders relating to the *basic engagement* of their armed forces or groups (7 "yes"; 6 "no" and 6 "n/a") and to the *specific methods* they were to use in doing so constituted DPH (8 "yes"; 6 "no" and 5 "n/a"). However, the decisions of political leaders on *specific operations and targets* were clearly considered to constitute DPH by a majority of 12 experts (3 "no"; 4 n/a).

Religious leaders: For religious leaders the pattern of opinions was slightly different. Religious leaders deciding on the *basic engagement* of their armed forces and groups were considered to be engaging in DPH by only 6 experts (against 7 "no" and 6 "n/a"), and decisions by religious leaders on *specific methods* to be used by their forces were considered to constitute DPH by 7 experts (against 6 "no" and 6 "n/a" respectively). Decisions of religious leaders on *specific operations and targets* were clearly found to constitute DPH by 10 experts (4 "no"; 5 n/a).

Questions to be discussed:

Should the characterization of a decision as DPH depend on whether it was made by a military, political or religious leader?

Is there any functional difference between political and religious leaders?

**Section 6:
Acts related to an armed conflict against protected persons and objects**

Summary: The sixth category of examples describes different acts directed against persons and objects protected by international humanitarian law. It generated considerable controversy, often with an almost equal number of experts supporting opposing views.

6.1. Looting and unlawful destruction of civilian property:

Looting and unlawful destruction of civilian property was considered not to constitute DPH by 9 and 7 experts respectively, opposed in both cases by 4 experts contending the contrary (6 and 8 "n/a" respectively).

One expert pointed out that, while qualifying unlawful destruction of civilian property as DPH would depend on the situation, a military commander may use deadly force to prevent destruction that would impede his military mission.

6.2. Deliberate killing, injury, unlawful deprivation of liberty, or humiliating and degrading treatment.

The qualification as DPH of the deliberate killing and injury of protected persons opposed equal groups of experts (6 "yes"; 6 "no"; 7 "n/a"). One expert pointed out that such killing and injury would have to be part of sustained and coordinated operations in order to qualify as DPH.

Unlawful deprivation of liberty and humiliating and degrading treatment, on the other hand, were said not to constitute DPH by 7 experts, against 5 "yes" and 7 "n/a".

One expert who abstained with respect to all the questions in this subsection stated that the responses would depend on the situation, namely on who is the perpetrator, who is the target and what is the reason for the act. The same expert pointed out that deadly force may also be used in law enforcement, regardless of whether the perpetrator was engaged in DPH.

6.3. Interfering with a civilian computer network (e.g. of a hospital, an electricity, heating or water distribution system, a public transport system or flight traffic control) resulting in harm to the civilian population.

Causing harm to the civilian population by interfering with a civilian computer network was held not to constitute DPH by a majority of 10 experts against 4 "yes" and 5 "n/a".

Note:

- One expert emphasized, however, that such interference had to be part of sustained and coordinated operations and had to additionally result in physical harm or damage in order to qualify as DPH.
- Another expert noted that if the act does not interfere with the armed conflict it is not DPH, but would be subject to criminal law.
- One abstaining expert stated that the responses would depend on the situation, namely on who is the perpetrator and what is the reason for the act. The same expert pointed out that deadly force may also be used in law enforcement, regardless of whether the perpetrator was engaged in DPH.

6.4. Behaviour related to acts against protected persons or objects.

Similar to sections 1.3., 2.4. and 3.4. above, this subsection generated considerable controversy. *Abstentions:* The questions in this subsection concerned only those examples which had been considered to constitute DPH in the preceding subsections (i.e. "yes" answers).

The relatively high number of abstentions in this subsection is thus probably explained by the relatively high proportion of "no" answers received in the preceding subsections.

Note:

- Threatening to engage in an act constituting DPH was considered not to be DPH by 6 experts against 3 "yes" and 10 "n/a". One expert supporting the minority opinion stated that a qualification of DPH required the simultaneous manifestation of threat, means and intent.
- The immediate preparation of an act of DPH was found to be DPH by 6 experts (3 "no"; 10 "n/a").
- While deployments to the geographic location where an act constituting DPH is going to take place was considered to constitute DPH by 6 experts (4 "no"; 9 "n/a"), the return from the geographic location where these activities took place opposed equal groups of experts (5 "yes"; 5 "no" and 9 "n/a").
- Finally, general (not immediate) planning or organizing of an act of DPH was considered not to constitute DPH by 6 experts against 3 "yes"; 10 "n/a" (planning) and 4 "yes"; 9 "n/a" (organizing).

Questions to be discussed:

What are the criteria for qualifying acts against persons and objects protected under IHL as DPH?

Section 7: Additional Questions
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Summary: This section contains additional questions with regard to those examples in the preceding sections and subsections that experts considered to constitute DPH.

Generally, experts held that an act constituting DPH must have a "*nexus*" to an armed conflict (7.1.), and that it did not necessarily have to be part of *collective operations*, but could also be an *individual and spontaneous act* (7.4.).

More diversity of opinion was generated by questions on whether an act constituting DPH must be motivated by a subjective *intent* and *wish* to engage in DPH (7.2.) and whether *geographical distance* to the zone of hostilities matters for the qualification of an act as DPH (7.3.).

7.1. Committing the same acts without any nexus to the surrounding situation of armed conflict.

A clear majority of experts considered that acts committed without any nexus to the armed conflict, such as in individual self-defence (14 "no"; 1 "yes" 4 "n/a") or acts of common crime (13 "no"; 2 "yes"; 4 "n/a") did not constitute DPH.

Note:

- One expert emphasized that self-defence could not be argued with respect to some acts.
- Another expert, while cautioning that the response to this question depended on the situation, contended that an act committed in self-defence or an act of common crime directed against a lawful combatant would constitute DPH even in the absence of a nexus to the armed conflict. The same expert pointed out that the use of deadly force might also be a law enforcement issue unrelated to whether the perpetrator is taking a direct part in hostilities.

7.2. Committing the same acts involuntarily.

The question of the importance of individual intent was controversial. The general tendency was to consider that *involuntarily* acts could also constitute DPH.

