



ICRC

Second Expert Meeting on the Notion of Direct Participation in Hostilities

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Summary Report

Co-organized by the ICRC and the TMC Asser Institute

This report was drafted by Nils Melzer, Legal Adviser of the ICRC, in a personal capacity and does not express or intend to express the institutional position of either the International Committee of the Red Cross or of the TMC Asser Institute on any of the issues examined. Equally, all oral and written contributions referred to in this report, whether nominally attributed or not, were made in the personal capacity of each expert and do not express or intend to express the position of any government, organization or other institution.

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Introduction

In the framework of its project "Reaffirmation and Development of International Humanitarian Law", the International Committee of the Red Cross (ICRC), in cooperation with the TMC Asser Institute, organized a Second Expert Meeting on "Direct Participation in Hostilities under International Humanitarian Law". This meeting, which took place on 25 and 26 October 2004 at the Netherlands Conference Center in The Hague, brought together almost forty legal experts representing military, government, and academia, as well as international and non-governmental organizations.

The event was part of a process of clarification of the notion of "direct participation in hostilities", which was initiated in 2003 and is intended to conclude in 2006. The process aims to identify the defining elements of "direct participation in hostilities" and to establish guidelines for the interpretation of that notion in both international and non-international armed conflict.

In preparation for this Expert Meeting, the ICRC had submitted an extensive questionnaire on the notion of direct participation in hostilities to the participants. A background paper evaluating the responses to the questionnaire received from the experts, as well as two commissioned papers drafted by Prof. Michael N. Schmitt ("Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees") and Prof. Michael Bothe ("Direct Participation in Hostilities in Non-International Armed Conflict") provided background material for the discussions. While a growing consensus emerged on certain issues, a number of questions remained clearly controversial and require more focused discussion.

The aim of this report is to provide an overview of the discussions held during the Expert Meeting as well as of the conclusions reached with regard to the further steps to be taken. For easier accessibility, the report is structured along the thematic order of the meeting's agenda (see annex) and summarizes the main interventions made by the experts during the course of the different working sessions.

I. Acts aiming at Destruction, Injury, Capture and Control

***Thematic scope:** The first group of topics was selected based on Sections 1, 2 and 6 (Part I) of the questionnaire and essentially covered the direct application of means of destruction or injury against the adversary, the establishment and exercise of control over military personnel, objects and territory, as well as acts directed against protected persons and objects. Topics also included acts carried out in situations of civil unrest, as well as acts of preparation of, deployment to and return from certain hostile activities. The following issues were the focus of interventions made by the experts.*

1. The importance of subjective intent for the qualification of an act as direct participation in hostilities

Several experts contended that, theoretically, "subjective intent" was a better criterion for the qualification of an act as direct participation in hostilities than attempts to define an objective list of activities (including the "use of certain means") that would constitute DPH. In practice, however, subjective intent could not be of decisive importance for an operable definition of DPH, as the reality of military operations did not allow for a careful determination of subjective motivations of each and every individual.

In light of these observations, other experts pointed out that a subjective intent criterion might be coupled with the nexus of an act to the armed conflict to produce useful indicators for DPH as determined from the point of view of the soldier. In this regard, reasonable belief in the existence of subjective intent based on the concrete circumstances should be sufficient. Subjective intent could also be inferred when the objective aim of an act was to diminish the military capacity of the adversary. One expert emphasized that, in practice, the effort that could reasonably be dedicated to the determination of subjective intent depended on the available time.

2. The importance of the means used for the qualification of an act as direct participation in hostilities

Few interventions were made on this issue. One expert explicitly contested that the use of certain means could qualify an act as DPH and stated that the focus should be on subjective intent. Another expert proposed, however, that subjective intent to engage in DPH could be indicated precisely by the use of certain means or types of weapons as illustrated, for example, by the use of firearms during demonstrations. One expert recalled that in some contexts and situations, machetes and spears could be used to carry out acts of DPH, while in other situations these weapons were carried by civilians for traditional or ceremonial purposes.

3. Qualification of planning as direct participation in hostilities

Several experts proposed to distinguish different qualitative levels of planning. One expert contended that, as far as planning is concerned, it is necessary to distinguish between abstract or amorphous planning, which would not amount to DPH, and concrete or detailed planning, which would. Along similar lines, another expert proposed distinguishing between strategic and tactical planning, with only the latter constituting DPH. Operational planning, on the other hand, would only constitute DPH to the extent that it actually affects the course of hostilities.

4. Qualification of acts of violent civil unrest as direct participation in hostilities

It was recognized that the determination of whether a specific act occurring during a riot intertwined with hostilities constituted DPH was a complex question. One expert pointed out that IHL would become very complicated if activities such as the construction of roadblocks and shooting into the air during civil unrest related to the conflict were not to be considered as DPH. Other experts said that the decisive criterion for the qualification of an act occurring during a riot as DPH should be the link of that act with ongoing combat. If a riot occurs in a combat zone, for instance, that geographic location could indicate that the riot is part of the hostilities. One expert cautioned, however, that this would not be necessarily the case if the riot occurred in a zone already under the effective control of the forces responding to it. Two experts added that the mere fact of carrying weapons in a combat zone does not constitute DPH.

5. Applicability of human rights

Two experts pointed out that, in territories controlled by a state party, human rights norms apply in parallel to IHL. As a consequence, the conduct of hostilities should also be guided by applicable human rights norms with the effect that the standard of minimum force should be applied. In relation to this issue, one expert raised the question of determining the extent of control required for the applicability of human rights.

6. Qualification of acts against protected persons as direct participation in hostilities

While recognizing the importance of putting a stop to violations of IHL committed against protected persons and objects, an expert nevertheless questioned why it was important to determine whether such acts constituted DPH. In response, another participant pointed out that the qualification of such acts as DPH would allow direct attacks on the perpetrators instead of mere law enforcement operations. While a third expert contended that the mere fact of attacking civilians would not constitute DPH unless such attacks were used as a means of facilitating future military operations, another emphasized that attacks on civilians as "soft targets" were the very nature of modern, asymmetrical warfare and that, as a result, it was difficult to maintain that such attacks did not constitute DPH.

It was felt by at least one expert that the issue was of particular importance, especially in some non-international armed conflicts where the acts described in section 6.2. of the questionnaire were the very purpose of the conflict (i.e. deliberate killing, injury, unlawful deprivation of liberty, or humiliating and degrading treatment of persons protected by IHL). But even in international armed conflict, a state could use an armed group of civilians to commit these acts against other civilians so as to advance its own military objectives. In both cases, such activities should be regarded as DPH. The distinction between ordinary crime and DPH should be made based on the objective intention behind the act, which can be objectively deduced from the way a conflict is being waged.

Another expert added that inter-civilian violence was not only relevant in scenarios of ethnic cleansing as observed in recent armed conflicts, but that it extended to the whole phenomenon of terrorist attacks against civilians and to the recent hostage-taking of numerous civilians by certain insurgent groups. Dealing with these phenomena requires clarifying whether such behaviour constitutes DPH, consequently permitting the direct targeting of the perpetrators.

