



ICRC

Executive Summary Background Paper 2004

1. The Background Paper and the Questionnaire: The purpose of the following background paper is to provide the participants of the Second Expert Meeting on “Direct Participation in Hostilities under IHL” with a non-interpretive summary of the responses received to a questionnaire that was sent to them in advance for feedback. The primary purpose of that questionnaire was to help identify the main issues of agreement and, respectively, disagreement between the experts related to the issue of “direct participation in hostilities” (DPH). This would allow to better focus and structure the discussions and would thereby facilitate the further clarification of the notion of DPH.

2. Specific Categories of Situations: Part I of the questionnaire primarily comprises a non-exhaustive list of examples that may or may not be deemed to constitute DPH and required essentially a “yes” or “no” answer.

Main Points of Agreement:

- Most of the examples describing the application of means of destruction (Sections 1 & 2) against the personnel, equipment or positions of an adversary - whether direct or indirect, immediate or delayed - were clearly considered to constitute DPH by a majority of experts.
- On the other hand, almost all of the support activities (Section 4) were considered not to constitute DPH by a majority of experts.
- Experts also generally agreed that an act constituting DPH must have a "nexus" to an armed conflict, and that it did not necessarily have to be part of collective operations, but could also be an individual and spontaneous act (Section 7).

Main Points to be Further Discussed:

- More differences in opinion were generated by the examples describing activities related to acts of DPH (Section 1, 2, 3 & 6), acts occurring during violent civil unrest (Section 2) as well as intelligence activities (Section 3).
- Some of the questions relating to the various degrees of affiliation to armed forces and groups (Section 5) also failed to generate clear majorities, particularly with regard to non-international armed conflict and to the qualification of the military decision-making activities of political and religious leaders.
- The examples concerning acts carried out against protected persons and objects (Section 6), although generally considered not to constitute DPH, nevertheless found relatively strong minorities supporting the contrary view.
- A certain diversity of opinion was also generated by questions on whether an act constituting DPH must be motivated by a subjective intent and wish to engage in DPH and whether geographical distance to the zone of hostilities matters for the qualification of an act as DPH (Section 7).

3. General Questions: Part II of the questionnaire, which deals with more general questions related to the notion of DPH (A.) and on the loss of immunity from attack (B.) due to such participation, required narrative answers.

A. The Notion of DPH:

- **Potential Defining Elements:** 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 requirement of a hostile intent displayed by an act, the requirement of causality between the act and harmful consequences, the added value of an act for the war effort and the cumulative or alternative interrelation between those criteria gave rise to considerable disagreement and need to be further discussed.
- **International and Non-International Armed Conflict:** A clear majority of experts thought that a single definition of DPH should apply for both international and non-international armed conflict.
- **Direct Participation, Self-Defence and Common Crime:** 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. However, the general view was that such self-defence would constitute DPH and thus lead to the loss of civilian protection if the persons in question provide security for military personnel or military objects against enemy military operations.

B. The Loss of Immunity from Attack

- **Temporal Scope of Loss of Immunity from Attack:** This question clearly was the most controversial of the whole questionnaire. 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.
- **Membership Armed Groups as DPH?:** While several experts limited their answers essentially to stating that they did not consider that membership in an armed group *per se* constituted DPH, the responses of several others regarding the determination of the beginning and end of such membership appeared to support, at least implicitly, the opposite view.
- **"Revolving-Door" Phenomenon:** The question whether the *notion of DPH should 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) gave rise to clearly opposed positions between almost equal groups of experts. Regarding the question, whether the risks for the civilian population created by a more extensive definition of DPH could be balanced by a more strict interpretation of the principle of "precaution" or principle of "necessity", on the other hand, a clear majority of experts found that this was not a viable option, primarily as these principles could not be interpreted in a more "loose" or "strict" way than originally intended.