This was the opinion of 7 experts (against 5 "no" and 7 "n/a") for acts committed under threat, and of 6 experts (against 4 "no" and 9 "n/a") for acts committed upon requisition. Acts committed under force opposed equal groups of experts (6 "yes"; 6 "no" and 7 "n/a").

Note:

- One expert pointed out that, while involuntary behaviour did not constitute DPH, the reaction of the adversary nevertheless remained lawful.
- Another expert stated, on the other hand, that involuntary behaviour did indeed constitute DPH, but was without prejudice to the possible exclusion of individual responsibility.
- An abstaining expert said that the response to this question depended on the situation. Use of deadly force may be a law enforcement issue unrelated to whether the perpetrator is engaged in DPH. Given that a soldier responding to an act is unlikely to know whether the act is voluntary or involuntary, this question unduly places the burden on the soldier rather than on the civilian(s) committing the act(s) in question.

<p>Questions to be discussed:</p>
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<p>Is individual intent a defining element of DPH, with the effect that lacking individual intent precludes the loss of civilian immunity?</p>
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Or, does a lack of individual intent merely mitigate or preclude individual penal responsibility for the act in question?
How can individual intent or lack thereof be objectively identified in practice?

7.3. Committing these acts from a location in proximity to or very remote from the geographic zone of hostilities (assuming that the consequences remain the same).

The influence of geographic distance from the zone of hostilities on the qualification of an act as DPH generated some disagreement. A relative majority of 9 experts contended that the qualification of an act as DPH remained valid both when the act in question was in proximity to (3 "no"; 7 "n/a") and very remote from (4 "no"; 6 "n/a") the geographic zone of hostilities.

Note:

- One abstaining expert stated that "proximity" was a confusing term to be considered on a case by case basis.
- Another expert contended that an act would not constitute DPH unless proximity led to some kind of a nexus.
- According to another abstaining expert the criteria of remoteness and proximity did not make any difference.
- One expert also pointed out that the actual issue is the consequences, and not the location or the proximity of an act to the zone of hostilities. This expert reiterated that the use of deadly force may also be a law enforcement issue unrelated to whether the perpetrator is engaging in DPH.

Questions to be discussed:

Assuming that the results remain the same, does geographical distance to the zone of hostilities – whether proximity to or remoteness from it - matter for the qualification of an act as DPH?

7.4. Do such acts have to be part of collective operations or can they also be individual and spontaneous acts?

A majority of 9 experts (3 "yes"; 7 "n/a") contended that DPH did not have to be part of collective operations, and 12 experts (2 "no"; 5 "n/a") stated that DPH could also consist of individual and spontaneous acts.

Note:

- One expert specified that, in the case of an individual or spontaneous act, the act must still be linked to the armed conflict.
- Another expert, who shared the majority opinion, specified that an act qualifying as DPH must take place within the framework of hostilities.
- Another expert specified that – while both could constitute DPH - *collective* operations would more likely be regarded as DPH, whereas *individual and spontaneous* acts would more likely be regarded as a use of deadly force issue (law enforcement).

7.5. Any other important examples:

a) Clearly within the scope of "direct participation in hostilities":

- One expert proposed: "providing of shelter for armed groups" (but see subsection 4.3. above).

- According to another expert, the argument could be made that a state, which committed systematic, grave and large-scale human rights violations against part of its population committed a permanent aggression against this population. These violations could thus be regarded as a form of DPH even if they were not accompanied by military operations *stricto sensu*. Acts of armed resistance against such a policy of human rights violations would thus appear as acts of war (and not of terrorism, if they respected IHL) and of DPH.
- One expert mentioned the criteria of "knowledge of participation in hostilities".
- Another expert proposed: "direct attack of military personnel and military objectives; planning, executing, commanding such attacks".

b) Clearly outside the scope of "direct participation in hostilities":

- One expert proposed "logistical support for armed groups" (but see subsection 4.1. above).
- Another expert mentioned "acts committed without knowledge of their influence on the hostilities".
- Another expert proposed: "activities purely civilian in character".

c) In the "grey-zone", which needs to be further clarified:

- One expert proposed "actively participating in war propaganda" (but see subsection 5.5. above).
- Another expert contended that almost any activity short of direct attacks on enemy military personnel and military objectives would fall within this grey-zone, depending on the specific circumstances.

PART II. General Questions

A. The Notion of "Direct Participation in Hostilities":

1. Defining elements of the notion of "Direct Participation in Hostilities"

Summary: This section takes a closer look at a number of potential defining elements of DPH, namely: the *nexus* of an act to the armed conflict (1.1.), the *hostile intent* displayed by an act (1.2.), the *requirement of causality* between the act and harmful consequences (1.3.), the *added value of an act for the war effort* (1.4.) and the *eventual interrelation* between those criteria (1.6.). Experts were also invited to propose additional or alternative defining elements (1.5.). Generally, while there was wide agreement that an act must have a "nexus" to a situation of armed conflict in order to qualify as DPH, the other elements gave rise to considerable disagreement and need to be further discussed.

1.1. Nexus: *Does behaviour qualifying as DPH require a "nexus" to a situation of armed conflict, including occupation? If yes, how can such a "nexus" be defined / identified in practical terms, in order to distinguish e.g. direct participation from common crime?*

a) Requirement of a "nexus":

12 experts (against 2 "no" and 5 "n/a") found that having a "nexus" to a situation of armed conflict, including occupation, was a defining element of behaviour qualifying as DPH.

- One of the two experts who contended that there was no nexus requirement specified that deadly force may be used against an individual who is taking a direct part in hostilities or who is acting unilaterally for other reasons. Consequently, the attack on that individual may take place for military or law enforcement purposes.

b) Definition of a "nexus" (in order to distinguish DPH from "common crime"):

Note: The following elements were said to be indicative of a "nexus" between an act and a situation of armed conflict:

- The conduct took place "in the context of and was associated with" / "directly connected to an armed conflict".
- The act intends to obtain a military advantage for a party to the conflict.
- The act must have a direct impact on ongoing or imminent military operations.
- The act is only governed by the will to fight the enemy beyond any personal gains or interests.
- Behaviour that contributes in any way to the war effort.
- The act takes place in the framework of armed hostilities and is generally characterized by the quest for a military advantage. A non-violent act with political aims, which does not encourage violence against the adversary or which solely aims to satisfy a private interest is not an act of DPH.
- Membership in armed groups.
- Reference was made to the increasing amount of ICTY and ICTR jurisprudence on this very point (reference to ICTY, 96-23 and 23/1-A, *Kunarac et al.*, 12 June 2002, §§ 58 ff.; ICTR, 96-3-A, *Rutaganda*, 26 May 2003, §§ 570 ff.).