II. Support and Intelligence Activities

Thematic scope: The second group of topics was selected based on Sections 3 and 4 (Part I) of the questionnaire, which addressed intelligence and support activities for armed forces and groups. As becomes apparent from the following overview, the majority of contributions made by the experts on the issues concerned the "provision of information" by civilians to armed forces or groups and the voluntary "shielding" of military objectives by civilians through their presence.

1. Intelligence activities

The experts proposed and discussed several criteria that could be used to determine whether intelligence activities constituted DPH. A general and recurring concern was that the notion of "intelligence information" was imprecise and open to varying interpretations that could unacceptably broaden the category of persons susceptible to direct attack.

a) Causation: While one expert proposed that intelligence activities must have an impact on hostilities in order to constitute DPH, another expert cautioned that this criterion, while basically useful, might still be too broad. The second expert thus proposed that there must be a causal relationship between the information given and the conduct of operations at the tactical level. In this context, the example was given of a Somali woman who had several times during the same attack peeked into a building where US forces had taken cover and indicated their position to the attacking Somali fighters. This was described as the equivalent of a "fire control system" by another expert. Yet another participant agreed, stating that the decisive criterion should be the importance of intelligence information to a concrete military operation and, thus, to the direct application of violence. However, others proposed that the distinction should not be made between *strategic* and *tactical* information, but between information for *operational* planning or for *contingency* planning.

b) Intent: Several experts mentioned that subjective intent could also be a relevant criterion for the qualification of the provision of intelligence information as DPH. For instance, the provision of information with the intent to influence the hostilities should constitute DPH, whereas a civilian simply answering a question asked by passing armed forces would not be considered to engage in DPH. It was also contended that subjective intent should be construed from the perspective of the targeting soldier, and that such intent could be inferred from a reasonable interpretation of the acts. However, in disagreement, an expert proposed that subjective intent as a criterion be excluded since it could only be established *ex post facto*.

c) Other criteria: According to an opinion voiced during the Expert Meeting, the nature of the act, the functional element and the geographical element must also be taken into account when determining whether intelligence activities constituted DPH. Other experts cautioned, however, that mere membership in an organization or agency that collects intelligence does not suffice to constitute DPH. With regard to intelligence organizations or agencies, while the individual employee or member might not be targetable, the building in which intelligence is processed could nevertheless constitute a legitimate target.

d) Providing information: Regarding the provision of information to military personnel, one expert distinguished between two categories of civilians to which different criteria might apply, namely ordinary civilians and civilians belonging to an organization linked to a party to the conflict. There appeared to be general agreement that civilians merely answering questions asked by passing military personnel could not be considered as directly participating in hostilities.

One expert recognized the clear need to stop a civilian whose provision of intelligence formed part of an ongoing situation, such as was described in the case of the Somali woman. Nevertheless, contended that such necessity did not exist if the civilian in question had only once indicated the probable position of military personnel to enemy forces once and was not necessarily about to do so again.

In this regard, it was also recalled by an expert that loss of protection due to DPH was an exception to the general rule of civilian immunity from direct attack. Therefore, all feasible precaution would have to be taken in conducting the determination and, in case of doubt, civilians providing information should not be regarded as engaged in DPH. Possibly, the criteria for the definition of military objectives expressed in Article 52 [2] AP I could also serve to define the category of information the provision of which would constitute DPH. Another expert explicitly rejected the application of the defining elements for military objectives in Article 52 AP I and contended that the main issue at hand was not the principle of precaution but the rule of doubt.

2. Support activities

After a few introductory contributions of a general nature, the discussion on other support activities quickly focused on the issue of "voluntary human shields".

a) General remarks: One expert noted that not everything beneficial to the military is DPH and pointed out that Article 4 A [4] of GC III explicitly foresees certain civilian support activities to the armed forces which are not considered to constitute DPH. Similarly, working in a munitions factory does not constitute DPH *per se*. Therefore, while workers employed in a munitions factory could not be directly targeted, the factory itself nevertheless remained a legitimate military objective.

b) Voluntary human shields: A contentious point was the issue of civilians who are voluntarily shielding military objectives (voluntary human shields). Several experts held that such voluntary human shields could not be regarded as engaged in DPH, whereas others contended the contrary. It was noted that the application of the principle of proportionality posed particular difficulties in this context.

Voluntary shielding does not constitute DPH:

One of the experts opposing the qualification of voluntary human shielding as DPH required that, in order to lose their protection from attack, civilians must in some way become active against the adversary. Another expert excluded the qualification of voluntary human shielding as DPH, cautioning that otherwise these civilians could already be targeted during preparation, namely when moving towards the military objective to be shielded by their presence. One expert pointed out that while a voluntary human shield did assume an increased risk, contrary to an armed defender of a military objective he nevertheless did not become a direct target. Another expert pointed out that the very logic of Article 51 [7] AP I prevented the conclusion that human shielding, whether voluntary or involuntary, constituted DPH. All of these experts agreed, however, that the shielded objects remain military objectives.

Voluntary shielding constitutes DPH:

Another group of experts held that there was an important difference between involuntary and voluntary human shields. One expert pointed out, that DPH is not necessarily limited to destruction and killing, but can also mean depriving an enemy of a military advantage. Another expert qualified voluntary human shields as combatants that can be targeted even while deploying to the object to be shielded.

Compromise views:

One expert contended that the qualification of voluntary shielding as DPH would depend on the circumstances. In aerial warfare, for instance, civilians shielding military objectives with their presence constituted much more of a legal obstacle for the attacker than an actual physical defence. Therefore, such voluntary shielding did not constitute DPH but had to be weighed in the proportionality test. In land warfare, on the other hand, voluntary shielding could become an actual physical obstacle to military operations and would then have to be regarded as a defensive measure, which constituted DPH.

Another expert illustrated his point of view with the example of a Somali woman who walked across the street holding her arms up and hiding behind her one or two fighters, who would fire their weapons from behind her flowing white gown. While behaving in this manner, the woman in question was a voluntary human shield and part of the target and could be attacked. However, she would not continue to be a target for the rest of the day after she had gone home to her children, even if she repeated her behaviour the next day. She could be targeted only while playing an active role in protecting the two fighters who firing from behind her.

Proportionality:

The experts contending that voluntary human shielding did not constitute DPH stressed the importance of precautionary measures when deciding whether to attack a military target that was being shielded by civilians. Several of those experts emphasized that the proportionality test changed radically when dealing with voluntary human shields, since the desire of the concerned civilians to position themselves in proximity of a military objective had to be taken into account.

In particular, the risk taken by voluntarily shielding a military objective had to be evaluated differently from the workers forced to take an increased risk because they earn their living in a weapons factory. Another expert felt that, based on this reasoning, the family members of military personnel living on a military base could be regarded a voluntary human shields, but doubted that direct attacks against such persons would be allowed under IHL. According to this expert, different categories of civilians could be distinguished for the purpose of the proportionality test: civilians involved in the hostilities below the threshold of DPH should not have the same weight in proportionality considerations as civilians who had nothing at all to do with the military effort. In response, one expert expressed serious concern over this attempt to apply different standards of proportionality to different categories of civilians. In concrete operational reality, it was already very difficult to determine what was proportionate and disproportionate. Introducing additional differentiations and categories based on various criteria into a decision-making process, which is already taking place in a grey area would only further complicate this determination.

One expert recalled that the question of proportionality was better phrased as the question of "excessive" civilian casualties. In determining how many casualties would be excessive, one always had to take into account the concrete situation and context. What was excessive in ordinary circumstances was, according to him, not necessarily excessive if the casualties were voluntary human shields.

III. Decision-Making Activities of Political, Religious and Military Leaders

Thematic scope: The third topic was selected based on Section 5.7 (Part I) of the questionnaire and covered the different levels of decision-making activities of political, religious and military leaders. Interventions made by the experts are summarized below.

1. Political leadership

a) Direct involvement in military operations: One group of experts considered that the role of politicians could constitute DPH if their specific activities represented direct involvement in, or included direct responsibility for, military operations. Therefore, they distinguished between the general, overall control of politicians, which would not constitute DPH, and their involvement in the detailed planning of operations, as well as in the decision-making process related to targeting, which would constitute DPH. For example, one expert pointed out that a political leader retaining ultimate decision-making authority over whether a particular objective should be attacked would be directly participating in hostilities. Another expert added that this could be the case even for the whole Cabinet, depending on the type of decisions brought before it.

According to yet another expert, it is the influence of a politician's act or decision on military operations that should be regarded as decisive in qualifying that act or decision as DPH. A participant added that the politician in question must be involved in the day-to-day planning of military operations in order to be considered a lawful target. Several experts warned that treating the political leadership differently from other civilians would complicate the notion of DPH and render the law inoperable. If different standards were to be applied to politicians, then the legal basis for such distinct treatment would have to be made very clear in order to avoid an unintended broadening of the notion of DPH.

b) Functional criteria: One expert contended that the function of political leaders could also be a determining factor. The function of a Prime Minister, President (as Commander in Chief) or Minister of Defence, for instance, could be considered as directly related to the conduct of hostilities. The Minister of Agriculture, on the other hand, could at most be regarded as sustaining the war effort, but not as being engaged in DPH.

The same expert argued that, as a rule, political leaders participating in the hostilities should be afforded lawful combatant status if they were not in breach of the four criteria required for prisoner of war status. According to him, they are presumably organized and respect the laws and customs of war. As they do not carry arms at all and are far from the battle zone, they do not have to wear uniforms. Another expert responded that these four criteria are in fact irrelevant as regards politicians because they cannot be considered members of militias or volunteer corps in the first place. In the view of this expert, civilian politicians who retain significant control over specific military operations - as had been the case in NATO's Kosovo-campaign - should not be assimilated to combatants, because they would otherwise have to be regarded as unlawful combatants. Since this would not make sense, civilian politicians should preferably be regarded as civilians who have lost their protection as a result of DPH.

c) Military value: One expert said that political leaders, such as members of a Cabinet, became legitimate military targets not because of DPH, but because of their function and the military value that could be gained by targeting them. However, the criterion of "military value" was rejected as dangerous by several other experts who recalled that, as far as persons are concerned, only combatants and civilians engaged in DPH can be attacked. The criterion of

"military advantage" was only relevant in determining the lawfulness of targeting objects and could not be applied in the same way to natural persons.

2. Religious leadership

There was little specific discussion of the issue of religious leadership and DPH. The few experts who did mention religious leaders suggested that their activities should not be viewed differently than those of political leaders. According to these experts, the determining factor for the qualification of the activities of religious leaders as DPH would again be that these activities represented direct involvement in military operations. This view was not opposed.

IV. Recruitment, Training and Incitement to Engage in Direct Participation in Hostilities

Thematic scope: *The fourth topic was selected based on Section 5.5 (Part I) of the questionnaire and covered the recruitment, training and incitement of others to engage in DPH. The following points represent the broad themes addressed.*

Two experts cautioned that qualifying "recruitment" as DPH depended on the circumstances. One of them argued that a distinction should be made between recruitment for regular armed forces, which normally would not constitute DPH, and recruitment for "terrorist" groups, which could constitute DPH. This was due to the fact that, in terrorist organizations, the role of the recruiter can be much more important than that of the actual attacker. The second expert argued that, while general recruitment and training did not constitute DPH, both recruitment and training and should be regarded as DPH as soon as they are carried out with a view to specific military operations.

In response, several experts contended that there was no direct link between the recruitment of others for future engagement in DPH and actual military operations and that, therefore, the activity of "recruiting" was too remote from the hostilities to constitute DPH. One expert pointed out that recruiting and training were general preparatory measures comparable to the manufacture of weaponry and therefore could not be regarded as DPH. The same expert recalled that "direct participation in hostilities" was not synonymous to "involvement in" or "contribution to" hostilities or an armed conflict or to "preparing someone else to be able to engage in DPH in the future", but that it meant personally "taking part in the ongoing exercise of harming the enemy".

While one expert stated that recruitment, training and incitement could never amount to DPH, another expert disagreed, cautioning that in certain circumstances inciting others could very well constitute DPH. Nevertheless, the experts were generally of the opinion that the latter would not be the case. First, the persons incited would still have to decide on their own whether they would actually carry out the proposed acts. Second, even that decision itself would not render the persons incited military targets – it is only the actual conduct of DPH that would render them lawful military targets.

Finally, it was noted that Article 4 of the Fifth Hague Convention on Neutrality (1907) prohibited the use of neutral territory for the recruitment of combatants for the benefit of the belligerents.

V. Private Contractors and Civilian Employees

Thematic scope: The fifth topic was selected based on Section 5.6 (Part I) of the questionnaire and covered the question to what extent civilian employees and private contractors could be deemed to be directly participating in hostilities. The discussion was opened after Professor Michael N. Schmitt presented his Expert Paper on the issue and after brief comments on that paper by Professor Louise Doswald-Beck.

1. Presentation of Expert Paper by Professor Michael Schmitt

The Expert Paper "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees" had been distributed to the participants prior to the Expert Meeting. In his presentation, Professor Michael Schmitt raised the following main points:

- Practical relevance of the phenomenon of private contractors and civilian employees, particularly in the context of Iraq.
- Political, financial and practical reasons why armed forces have turned towards private military (PMC) or private security companies (PSC).
- Issues of discipline, accountability of and jurisdiction over private contractors and civilian employees.
- In international armed conflict, there are only two categories of individuals: combatants and civilians. Combatants can be either "lawful" (members of armed forces) or "unlawful" (individuals not members of armed forces engaging in DPH).
- *De jure* membership in armed forces: According to Article 43 [3] AP I, even armed law enforcement and paramilitary organizations cannot become *de jure* members of armed forces without formal incorporation and notification. Therefore - *a fortiori* - the same must be the case for civilian employees and private contractors. Formal incorporation requirements depend on national law.
- *De facto* membership in armed forces: simple logic further requires that civilian government employees cannot circumvent formal incorporation by fulfilling the less stringent requirements established by Article 4 A (2) GC III for *de facto* membership in the armed forces. While this would be theoretically possible for private contractors, they would only rarely fulfil the four criteria of the said article.
- DPH requires "but for"-causation (i.e. "but for the action the harm would not have befallen the enemy"), causal proximity (not direct causation) and *mens rea*.
- In grey-area cases it is best to interpret the situation in favour of finding DPH.
- Finally, some examples of DPH: attacking or defending military objectives; human shields; operations to rescue civilian hostages or military personnel.