- One expert contended that there was no general and comprehensive definition of such a nexus.
- According to another expert, the term “nexus” did not help clarify the notion of DPH. For example, in pure IHL terms, DPH must be separated from "participation in the war effort" although both have a nexus to an armed conflict. The use of the term “common crime” also needs to be clarified, as DPH of "unprivileged belligerents", while not in and of itself prohibited by international law, could nevertheless at the same time constitute a “common crime” under domestic law.
- One expert stated that, as situations of armed conflict cannot easily be compared, a "nexus" should not be defined based on a precise criterion, but be based on several indicators allowing the determination of a ‘sufficient nexus’ or an ‘insufficient nexus’. Subjective and objective criteria should be used and need to be discussed. Setting up a ‘test’ would be a good idea.
- Another expert contended that there was a presumption of a "nexus" between an armed conflict and the acts of members of the armed forces of the parties to the conflict. The same expert held that a nexus between the acts of other individuals and an armed conflict must be established in each case.
- One expert emphasized that the intent or purpose behind the act of an individual (that is, "direct participation" vis-à-vis "common crime") may not be known at the time of use of deadly force against that individual. For example, given that an occupying power [in addition to its military role] has a responsibility for maintaining law and order, the end result [i.e. the use of deadly force] would likely be the same [regardless of the existence of a nexus between the act in question and the armed conflict].

1.2. Hostile intent: *Does behaviour have to display "hostile intent" in order to qualify as DPH? If yes, how can such "hostile intent" be identified in practical terms? Is there a qualitative or quantitative threshold requirement?*

a) Requirement of a display of hostile intent:

This question generated some controversy. In their responses to this question (and perhaps due to its wording), many experts deliberated on the requirement of the subjective aspect of "hostile intent", rather than on the recognizable, outward display of that intent, which had been the intended focus of this question. It was therefore difficult to evaluate the responses. Generally, 8 experts recognised subjective hostile intent as a requirement for the qualification of an act as DPH (against 5 "no" and 6 "n/a"). This leads to the same questions as in Part I, Section 7.2. (i.e. involuntary engagement in DPH). One expert, who held that behaviour qualifying as DPH did not necessarily have to display "hostile intent", specified that this was not necessary if a person could otherwise be determined to be taking an active or direct part in hostilities.

b) Identification of hostile intent:

Note: The following elements were said to allow the identification of "hostile intent":

- An action carried out in transparent manner with prior notice through the media or other open channels.
- The will to inflict some damage on the adversary. The question of a threshold is not relevant.
- The carrying of arms. Aiming to diminish the military capacity of an adversary.
- The individual should have meant to engage in the conduct and meant to cause consequences that negatively impacted enemy military operations.
- The threshold lies in the exercise of violence. The act aims at killing, injuring, capturing a person or an object; the preparation of such act of violence also constitutes DPH.

- One expert found it difficult to see how "hostile intent" could be relevant to DPH as it was a term associated with acting in self-defence and with rules of engagement and peace support operations. The question should not be one of display of hostile intent, but rather one of membership in an armed force or fighting organization engaged in the armed conflict.
- Another expert pointed out that it could be problematic to determine evidence of 'hostile intent', as intent is necessarily subjective. Although such intent can sometimes be identified based on the general behaviour of a person, this is not always possible, as a person can participate in a specific operation without showing "hostile intent". This expert concluded that hostile intent serves as a major indicator for identifying DPH but cannot be used on its own and independently of the context of the conflict. A set of indicators should be set up to evaluate the existence and reality of hostile intent.
- One expert contended that there was a presumption of "hostile intent" as regards the acts of members of the armed forces of the parties to a conflict. The same expert found that the hostile intent of other individuals must be established in each case.
- One expert explained that, in general terms (independently of the question of hostile intent), deadly force may be used if there is a reasonable belief of imminent threat of death or serious bodily harm.

Questions to be discussed:

The same as in Part I, Section 7.2. (Is individual intent a defining element of DPH, with the effect that lacking individual intent precludes the loss of civilian immunity? Or, does a lack of individual intent merely mitigate or preclude individual penal responsibility for the act in question? How can individual intent or lack thereof be objectively identified in practice?).

Regardless of the existence of subjective hostile intent, does a person have to display an objectively verifiable hostile intent in order for the act to be qualified as DPH?

1.3. Causality: *Does behaviour have to "directly cause" harmful consequences (immediate or delayed) to the enemy or the civilian population in order to qualify as DPH? If yes, do the harmful consequences of such behaviour have to reach a certain threshold in terms of "quality" or "quantity"?*

a) Requirement of "direct causality" between DPH and its harmful consequences:

Six experts found that, in order to qualify as DPH, an act must "directly cause" harmful consequences to the enemy or the civilian population, while 6 experts contended the contrary and 7 abstained or did not provide a clear answer.

Note: The following summarizes the views expressed by the experts:

- One expert stated that indirect causation may be sufficient, if the nexus can be established.
- Another expert said that, although the conduct need not directly cause the consequences, it must materially facilitate those consequences ("aid and abet the negative consequence").
- Another expert pointed out that the notion of DPH cannot be limited to acts "directly causing" harmful consequences, mentioning the example of a person "about to shoot". On the other hand, the same expert held that the extension of the notion of DPH to acts *indirectly* causing harmful consequences was problematic.
- Yet another expert stated that behaviour qualifying as DPH did not necessarily have to directly cause harmful consequences, but could also be limited to a mere threat in some cases. The response to this question would depend on the totality of circumstances.

b) Quantitative or qualitative threshold requirement for such "harmful consequences":

Note: The following summarizes the comments made concerning a possible threshold requirement for harm caused:

- There would need to be some sort of threshold in order to exclude behaviour that obviously does not constitute DPH.
- Minor intrusions should be excluded in this context.
- This would depend on the circumstances of the case and the nature of the consequences.
- Physical death, injury, destruction.
- One expert, contending that there was no threshold requirement, stated that this definition applies to civilians who are under the direct protection of the enemy at the time when the hostile act is committed.
- The element of causal connection should be considered primarily in terms of the function being performed (e.g. selecting targets in a national capital or gathering intelligence by "remote" means may constitute DPH in spite of the distance). There is nevertheless a geographical aspect (e.g. a civilian with a supply role well behind enemy lines is not engaged in DPH, while that same civilian delivering ammunition to the front lines would likely be considered to have crossed the threshold into DPH).
- If causality is an objective criterion, it seems difficult to evaluate the causality of a specific action without paying attention to the real knowledge and intent of the author of the act. This becomes even more difficult when responsibility for such an act is split between several authors who may or may not have the same degree of involvement and commitment to the act or project.

1.4. Value for war effort: *Is the "added value to the war effort" of an act sufficient to constitute "direct participation"? If yes, is there a qualitative or quantitative threshold requirement for such added value?*

A precise reading of the responses to this question suggests that it did not generate as much controversy as may appear to be the case at first sight. A majority of 9 experts held that the "added value for the war effort" of an act was not sufficient to qualify it as DPH (against 3 "yes" and 7 "n/a"). Even the three experts contending the contrary appeared to have interpreted "war effort" as direct contributions to combat operations, which would probably fall within the notion of DPH and was thus not the intended focus of this question.

Note: More specifically, the following views were expressed by the experts:

- The first expert (of the 3 "yes") said that "added value for the war effort" could be sufficient to qualify an act as DPH, provided that the other criteria (see 1.1. to 1.3. above) are met as well. The required threshold has both qualitative and quantitative elements, because minor support services should be excluded.
- The second expert (of the 3 "yes") said that the test (for the qualification of an act as DPH) is the impact of such added value on ongoing military operations.
- The third expert (of the 3 "yes") emphasized that the value of an act for the war effort cannot be equalized with DPH, because in many conflicts persons not participating in the conflict have some sympathy for one or the other party to the conflict. With regard to specific acts, their value for the war effort will depend on many criteria, such as the results of these acts, and especially the military advantage that such acts could have during the conflict as a whole.
- Another expert explicitly suggested caution on this question. This standard (of "added value to the war effort") would be analogous to the war-sustaining argument bearing on the definition of military objective. The key is not value added to the war effort, but rather effect on combat operations.

- One expert emphasized that the added value of an act for the war effort was too vague a criterion to justify the qualification of such acts as DPH.
- One expert stated that there may be some extreme examples, where the "added value to the war effort" of certain behaviour would be sufficient to constitute DPH, such as the activities of a key designer/developer of a new weapon of mass destruction, which is at a critical stage of completion. Thus, according to this expert, the issue is whether the rare exception should be the norm.
- One abstaining expert pointed out that it was not clear how "value" would be assessed.

1.5. Other criteria? *Do you have any other criteria to suggest?*

Note: A majority of 12 experts appear not to have felt that there were any important additional criteria to be taken into account. Nevertheless, the following additional criteria for qualifying an act as DPH were proposed:

- Any action, which under the circumstances would induce the commander to adopt any counter action or carries any threat to the physical or material safety of own forces.
- The clearest criteria would be a functional test. Armed forces and armed groups generally organize themselves along the same basic lines in order to deliver state-like violence in the context of an armed conflict. Therefore, if the person is performing a command, planning, intelligence, logistics, training or fighting role most commonly associated with an armed force, then he or she would logically be taking a direct part in hostilities.
- One expert contended that, contrary to the broader notion of "active participation in the military effort", DPH takes place on the battlefield, i.e. in an area of engagement and within the range of direct fire. Another criteria for qualifying an act as DPH would be that the civilian in question is endangering the life of the adversary or of persons under his protection, or is physically damaging facilities, equipment, or means of transport of the adversary (intelligence activities do not fall within these categories).
- One expert contended that in contexts where human rights law was applicable that body of law provided additional criteria for qualifying an act as DPH.
- One expert, while having no specific criteria to suggest, nevertheless proposed the following method of evaluation of the proposed criteria: all of the above criteria are clearly relevant for evaluating the notion of DPH, but cannot be identified in practice, as each of them is based on both subjective and objective elements. Moreover, in every armed conflict there will be contextual elements to be taken into consideration. One possible track would therefore be to use these criteria as mere presumptions that could be overturned following a precise and complete evaluation of the behaviour of each participant. The idea would be to qualify all indicators in a positive or negative manner (positive indicating DPH, negative indicating no DPH). A subsequent assessment balancing the positive and negative indicators would then lead to a conclusion as to whether a specific act constitutes DPH.

1.6. Please indicate whether the above criteria apply cumulatively or alternatively

Note: Interestingly, while not generating clearly opposing views, this question caused a relatively high number of abstentions. While 7 experts found that those elements which *are* required apply cumulatively, only 1 expert contended that the criteria applied alternatively. Eleven experts found the question not applicable / irrelevant or abstained from answering for other reasons. One expert held that the response to this question would depend on the circumstances.

2. International and non-international armed conflict

Is it possible to have a single definition of direct participation in hostilities applicable in both international and non-international armed conflict, or would it be necessary or opportune to envisage a separate definition for each context?

Summary: This question did not generate major controversy. The responses showed that a clear majority of experts thought that a single definition of DPH should apply for both international and non-international armed conflict (11 "single"; 2 "separate"; 6 "n/a").