2. Comments on Expert Paper by Professor Louise Doswald-Beck

In her comments on the Expert Paper, Professor Louise Doswald-Beck raised the following main points:

- These questions are not easy, and a certain amount of fundamental common sense has to be used in finding the answers.
- Private contractors are not what the drafters of IHL had in mind when they talked about the protection of civilians from the effects of hostilities.
- It is a general principle of international law that a state is responsible for the acts of persons it has authorized to perform activities that are the function of the government. This has been reaffirmed by the International Law Commission.
- Another principle of international law is that states cannot use national law as a way of getting out of their responsibilities under international law.
- A distinction must be made between entitlement to combatant status and entitlement to POW-status. That is not the same question.
- Combatant status: membership in armed forces does not depend on the technicalities of national law. Decisive are the requirements of international law and whom these persons actually appear to fight for in the eyes of the enemy. In terms of GC III, if Article 4 A [1] GC III does not cover these contractors, Article 4 A [2] GC III probably would. The need for formal uniforms is less important today and contractors are still sufficiently distinguishable by their equipment and outfits. As all other criteria are fulfilled, they can be attacked. In terms of AP I, contractors are fulfilling governmental functions and therefore clearly fall within the scope of the notion of "armed forces" according to Article 43 AP I. This is not eliminated by the obligation of notification in Article 43 [3] AP I, which is not a constitutive requirement. An analogy to mercenaries could be made.
- POW-status: Private contractors who use force fulfil every requirement for being considered "mercenaries" (Article 47 AP I), apart from nationality in the case of US companies working for the US government. The objective of that article was to avoid giving mercenaries POW-status, but nothing prohibits targeting them as military objectives.
- Rescue operations. Care must be taken when concluding that rescue operations constitute DPH because Article 18 GC I encourages the civilian population to provide care for wounded military personnel.

3. Informal additional remarks by W. Hays Parks

Before the opening of the discussion, Hays Parks gave a brief overview of some aspects of the work undertaken on the issue of private contractors and civilian employees by the US Department of Defence Law of War Working Group chaired by him. His intervention, made in a purely personal capacity, focused on the following main points:

- Iraq is a special situation because it entailed belligerent occupation. Contractors were only present in significant numbers once the country was occupied. They were intended to provide services to the civilian population related to that occupation and for the reconstruction of Iraq. Each reconstruction contractor had to provide for his own security. As the insurgency increased and reconstruction security changed in nature, the phenomenon of armed security contractors reached an unprecedented scale. Had there

been a benign occupation, the requirement for armed security contractors would have been less. Had Iraqi expertise and public services been readily available (such as fire prevention and law enforcement), the overall number of civilian contractors would have been substantially smaller.

- Contractors are not to be confused with the Department of Defence's "Emergency Essential Civilians", who are career civilian employees, sent to the battlefield for their expertise and under the military chain of command.
- There were two kinds of contractors in the field: the military component under US Central Command and the civilian component under the Coalition Provisional Authority. The civilian contractors working under US Central Command were not authorized to carry weapons. So far only one single person has received a special permit to carry a pistol; all other armed contractors were part of the Coalition Provisional Authority.
- Historically, the end of the Cold War led to a significant downsizing of the military around the world and to increased outsourcing of traditional military activities, a trend perhaps compounded by peace operations during the 1990's.
- A major issue today is how to discipline and to ensure criminal jurisdiction over contractors who misbehave. Existing national jurisdiction must be extended beyond that provided by instruments such as the U.S. War Crimes Act and the Military Extraterritorial Jurisdiction Act. Governments do not relinquish their law of war obligations, including respect for the law of war, by contracting out. There must be a method to "respect and ensure respect" for the law of war.
- Another issue is the identification of those positions that are "civilian essential" and those that are "military essential", as well as the identification of functions that are inherently governmental and thus exempt from private sector performance. All of this is part of the effort of determining how far one can go in outsourcing military functions to private contractors.
- In practical terms, the presence of large numbers of armed private contractors increases the risk of friendly fire incidents. There is also tension and friction between the uniformed military and the contractors.
- There is also the issue of POW-status, although it is less relevant for the question whether contractors are legitimate targets.
- Hays Parks noted that, as a result of recent developments, the whole issue of armed contractors was under active consideration with many governments. Speaking in his personal capacity at the Expert Meeting, he said that if a government takes civilian contractors and substitutes them for traditional combatants, they certainly are taking direct part in hostilities and would be legitimate targets, regardless of the POW-issue.

4. Legality and legitimacy of the use of civilians in armed conflict

One expert observed that private armed security providers exist everywhere in the world already in peacetime and that, therefore, their massive presence in the current context in Iraq was not surprising. Another expert pointed out that, apart from an old prohibition of privateering in the 1856 Paris Declaration, there was no other written prohibition of making use of civilians in armed conflict. Therefore, while the use of contractors exposed them to certain risks, it certainly did not violate the law of armed conflict. The clearest solution would be for governments to subject civilian contractors to military discipline and integrate them into the armed forces as

soon as an international armed conflict has begun. This would of course only be possible for contractors hired by governments. One expert nevertheless contended that the extent to which military activities could be contracted out legitimately remained an important issue to clarify.

5. Status of private contractors and civilian employees

According to one expert, the issue of private contractors suggested the existence of something like a grey-zone between persons deserving full civilian protection and persons who could be directly attacked. One expert asked why other experts tried so hard to fit private contractors and civilian employees into one of the categories described in Arts. 4 A [1] or [2] GC III. While this would have the benefit of making them targetable, it would also give them an actual right to engage in hostilities themselves, a consequence the desirability of which was far from certain. In response, another expert recalled that, realistically, one had to admit that these persons had been hired or at least tolerated by governments, and that some of them had actually been allowed to fight. Thus, there was no reason why such individuals should be treated differently than other combatants.

6. Practical scope of the problem

One expert recalled that the problem of private contractors was not just an issue of logistical supply and security operations. A very problematic aspect was, for instance, that the scientific and technical expertise associated with running complex modern weapons systems was no longer the exclusive domain of the military and the fact that this trend was likely to continue in the future. Another aspect of the problem involves the corporate organization of contractors, which might lead to managers being regarded as engaged in DPH because of the instructions they issue to employees.

7. Qualification of acts as DPH, law enforcement or self-defence

One expert cautioned that confusion should be avoided between security activities qualifying as DPH and specially protected civil defence activities. He emphasized that not every activity carried out by private security corporations could qualify as DPH based on the mere fact that they contribute to the security, for example, of the armed forces or so called "high value targets" or even of infrastructure with war sustaining value.