Note: Nevertheless, many experts among the majority made additional remarks:

- One expert supporting a single definition of DPH cautioned that this requires that members of regular and dissident armed forces engaged in internal armed conflict have something akin to combatant status. Furthermore, the same expert found that the development of such a status, with its corollary, prisoner of war status, would be highly desirable.³
- Another expert pointed out that, while there should be a single definition of DPH, the circumstances establishing a nexus could be different.
- One expert held that the increased blurring of lines between international and non-international armed conflict and the applicable legal regimes made a single definition of DPH for all situations of armed conflict desirable.
- Another expert explained that, because DPH results in loss of civilian immunity from attack and can be prosecuted under domestic law in both international and non-international armed conflict, there must be a single definition of DPH for both situations.
- Another expert supporting a single definition of DPH pointed out that, while non-state actors in an internal armed conflict would ordinarily be classified as criminals (unless they receive some form of amnesty), they could still be targeted as direct participants under the IHL paradigm (if an armed conflict exists), because of what they do in the conflict.
- One expert advocated a single *set* of criteria and emphasized that the issue is one of loss of immunity from direct attack and not of status if captured.
- One expert who abstained from giving a "yes" or "no" answer said that a single definition for both types of conflicts would be the ideal solution. However, due to the various contextual differences occurring in situations of armed conflict, this expert expressed doubts as to the possibility of reaching a single definition. While it would be more satisfying from an academic perspective, a single definition would have to take into consideration the key differences between international and internal armed conflict from an operational point of view.
- One expert who supported a separate definition of DPH for international and non-international armed conflict explained that States had a particular responsibility for persons under their jurisdiction or effective control and that the criteria for loss of civilian immunity could therefore not be the same.

Question to be discussed:

What would be the legal and practical consequences of a single definition of DPH in international and non-international armed conflict?

³ See also responses to Part I, Subsection 5.3. above.

3. "Direct participation" vs. "individual self defence" and "common crime"

Does the exercise of mere self-defence by a civilian (who is not directly participating in the hostilities) against an unlawful attack lead to the loss of immunity against direct attack? If not, how can "individual self-defence" be distinguished from "direct participation in hostilities"? Can the employees of private companies, performing a variety of security activities for the military or for civilian companies claim individual self-defence when attacked? If yes, why? If not, why not?

a) Does the exercise of self-defence by a protected civilian against an unlawful attack lead to the loss of immunity against direct attack? How can "individual self-defence" be distinguished from DPH?

Summary: This question did not generate any major controversy. The experts appeared to agree that an act carried out by a person in self-defence against an attack unlawful under IHL did not constitute DPH and thus did not lead to loss of protection from direct attack. While 8 experts explicitly stated this opinion, 6 additional experts came to the same conclusion implicitly. Only 1 expert implicitly tended towards the contrary opinion and 4 experts abstained.

Note: Provided below is an overview of the variety of opinions expressed by the experts, grouped under a few thematic titles:

aa) Question of "unlawful" attacks:

- Two experts cautioned that the reference to an "unlawful" attack in this question was problematic. One of them contended that this could be interpreted as introducing the idea of "just war", while the other explained that a decision by a civilian to carry or use a weapon or otherwise engage in acts in "self defence" leads to a slippery slope that endangers the civilian population and the principle of distinction, and thereby the presumption that a civilian is to be respected and protected.

bb) Distinction between self-defence and DPH:

- One expert emphasized that "mere self defence by a civilian" should not be regarded as DPH because if it was, then defending oneself against an unlawful attack converts the defender into a military objective who can be attacked on sight.
- Two experts, each in different words, explained that self-defence does not involve a hostile intent or an intention to engage in DPH. One of these 2 experts stated that the distinction of an act of self-defence from DPH has to be made based on the surrounding circumstances. As opposed to DPH, an act of self-defence does not aim at achieving a military advantage but simply at protecting the life, physical integrity or freedom of the defender or of persons under his/her responsibility.
- Yet another expert pointed out that, to the outsider, self-defence and DPH may look exactly the same and involve the same actions and that the difference is in the trigger (of those actions).
- One expert also pointed out that, in order to counter an invasion, civilians have the option of acting as part of a levee en masse.
- Another expert contended that the burden of distinction is shared by the civilian and the soldier and that the "slippery slope" of acknowledging a "right" of self defence must be weighed against the potential risk to the general civilian population. Governments, individual civilians and the civilian population as a whole must accept some responsibility for ensuring that civilians not engage in acts that may place them at risk. While there is no doubt that

individual civilians are killed incidental to legitimate combat operations or, in some cases, are murdered, it is foolhardy to start down a road in which every decision by a soldier to resort to deadly force is second-guessed and subjected to judicial review.

cc) Narrow scope of self-defence in armed conflict:

- One expert contended that "self defence" should be given a very narrow scope, probably limited to defence of self or others against an unlawful imminent threat to life or bodily integrity or perhaps to situations in which medical personnel are allowed to use weapons. Anything broader could present major problems.
- Another expert emphasized that the decision by civilians to carry arms in the midst of an armed conflict is one fraught with danger and that therefore the occasions in which civilians might exercise individual self-defence are extremely limited.
- Yet another expert specified that an action carried out in self-defence of person or property is characterised by a limited response in terms of intensity and is time-confined to the period of threat or actual violence.
- One expert contended that, as long as the use of force remained limited to self-defence, no direct participation in hostilities could be identified. According to the same expert, this qualification would change only if civilians decided to transform their participation (i.e. the use of force in self-defence) into active participation in favour of one of the parties to the conflict. This expert also pointed out a practical difficulty, namely that in some situations, a civilian could have a twofold goal: self-defence, as well as involvement in the conflict.
- One expert cautioned that, although IHL does not exclude the individual right of self-defence, it is somewhat risky to exercise that right, as it may well constitute DPH. However, he added that if the adversary gets hold of a civilian who has exercised the right of self-defence, that civilian may not be punished.
- Another expert said that if civilians were directly attacked, they should surrender. If they were subsequently attacked despite an attempt to surrender, they could then exercise their right to self-defence.

dd) Acts exceeding self-defence may constitute DPH:

- Several experts held that protected persons who exceed the framework of self-defence under national criminal law by engaging in military activities such as defending combatants, other persons engaged in DPH, objects or territory against attacks linked to the conflict, whether lawful or unlawful under IHL, would themselves be engaging in DPH and thus lose their special protection under IHL.
- One expert said that the "grey-zone" cases are civilians defending civilian objects against unlawful attacks, while another expert contended that the right of self-defence did not apply against military attacks.

b) Can the employees of private companies, performing a variety of security activities for the military or for civilian companies claim individual self-defence when attacked?