Another expert proposed distinguishing between private military companies and private security companies. With respect to the latter, it will then have to be determined whether their operations are of a defensive or offensive nature. If they are offensive and effectively involved in hostilities then they should be regarded as engaged in DPH. But if their role is defensive and involves defending persons who are not legitimate targets themselves, then they should not be regarded as engaged in DPH even if they have to use considerable force to do so.

Finally, an expert stated that geographic proximity of an activity to the combat zone could often not be regarded as decisive. On the one hand, that zone is difficult to define in practice and, on the other hand, bombs can be loaded on one continent and delivered on another. Nevertheless, it could be concluded that "immediate battlefield logistical functions", such as the direct supply of ammunition to groups engaged in combat, would constitute DPH.

VI. Non-International Armed Conflict

Thematic scope: *The sixth group of topics was selected based on Sections 5.3., 5.4. (Part I) and 2 (Part II, A.) of the questionnaire and covered the issue of direct participation in hostilities from the specific perspective of non-international armed conflict. Within this context, discussion included the status of organized armed groups, the consequences of membership in such groups and the influence of the domestic law enforcement paradigm on the conduct of hostilities. The discussion was opened after Professor Michael Bothe presented his Expert Paper on the issue and after brief comments on that paper by Yves Sandoz.*

1. Presentation of Expert Paper by Professor Michael Bothe

The Expert Paper on "Direct Participation in Hostilities in Non-International Armed Conflict" had been distributed to the participants prior to the Expert Meeting. In his presentation, Professor Michael Bothe raised the following main points:

- In international armed conflict, there are two categories of persons: civilians and combatants. Civilians are all persons who are not combatants. Civilians are immune from attacks (except those engaging in DPH), while combatants are subject to attack at all times (except those who are *hors de combat*).
- Outline of the historical development of IHL applicable to non-international armed conflict which has gradually been assimilated to IHL applicable to international armed conflict.
- As a consequence, in non-international conflict (regardless of the applicability of Additional Protocol II) there are two categories of persons: on the one hand "fighters", and, on the other hand, protected civilians, as well as civilians who have temporarily lost their protection against direct attack.
- "Fighters" are persons who belong to that part of the administrative organization of a party to a conflict that constitutes its armed forces. They do not lose membership by working during the day and fighting only at night.
- On the other hand, civilians who do not belong to an armed organization lose protection only while directly participating in hostilities.
- Consequently, according to Additional Protocol II and customary law, both "fighters" (for the entire duration of their membership in the armed organization) and unprotected civilians (for the duration of their DPH) constitute legitimate military objectives.
- The meaning of the notion of DPH is essentially the same in international and non-international conflicts.

2. Comments on Expert Paper by Yves Sandoz

In his comments on the Expert Paper, Yves Sandoz raised the following main points:

- Two clarifications on points that might be misinterpreted when reading Professor Bothe's Expert Paper: First, in an international armed conflict, even if a combatant commits violations of IHL or war crimes, he or she will not automatically be deprived of entitlement to

POW-status after capture. Second, even so-called "unlawful combatants" enjoy immunity from direct attack when *hors de combat* due to wounds or for other reasons.

- Agrees that a single definition of DPH for both international and non-international conflicts is preferable.
- Agrees that, in non-international armed conflict, members of armed groups are not explicitly obliged to wear a distinctive sign. The central question is how to deal with this situation without diminishing the protection of the civilian population.
- In order to address this problem, it is important to clarify the question of presumption of civilian protection. It would not be acceptable to assume that every civilian is a "fighter". Moreover it should be carefully determined what precautionary measures have to be taken in the conduct of hostilities and what other means are available to protect the civilian population.
- In fact, in non-international armed conflict, three categories of persons can be distinguished: "fighters", civilians temporarily participating in the hostilities and "pure" civilians.
- "Fighters" are treated like regular forces in that they do not have immunity from direct attack, even when they are not engaged in combat.
- Civilians, on the other hand, benefit from immunity against attack unless they are engaged in DPH. Of course, immunity from direct attack does not mean immunity from arrest and penal process.
- It would be interesting to discuss the difference between the actions a government is allowed to take with respect to "fighters" and civilians temporarily taking a direct part in hostilities. The former do not enjoy immunity from direct attack, whereas operations aimed at capturing civilians who have engaged in hostilities are similar to police operations in search of dangerous criminals.
- An important problem is that there seems to be no incentive for "fighters" to respect IHL. They must have a chain of command and internal rules of discipline and must comply with IHL, but do not get anything in return. They may not only be attacked at any time but, if captured, can also be prosecuted and punished for participation in the hostilities.
- Therefore, something should be offered to "fighters". It is certainly not realistic to imagine that a government would offer them amnesty before the end of hostilities unless they surrender, because such an offer could be perceived as a sort of recognition of belligerency and might have the side-effect of encouraging participation in the hostilities. But, a concrete step could be to exclude the death penalty for participation in the hostilities or at least to announce a "freeze" on the execution of capital punishment until the end of the conflict. The execution of prisoners during a non-international armed conflict is likely to trigger a vicious circle of similar measures and countermeasures and put respect for all IHL-provisions at risk. Therefore, a gesture such as the suspension or exclusion of capital punishment could be of great importance.

3. Terminology "fighter" and "unlawful combatant"

One expert called for caution regarding the use of the term "fighter", explaining that this term was originally introduced in the San Remo Manual¹ only in order to avoid the use of the term "combatant" for situations of non-international armed conflict. The term "fighter" was intended to cover everyone who was directly participating in the hostilities, regardless of membership in an armed group, precisely because the determination of such membership was very difficult. Another expert added that the use of the term "fighter" in the San Remo Manual was very much based on a case study, namely the FARC in Colombia. This, however, was very different from civilians just temporarily participating in the hostilities.

Although aware that this was not strictly an issue of non-international armed conflict, one expert used the occasion to appeal to the participants not to use the term "unlawful combatant" any longer. It confused what was "unlawful" under international law with the consequences of certain behaviour under domestic law. After all, international law did not prohibit the participation of civilians in hostilities or, for instance, the activities of spies. These categories of persons are not "privileged" in the sense of immunity from penal prosecution under domestic law, but their activities are not "unlawful" under international law. Therefore the terms "unprivileged" combatants or "unprivileged" fighters were much more accurate. Another expert expressed agreement with this position.

4. The notion of "direct participation in hostilities" in international and non-international armed conflict

A participant expressed concern that the adoption of a single notion of DPH for both international and non-international armed conflict could lead to a blurring of the distinction between these two categories of conflict. He added that the experts would have to decide whether they wanted to support the approach taken in the Statute of the International Criminal Court - which distinguishes between the two kinds of conflicts - or whether it wanted to go along with the model applied by the ICTY Prosecutor's Office, which tends to say that the applicable law is essentially the same in both situations. Another expert held that the jurisprudence of the ICTY (the *Tadic* case) and the Inter-American Commission of Human Rights (the *Abella* case) suggested that the same standards applied to DPH in both international and non-international armed conflict.