Summary: Experts generally found that self-defence, as an inherent right, could be exercised by anybody, including the employees of private companies. However, the general view was that such self-defence would constitute DPH and thus lead to the loss of civilian protection if the personnel in question provide security for military personnel or military objects against enemy military operations.

Note: The following views were expressed by the experts:

- Several experts explicitly pointed out that anybody, whether combatant or non-combatant, can claim the inherent right of self-defence.
- According to one expert, civilian security personnel can claim individual self-defence when attacked unless they are providing security for military personnel or military objects against enemy military operations. In the latter case, they would be engaged in DPH.
- Another expert, who shared this (previous) opinion, stated that employees of private companies can claim self-defence when defending values not dedicated to military purposes. However, when defending values dedicated to military purposes, they are supposedly performing DPH.
- Another expert found that whether employees of private security companies have the right to defend themselves from unlawful attacks depends on whether they or their company are engaged in DPH.
- Yet another expert held that, when engaged in DPH, such personnel may be acting as “unprivileged belligerents”, while in other cases the duties would be more closely associated with security provided in a “law enforcement” paradigm.
- One expert, contending that the right of self-defence does not apply against military attacks, held that private security service members so attacked and engaged in military operations should be treated as belligerents. Private security companies could, in principle, be given combatant status by a state party to an armed conflict.
- One expert concluded that the main criteria for qualifying acts carried out in self-defence by employees of private security companies as DPH was subjective. If there were a clear understanding by the employees that their acts constituted DPH, then a qualification of DPH could be established. On the other hand, if the employees had no such understanding, a qualification of DPH would be difficult. In any event, this expert emphasized that the question could only be answered in practice, depending on the type of conflict in which the qualification takes place.
- Another expert held that the "demarcation line" between the involvement of private companies in the hostilities and their other security tasks is clear. The mere defence of a depot or of a hospital against looting, for instance, cannot extend to opposing the capture of those objects by the adversary. This would mean crossing the "demarcation line" into DPH. As long as the enemy forces are disciplined and respect IHL, the situation is clear. However, if they are poorly organised and do not comply with IHL, it will be difficult to tell whether the person who is defending the hospital is engaged in DPH or is simply exercising self-defence or defence of others against an unlawful attack. Unfortunately, one has to live with this ambiguity. In short, it appears that the response to this question is quite clear in terms of law, but that – as is often the case – the relevant facts are difficult to establish.
- Yet another expert held that the response to this question depended on the situation. Civilian security companies may respond in self defence to acts of violence threatened or committed against them or the facility they are hired to protect. Unless there is some evidence of perfidy, such private contractors would not be unprivileged belligerents, as they are acting on behalf of a government (either host nation, Occupying Power, etc.).

B. The Loss of Immunity From Attack:

1. Temporal scope:

How can the "temporal scope" of the loss of immunity from attack due to DPH be determined in practical terms?

Summary: At one end of the spectrum were experts who preferred narrowly defining temporal scope and favoured strictly limiting loss of protection to the period where DPH is actually being carried out. At the other end were experts who said that, once a person had undertaken an act constituting DPH, that person must clearly express a will to definitively disengage and offer assurances that he or she will not resume hostilities in order to regain protection against direct attack. However, opinions varied greatly and could not easily be divided into two groups supporting distinct positions. Four experts abstained from answering this question.

Note: Provided below is an overview of the variety of opinions expressed by the experts:

aa) Undecided responses:

- One expert identified two possible solutions: the first one would be that DPH automatically leads to a loss of immunity from attack until the end of the conflict; the second would be to say that DPH leads to a loss of immunity from attack only while an act is being carried out, while outside of that specific situation the person would continue to enjoy immunity from attack. This expert added that this is more theoretical than practical as there is little chance that the second solution would receive support from the enemy side. However, this second solution corresponds better to the text and the spirit of the Geneva Conventions and their Protocols.
- Another expert held that the temporal scope would depend upon the concerned individual's actions, duties or responsibilities. The same expert emphasized that the idea of a "temporal scope" of loss of protection runs counter to the presumption of civilian immunity from intentional attack. The "revolving door" endangers the overall civilian population, especially innocent civilians (more than 99% of population in most conflicts), who are taking no active or direct part in hostilities. The beginning and end of direct participation is dependent on many other factors.

bb) Narrower scope of loss of immunity from attack:

- One expert proposed a very narrow scope, suggesting the use of the objective criteria referred to in question 3 (a) below (i.e. "behaviour that is sufficiently visible and obvious to leave no room for doubt [maximum avoidance of erroneous targeting of persons protected against attack]").
- Another expert proposed a loss of protection *during* participation and *deployment towards* participation, but not *after* participation. Yet another expert contended that, in terms of the beginning of DPH, threats / preparation / planning etc. are to be excluded. According to the same expert, DPH starts with the actual carrying out of the act itself. In terms of the end, "somehow being away from the area where DPH took place" or "no longer posing a direct threat to the enemy" might be important factors.
- One expert held that the period of loss of immunity from attack ends when the civilian is no longer able to provoke any risk, danger or damage to the adversary or when the civilian comes out of the area of current military operations (where law enforcement measures could be used against him/her).

- Another expert contended that the temporal criteria for DPH appears to be the direct causal link between the act and the attack. Every attack results from a causal chain of acts. Any act decisively contributing to the attack, so that it becomes a *conditio sine qua non* for the attack, appears to constitute DPH (e.g. producing a car that *may* be used in an attack is not DPH, but driving this car *in order* to carry out an attack is DPH). All of this is without prejudice to the fact that a civilian is presumed to be a civilian until proof of the contrary.

cc) Wider scope of loss of immunity from attack:

- One expert held that although IHL is clear on how the temporal scope of loss of immunity from attack should be interpreted, in most cases it is difficult to argue that a person who participates regularly does not permanently lose his or her immunity against lawful attack. The key questions are the damage to uninvolved civilians that is to be avoided and the treatment in detention of persons having engaged in DPH.
- Another expert held that, if civilians engaged in DPH become combatants, albeit unlawful, then the whole point of the temporal scope goes out of the window. However, if someone involves himself in armed conflict in such a way that he is engaged in DPH, then he must take positive steps to disassociate himself from DPH in order to regain his immunity from attack. It is not enough simply to melt away into the night. He has joined the “common purpose” and remains a part of it. This does not mean that he becomes a combatant, but merely that he is a civilian without the protection that that status usually grants. If this approach were accepted, then many could live with a narrower definition of DPH; if not, then a wider definition, which would imperil many civilians in lesser support functions, may be necessary.
- Another expert held that DPH lasts from the start of firing until the surrendering of arms by the person engaging in DPH. As all the criteria are to be applied cumulatively (see above, Part II A 1.1-1.4), the beginning of DPH is determined by all of them and the end by the termination of one of them. But in that case a person having engaged in DPH must clearly express a will to surrender and offer assurances that he will not resume hostilities again.
- Similarly, another expert stated that the "revolving door" approach makes no sense. The direct participant should be required to affirmatively cease activities as a general matter. He or she bears the burden of proof and the risk that the cessation of DPH will not be understood by the former opponent.
- One expert stated that DPH of civilians is limited by the wording of AP I, art. 50 [3]: "*unless and for such time*". However, such participation is not limited to carrying weapons or deploying to military operations. To allow a "revolving door" of protection could place uninvolved civilians at risk and could be abused to plan future attacks. If civilians want to enjoy the protection of their status then they should be required to act fully and continuously as “innocent” civilians. In this context, any claim by an unprivileged belligerent to be an uninvolved civilian should be concretely demonstrated: by surrendering, overtly demonstrating a cessation of DPH, or by becoming *hors de combat*.
- One expert also stated that the temporal scope would depend on the actual circumstances prevailing.

2. Membership

If you consider membership in an armed group to constitute per se "direct participation in hostilities" (Section 5, Part I) and thereby to justify the loss of immunity against attack for the duration of such membership, how could such membership be defined and how could its beginning and (particularly) end be determined in practical terms?

a) Qualification of membership in armed groups as DPH ?

While 6 experts abstained, 7 experts limited their answers essentially to stating that they did not consider that membership in an armed group in and of itself constituted DPH.

Note: Nevertheless, several experts made additional comments:

- One of the experts who did not consider that membership in an armed group *per se* constituted DPH clarified that membership is only one of several criteria for the qualification of an act as DPH.
- Contrary to this view, another expert said that membership could be regarded as a presumption of DPH, which would be rebuttable if sufficient and clear indicators were given that such membership / support / sympathy did not automatically mean that the person in question would actually engage in an act of DPH.

While no other experts made explicit statements in favour of considering membership *per se* to constitute DPH, some of the responses to the second part of the question at least implicitly appeared to support this assumption (see below).

b) Definition of membership and determination of its beginning and end:

Note: The following views were expressed on this question:

- One expert cautioned that the concept of "membership" must be carefully assessed. The issue is not membership in a political movement, but rather membership in an armed group or "fighting organization". Where armed groups do not wear uniforms or overt signs of membership, then involvement might be assessed by the function performed (fighter, commander, planner, intelligence-gatherer, etc.).
- Another expert acknowledged that it would be difficult to determine the end point of membership in an armed group, but added that an affirmative step should be taken to sever the relationship (e.g. returning home from the battlefield while operations are ongoing, shedding of uniform and weapons).
- One expert pointed out that if membership in an armed group cannot be determined by a distinctive sign then it could, for example, be determined with reference to an existing link between the person and the armed group. In any event, this expert pointed out, determining membership will prove to be difficult.
- Another expert said that "membership" is an undefined and relative term. Many organizations do not have a formal "membership" process or have a very compartmentalized one. Therefore the response to this question would depend on the situation.
- Finally, one expert stated that domestic laws provide an effective answer by laying down provisions relating to membership of banned organisations which falls within the domain of national legislation and is capable of judicial scrutiny.

3. Revolving Door

In order to ensure the effective protection of persons who are not or are no longer directly participating in the hostilities while at the same time avoiding the "revolving door" scenario ("farmer by day, fighter by night"):

a. Objective criteria: *Could the definition of "direct participation" (and thereby the loss of immunity against attack) be restricted to behaviour that is sufficiently visible and obvious to leave no room for doubt (maximum avoidance of erroneous targeting of persons protected against attack)?*

Summary: This question generated clearly opposed positions, with 7 experts favouring a narrow definition of DPH, and 7 experts explicitly stating that this would be unhelpful, a bad idea or not possible. One expert proposed an alternative approach, and the remaining 5 experts abstained.

Note: Provided below is an overview of the variety of opinions expressed by the experts:

aa) General remark on "definition" of DPH:

- One expert pointed out that the term "definition" (of DPH) suggested that a clear definition could meet all circumstances and draw a bright line, requiring "no doubt" in a soldier's mind before resorting to deadly force. This would place an unfair burden on military personnel as combat is not the same as law enforcement operations. According to this expert, domestic and international judicial standards require a "reasonable belief," not absolute certainty. Attempting a more precise definition would be likely to encourage repetition of recent practices by some of use of human shields – voluntary or involuntary – and the unfortunate practice of inter-mingling civilians and civilian objects with military objectives.

bb) Narrower definition of DPH:

- One expert explained that a narrow definition of DPH would be preferable, in view of the serious consequences attached to DPH for the person who loses immunity, as well as for the person who misjudges a "grey-area" situation and targets a protected person. According to this expert, some obvious elements for a definition would include: acts of war (conduct) (by otherwise protected persons) that by their nature or purpose cause, or are likely to cause at the time of the act, actual harm to the personnel and equipment of enemy armed forces. These acts need to be directly connected to an armed conflict. DPH includes acts of war in response to an attack only if the attack is manifestly lawful.
- Another expert held that, from a purely legal and criminal law point of view, a narrow definition of DPH would be preferable as there must be evidence that the person is engaged in DPH. Even though security requirements in armed conflicts might tempt the parties to the include suspicious civilian behaviour in the notion of DPH, leaving room for such other criteria would be dangerous. There should be no doubt that targeted persons are consciously and wilfully engaged in DPH.

cc) Wider definition of DPH:

- One expert contended that adopting a narrow definition of DPH, although possible, would be a bad idea. The very notion of a "revolving door" places humanitarian law at risk by encouraging disrespect thereof.
- Another expert held that the test should not be whether there was "no" doubt in the mind of the person making the targeting decision, but whether the person is engaged in DPH. The

principle of distinction must be applied, but it does not require “visible” behaviour. What is required is that everything feasible be done to verify that the person is a valid target (AP I, art. 57). The issue of doubt has been dealt with in the ICTY *Galic* decision, which requires that there be a reasonable belief that the person in question is engaged in DPH. This has both objective and subjective elements, but does not require “no doubt” or “beyond a reasonable doubt”.