5. Influence of human rights law on the conduct of hostilities

Several experts pointed out that not only IHL, but also human rights law applied in non-international armed conflict and referred to substantial human rights jurisprudence in that regard. One expert recalled, however, that the problem with the applicability of human rights law in armed conflict was that its rules were binding only on states and not on non-state actors.

a) Favouring the law enforcement paradigm in hostilities: For two experts, human rights law implied that government forces must apply the principle of due diligence and arrest rather than kill the persons involved whenever the situation allowed them to. Another expert held that the law-enforcement paradigm must always be applied when the opponent is not an organization comparable to a military one. Conversely, the opinion was voiced that human rights jurisprudence on the principle of due diligence simply did not deal with situations of armed conflict.

¹ San Remo Manual on the Protection of Victims of Non-International Armed Conflicts. Available at: www.iihl.org

Another expert argued that the practical problem of "combatants" melting into the civilian population imposed the use of law enforcement methods. A single combatant hiding in a building could not be attacked by bombing the building, but had to be arrested or even killed using law enforcement methods. In situations foreseen by Additional Protocol II, on the other hand, where identifiable parties to the conflict exercise territorial control, "macro-war methods" can be employed instead of law enforcement. In response, an expert rejected the application of different approaches depending on territorial control because this would add even more levels of complexity to an already complicated issue. Another expert, however, pointed out that differences in the degree of control that forces have over territory have certain legal consequences. For instance, the "feasibility" of precautionary measures in identifying legitimate targets and avoiding incidental civilian losses often depended on the level of territorial control.

Another expert said that the law-enforcement approach should be applied to civilians who only occasionally take part in the hostilities without being integrated in organized armed groups. Nevertheless, it should be made clear to the armed forces that civilian immunity does not imply immunity from penal prosecution. Provided the relevant domestic law is complied with, civilians may be arrested at any time.

b) Rejecting the law enforcement paradigm in hostilities: Other experts, while agreeing that human rights law applied in armed conflict, stated that hostilities were not governed by the law-enforcement paradigm. The relationship the authorities and suspects in law-enforcement was vertical, whereas the relationship between parties engaged in hostilities was horizontal. Therefore, while the right to life remained applicable in non-international armed conflict, it had to be interpreted according to the *lex specialis* of IHL.

One expert saw a certain contradiction in the case law of the European Court of Human Rights, which considers that domestic and human rights law are applicable to situations of insurgency, thereby denying a right to "shoot to kill". Another expert held that due diligence and the law enforcement paradigm were difficult to apply in the context of non-international armed conflict, because the involvement of highly organized, heavily armed groups clearly exceeded the capacities of response of law enforcement agencies. Nonetheless, specific rules of engagement, including those of counter-terrorism units, generally did not provide for a "shoot to kill" policy, which would, in any event, be very dangerous. Instead, the policy was one of "capture or kill", and the preference was always to capture. According to this participant, "capture or kill" essentially means that deadly force can only be used against persons who resist capture. Referring to this statement, another expert found that the fact that states facing non-state actors had adopted a policy of "capture or kill" with a preference for capture could be taken as an indication that this policy should be the rule.

Several experts said that the rules to be applied depended on the situation. Accordingly, the existence of armed groups outside the control of the authorities made it impossible to apply the rules of law enforcement. In such situations, one could not insist on the application of – essentially insufficient – methods of law enforcement instead of offering a realistic approach on how to deal with armed groups. This would weaken respect for IHL by all those involved and, ultimately, lead to a decrease in protection for the civilian population. Therefore, if necessary, the rules of war must be applied side by side with law enforcement methods. Another expert mentioned the example of a group posing a serious threat to security in an occupied territory. In such a case, the occupying power may need to respond with deadly force, because it may lack sufficient control and resources to provide for effective policing.

c) Issue of "license to kill": Two experts pointed out that there was no automatic "licence to kill" civilians who were only temporarily engaged in DPH. While there may be a necessity to directly target them in certain circumstances and while this may be lawful, the choice of means adopted must still be reasonable. Similarly, another expert recognized that the "right to render *hors de combat*" implied a "right to attack", but insisted that this was not synonymous with a

"right to kill". Clearly, rendering an enemy *hors de combat* often required killing him, and no commander was obliged to endanger his troops in order to protect an enemy. This, however, did not refute the principle of "capture rather than kill", whether in international or in non-international armed conflict. In response, three experts contended that there was no legal duty to use minimal force in armed hostilities. A party to the conflict in control of a territory may have a policy, but not a duty, of "capture rather than kill". In this regard, the view was also expressed that the lack of a prohibition to kill did not entail an automatic right to kill. Not everything that was not prohibited by IHL could be regarded as being allowed.

It was also reiterated that when a civilian who had previously engaged in DPH was subsequently spotted in peaceful activity, for example in a supermarket, the civilian could not automatically be targeted but had to benefit from doubt as to his or her continued direct participation in hostilities. In response, another expert recalled that the civilian in question may return from the supermarket to plan further activities amounting to DPH, with the effect that this person should be regarded as engaged in DPH even when spotted in the supermarket.

VII. Membership Approach

Thematic scope: *The seventh topic was selected based on Sections 5.1 to 5.4. (Part I) and 2 (Part II B.) of the questionnaire and essentially dealt with the definition and consequences of "membership" in organized armed groups involved in situations (international or non-international) of armed conflict. This section summarizes the main interventions made on the issue.*

1. Arguments of caution regarding a membership approach

Several experts expressed caution with regard to a membership approach, under which "membership" in an organized armed group would be considered as a form of continuous DPH and would, therefore, allow the targeting of its members for the entire duration of their membership.

One expert found that it was not a good idea to create categories of persons, such as "fighters" in non-international armed conflict, who could be attacked at any time and in any place. According to the same expert, common sense demanded that a member of a group's armed wing could be targeted even while sleeping, provided that he or she was outside the area controlled by the attacker and would otherwise resume fighting the next day.

Another expert cautioned that at the lower end of a spectrum of violence a membership approach could encourage the government to qualify the situation as a non-international armed conflict in order to be entitled to "shoot to kill", rather than to maintain a law enforcement approach. In situations of non-international armed conflict that reach the threshold of Additional Protocol II, on the other hand, the membership approach did not pose any problems.

One expert also stated that, during the 1974 – 1977 Diplomatic Conference, the purpose of which was to integrate guerrilla warfare into IHL, the vast majority of the delegates understood the notion of DPH as being restricted to actual shooting and that, therefore, all the other situations would not constitute DPH. The introduction of a membership approach would thus go far beyond what was originally intended with the notion of DPH. In the context of guerrilla warfare, where the structure of the parties and their territorial control is less clear than in the situations foreseen in Additional Protocol II, it is particularly difficult to protect the civilian population. The means employed and the possibility of undertaking an attack often depend more on the geographical and physical circumstances of the battle zone than on the status of the person to be targeted. In response, another expert pointed out that, once someone had been identified as a military target, the problems posed by the surrounding situation should be addressed by other principles, such as proportionality. One expert required that the armed group in question have a degree of organization equivalent to a normal military organization; otherwise the approach must be that of law enforcement.

A participant required that the armed group in question must have a degree of organization equivalent to a normal military organization. Otherwise the approach must be that of law enforcement. The same expert suggested that, in situations that were clearly horizontal, the notion of persons being subject to attack at all times should correspond to some form of combatant's privilege. In response, another expert said that states could give non-state actors more practical incentives to respect IHL, by releasing "mere" participants in the hostilities more quickly during peace negotiations while, of course, refusing to release persons suspected of serious violations of IHL.

2. Arguments in favour of a membership approach

Other experts expressed support for a membership approach and found it a useful concept.

One expert said that it was necessary to go towards a membership approach because belligerents could be expected to respect the law only if they were put on an equal footing. Double standards and unequal protection had to be avoided. In non-international armed conflict, a membership approach would establish a horizontal relationship between the armed opposition group and the government involved, and would thereby put them on an equal footing.

Another expert explained his support for the membership approach by pointing out that persons who were part of well organized armed groups, such as the FARC in Colombia, could not be compared to persons only temporarily participating in hostilities. Another expert emphasized that it was important not to consider members of armed groups as mere civilians. Since such persons could not be afforded full civilian protection, this could also lead to a general lowering of the protection for "real" civilians. Another expert agreed that members of organized armed groups lost their civilian protection permanently. According to him, there was no difference in the rules governing the conduct of hostilities whether they take place in international or non-international armed conflict. Another expert disagreed stressing that, in reality, there was no equal footing in terms of rights and duties between states and non-state armed groups because governments did not accept that armed groups had any combat-related privileges.

One expert found that a membership approach was useful, but pointed out that "membership" was not synonymous with being a "fighter", since the latter term meant everyone who directly participated in the hostilities, and not only members of organized armed groups. Clearly though, as long as someone was a member of an organization whose purpose it was to engage in DPH that person would have to be regarded as involved in a continuous course of DPH.

3. Criteria for membership

Two experts raised the basic question of how, in practice, permanent membership in an armed organization could be distinguished from temporary participation, especially from the perspective of an adversary, on particular in situations where armed groups had no territorial control. In view of these difficulties and the inherent complexities of non-international armed conflict, another expert argued that the government would have to have specific knowledge on the armed group it is confronted with, if this approach were to be adopted.

Several experts noted that it was important to distinguish between the armed wing of an organization and its other sections, and that only members of the armed wing could be regarded as military targets.

One expert held that reciprocity was a useful indicator for identifying legitimate targets. In other words, one had to identify who was targetable within a state's armed forces and then apply the same criteria to non-state armed groups. Therefore, just like with state actors, some members of a group's political wing could also become legitimate targets if they had actual command and control of the armed wing. Another expert also suggested that this could be useful for determining whether a particular member of an organized armed group could be directly targeted.

VIII. Temporal Scope of Loss of Protection and "Revolving Door" Mechanism

Thematic scope: *The eighth topic was selected based on Sections 1 and 3 (Part II B.) of the questionnaire and essentially dealt with the temporal scope of loss of protection due to DPH and with the specific problems posed by the so called "revolving door" mechanism ("farmer by day and fighter by night").*

Preliminary remark: The mechanism of the "revolving door" (of protection) describes the legal situation of a civilian directly participating in hostilities who loses protection from attack for the duration of a specific military operation (including preparation and return), but regains protection between military operations, regardless of how often and regularly he or she engages in DPH. The "revolving door" mechanism poses a serious practical problem for the adversary who must be able to implement different and constantly alternating legal regimes in relation to the same person.

1. Impact of the "revolving door" on the protection of the civilian population

One expert warned that the "revolving door" of protection should not be misconstrued. The intention was not to protect persons who were involved in armed combat, but to protect those who were not. This was the real problem. Another expert said that the problem of the "revolving door" could not be avoided simply by saying that there was no "revolving door". A third expert cautioned that, if the "revolving door" mechanism were to be eliminated by extending the temporal scope of loss of protection beyond the actual period of DPH, this would undermine the protection of civilians.

However, one participant responded that it was the very existence of a "revolving door" that put persons who had at some point taken part in the hostilities at greater risk since, in practice, they lost the presumption of civilian protection. The responsibility for this outcome, however, was not with the attacker but with those who abused the "revolving door". One expert stressed that those who abused their protection from attack must lose it in order to safeguard the principle of distinction. The same expert nonetheless conceded that a civilian who engaged in DPH only once regained his or her protection immediately after that event. Those who participated regularly, however, could be targeted at any time.

For another expert, the issue with the "revolving door" was not so much whether or not someone could be targeted, but rather how to determine whether someone would continue to pose a threat in the future. The problem was much more which approach to choose when it could not be predicted whether the person in question would actually repeat his or her hostile activities (or had definitively disengaged from DPH). If people were allowed to jump in and out of hostilities whenever they liked, this would end up eroding the humanitarian shield enjoyed by the civilian population.

2. Presumption of loss of protection after direct participation in hostilities

One expert entirely rejected the "revolving door" approach and found it reasonable to assume that someone who had already engaged in DPH would continue to do so. The person in question must bear the risk of being targeted by the adversary and it was up to him or her to show that he or she would no longer engage in DPH. Another expert also found it likely that

someone who had already engaged in DPH would continue to do so in the future. A third expert supported this view by stating that members of armed groups who had already been involved in hostilities could be assumed to be directly participating in the hostilities until they did something to disengage from the group. However, a fourth expert questioned this reasoning and asked whether the fact of having participated once could make a person lose civilian protection permanently. A fifth expert also criticized this approach and questioned how, in actual practice, someone could prove that he or she was no longer participating.

3. The factor of time elapsed after an act of direct participation in hostilities

Several experts proposed that the lapse of time after DPH should play a role in allowing a person to regain civilian protection from direct attack. One expert stated that it all depended on a combination of time and space. For instance, a person who had last engaged in DPH six months ago and did not again show hostile intent could clearly no longer be attacked.

4. Membership approach as a solution for the "revolving door" mechanism

One expert pointed out that if the membership approach were to be accepted there would no longer be a "revolving door" for members of organized armed groups. Their targeting would no longer be an issue of DPH and the "revolving door" would continue to apply only to unorganized cases of DPH. Two experts were of the opinion that persons who only sporadically participated in hostilities lost their immunity from direct attack only during specific operations and would otherwise have to be dealt with under a law enforcement paradigm.

IX. Constitutive Elements of Direct Participation in Hostilities

Thematic scope: *The ninth topic was selected based on Sections 1 (Part II A.) and 7 (Part I) of the questionnaire and addressed potential constitutive elements of "direct participation in hostilities", namely the questions of "hostile intent", "hostilities", "causation" and "nexus". The following summarizes the main points made by the experts.*

1. Hostile intent

One expert proposed that, in situations of doubt, "hostile intent" could be a useful indicator for determining whether or not someone was engaged in DPH. For one expert, mere membership in an armed group already expressed such "hostile intent", while in other situations identification of "hostile intent" was an issue to be dealt with in rules of engagement (ROE). Another expert disagreed and stressed that identification of "hostile intent" was strictly and always an ROE issue. Nevertheless, according to other experts, "hostile intent" could not be disregarded altogether. Intent would have to be taken into account, especially when the adversary is faced with activities or means that do not involve the direct application of violence, such as computer networks attacks. "Hostile intent" in the context of hostilities is not synonymous with the notion of "intent" in criminal proceedings. One expert emphasized that, during hostilities, it was up to soldiers and commanders to interpret an act as "hostile" based on the potential injury. Intent, therefore, was not significant for determining DPH, but became relevant only at a later stage, when the act was subject to criminal investigation.