- Another expert shared this view, requiring, however, that the principles of precaution and proportionality be respected.
- One expert contended that a narrow definition of DPH leads to a slippery slope that should be avoided. As the protection of the civilian population is a fundamental premise of the law of war, actions should not be taken to encourage civilians to cross or “bend” the line. This would jeopardize the longstanding presumption of civilian immunity – and civilian adherence to refraining from engaging in activities contrary to that presumption.

dd) Alternative approach:

- One expert appeared to propose an alternative approach by suggesting that a non-exhaustive list of typical examples be developed. In his view, cases of doubt cannot be fully avoided.

b. Precautions: *Could the risks posed by a more extensive interpretation of “direct participation in hostilities” be balanced by a more strict interpretation of the obligation to take all “feasible precautions” in the identification of legitimate targets and in planning and deciding upon attacks?*

Summary: Although not without disagreement, a clear majority of 9 (3 “yes”; 7 “n/a”) experts found that this was not the way to go. The minority who favoured a more strict interpretation of the principle of precaution did not further explain their view. While it was felt that the principle of precaution was not open to a more strict interpretation, opinions nevertheless remained divergent in some aspects.

Note: The following views were expressed by the experts:

- One expert clarified that the duty to take precautions is to be interpreted strictly under all circumstances. It would therefore be unwise and confusing in practice to create a “more strict interpretation” for this obligation in relation to DPH.
- Several experts shared this view in different words, while one of them pointed out that it would be difficult to fashion a more stringent (and practical) requirement than the one already existing. This is the role of rules of engagement, which are designed to respond to individual circumstances.
- One expert explained that the reason underlying the obligation to take precautions in attack was the protection of “innocent” civilians and the avoidance of the unnecessary suffering of combatants. It does not extend to an obligation to protect fighters from being attacked.
- Another expert clarified that the word “feasible” means that which is practicable or practically possible taking into account all the circumstances ruling at the time, including humanitarian and military considerations.
- Another expert acknowledged that the approach outlined in the question was technically possible, but could be dangerous considering that it would entail differently interpreting the meaning of the term “feasible precautions”. If one extended the interpretation of “DPH”, while at the same time adopting a more restrictive interpretation of “feasible precautions”, this expert expressed doubt that the result would be very efficient. According to this expert, it would complicate rather than simplify things.

- One expert said that the response to this question depended on the situation and that "feasible precautions" at the individual soldier level involved rules of engagement and rapid decision-making when faced with a possible threat. This expert criticized the approach described in this question in that it places the entire burden on the individual soldier or military commander and none on the civilian population or the individual civilian. He pointed out that the term "feasible" was defined by consensus in Article 1 [5] of Protocol III of the 1980 UN Conventional Weapons Convention and emphasized that it should not be tampered with.
- Yet another expert preferred narrowly defining DPH to widely defining DPH, while at the same time adopting a more restrictive interpretation of "feasible precautions".
- Finally, one expert was of the opinion that obvious security considerations will always be of overriding importance.

c. Necessity: Could the risks posed by a more extensive interpretation of "direct participation in hostilities" be balanced by a more strict interpretation of the principle of "necessity" in the use of force against legitimate targets?

Summary: Again, although not without disagreement, a clear majority of 11 (3 "yes"; 5 "n/a") experts found that this was not the way to go. It was either said that the principle of necessity could not be interpreted "more strictly", or it was found to be inapplicable to operations against legitimate military targets in the first place. The minority who favoured a more strict interpretation of the principle of necessity did not further explain their views. Nevertheless, opinions among the majority remained divergent in some aspects.

Notes: The following views were expressed by the experts:

- Three experts contended that the principle of necessity did not limit the admissibility of or exclude an attack against a legitimate target. One of them pointed out that the principles that should be evoked are those of precaution, proportionality and of the least feasible damage.
- One expert emphasized that the proportionality test of AP I art. 52(2) for the targeting of objects does not apply to the targeting of persons.
- Reiterating the argument made with respect to the principle of precaution, one expert clarified that the principle of necessity is to be interpreted strictly under all circumstances and that it would therefore be unwise and confusing in practice to create a "more strict interpretation" for this obligation in relation to DPH.
- Another expert found that, just as for the principle of precaution, this is a question for rules of engagement.
- One expert pointed out that necessity is admissible only where foreseen by IHL. As an exception to the most fundamental principles of law, it must remain most restrictively interpreted.
- Another expert found that "necessity" and "DPH" are not norms, but standards that can be interpreted in a supple manner. Trying to more narrowly define the principle of necessity is, in his view, probably a lost cause.
- Similarly, one expert stated that the term "necessity" is undefined and unclear and that a situation often turns on judgment rather than on a precise formula, which courts traditionally have eschewed.

Questions to be discussed:

From the perspective of armed forces engaged in hostilities with organised armed groups it could be claimed that a "revolving door" approach to loss of immunity from attack would be unacceptable. Could it, however, be tolerated when armed forces are dealing with individual and sporadic acts of DPH within a context of armed conflict?

Conversely, from a humanitarian perspective, it would appear that "permanent" loss of protection is unacceptable as a consequence of spontaneous and sporadic acts of DPH by individuals. Could "permanent" loss of protection possibly be limited only to members of organised armed groups?

In other words: Would it be realistic / desirable / appropriate to adopt a membership approach when it comes to organised armed groups, but – *faute de mieux* - tolerating the "revolving door" approach with respect to individual and sporadic acts of DPH carried out by civilians?