2. Hostilities

One expert emphasized that, in order to better understand the notion of direct participation in hostilities, it was much more important to agree on the definition of the term "hostilities" than to discuss notions such as "hostile intent". In response, another expert asked whether "hostilities" could be defined as "acts that directly caused harmful consequences to the adversary". According to the first expert, the term "hostilities" comprised a wider variety of measures than just the infliction of harm on enemy personnel or property. In his view, the term "hostilities" was neither synonymous with "armed conflict" (whether international or non-international), nor with "attack".

Another expert held that the generalized concepts of "fighting" and "warfare" were broad enough to include unarmed combat, i.e. the unarmed roles by which a person may contribute to an armed attack. The same expert said that "hostilities" could refer to "hostile activities directed at injuring or neutralising the personnel and/or equipment of the enemy in the context of an armed conflict". One expert pointed out that the term "hostilities" had replaced the traditional term "acts of war". Essentially, the term "hostilities" referred to the same behaviour, only in situations of armed conflict instead of formal war. Clearly, "acts of war" included unarmed combat, intelligence gathering and many other activities that had nothing to do with causing damage to personnel or equipment. The same expert stressed that it was not necessary to spend time and energy on specifically defining the very broad term "hostilities" as long as it was understood to cover all acts of war. Another expert stated that "hostilities" could be understood as "the application of force or otherwise disadvantaging the opponent militarily", which would include intelligence activities. Nevertheless, this expert added that trying to define "hostilities" might not be a very helpful way of proceeding.

Two experts cautioned against widely interpreting the notion of "hostilities". One of them argued that as long as an armed conflict lasted, even if very low in intensity, every sporadic incident occurring in the context would have to be regarded as hostilities. The other expert cautioned that if the term "hostilities" were to be extended to every activity undertaken in relation to the hostilities, then the notion would be given an exceedingly broad interpretation.

The expert, who had initially raised the question of defining the term "hostilities" agreed with the equation of this term with "acts of war", stating that this clarified that a variety of behaviour qualified as DPH. At the same time, this expert recalled that DPH still required not only some sort of involvement or contribution, but a "direct participation" in such acts of war.

3. Causation

Two experts stated that the qualification of an act as DPH required some degree of causal relationship between the act and the damage caused. One expert said that direct causation of harm or disadvantage was not necessary for an act to constitute DPH. Instead, this expert required "but for causation", that is to say that, without the act in question, the damage would not have occurred. This would be a standard slightly lower than direct causation and would include, for instance, an analysis of the tactical intelligence that was to be immediately transmitted to a shooter. Another expert pointed out that the approach towards causation should not be result oriented. In order to be able to stop an attack, it was the intended result of an act, and not the actual damage caused that was decisive in qualifying it as DPH.

4. Nexus

Several experts emphasized that an act qualifying as DPH must be linked to an armed conflict. One expert said that it was this "nexus", and not "hostile intent", that allowed a distinction to be made between a common crime and an act of war. Thus, for example, there is an important difference between stealing a rifle in order to go hunting and stealing it in order to use the rifle in hostilities. Another expert agreed that any act that constituted "participation in hostilities" must be related to an armed conflict. The notion of DPH did not include ordinary crimes that were totally disconnected from the hostilities although they occurred in wartime. In that sense, even the theft of a military radio or helmet in order to sell the item on the black market would remain a simple law enforcement issue, while the seizure of weapons and equipment in order to use them in the fighting would constitute DPH. One expert drew the attention of the group to the rich jurisprudence developed by the ICTY and the ICTR on the issue of "nexus".

X. Conclusion and Way Forward

1. Conclusion

After the First Expert Meeting in June 2003, which had essentially been an initial brainstorming session on the issue, this two day event provided the desired opportunity to discuss a wide range of complex legal and practical questions related to the material and temporal scope of the notion of "direct participation in hostilities".

The evaluation of the responses given to the questionnaire before the expert meeting, the two Expert Papers provided by Professor Michael Schmitt and Professor Michael Bothe and the valuable contributions made by Professor Louise Doswald-Beck and Yves Sandoz as commentators on these Expert Papers allowed the discussions to be structured thematically and to focus on questions requiring clarification.

Thanks to the high level of expertise and motivation of the participants, the exchange proved to be constructive and fruitful in clarifying the nuances of the various positions and opinions. While a growing consensus could be observed on some issues, others still generated considerable difference of opinion. It also became clear that a few specific questions still needed to be researched in more detail in order to allow a conclusive discussion. Thus, in summary, the Second Expert Meeting allowed the participants to:

- address a wide range of complex legal and practical questions related to the material and temporal scope of the notion of "direct participation in hostilities" in a systematic and structured manner;
- clarify and provide a more accurate understanding of the positions and opinions held by the experts regarding the various issues addressed during the Expert Meeting;
- identify issues on which there is general agreement or growing consensus among experts, as well as questions still generating considerable difference in opinion;
- identify specific issues that require further research in order to allow a conclusive discussion.

2. Way forward

Based on these results, the organizers proposed that a Third Expert Meeting, preferably of three days, be held in 2005 in order to consolidate the process and address the outstanding topics. It was proposed that the agenda should, first of all, provide for a continuation of the discussion on:

- the issue of private contractors and civilian employees;
- the special problems raised by membership in organized armed groups and civilian participation in non-international armed conflict;
- the temporal scope of loss of protection and the "revolving door" mechanism.

Moreover, the Third Expert Meeting should also address other residual topics that need further discussion, such as:

- the potential constitutive elements of the notion of DPH, such as "nexus", "causation", "geographical proximity or remoteness", "collective or individual act";
- acts carried out by civilians against other civilians, such as acts of terrorism and hostage taking.

It was also suggested that based on the results of the three Expert Meetings (the two already held in 2003 and 2004 and the one to be held in 2005) a first attempt at identifying defining elements and establishing interpretive guidelines on the notion of direct participation in hostilities be undertaken in 2006.

The experts generally agreed that the clarification process should continue and found the topics well chosen. While no alternative approach was proposed, experts made the following individual remarks:

- One expert recalled that, so far, the discussions had focused very much on land warfare, and that the definition of DPH must apply also to air and sea warfare.
- One expert, while otherwise agreeing with the proposed topics, was not sure that there was a need to further discuss the requirement of a "nexus".
- Another expert said that, regarding the definition of "fighters" in non-international armed conflict, useful information could probably be drawn from the San Remo Project.
- While two experts questioned whether the issue of private contractors and civilian employees was sufficiently important for the notion of DPH to be further discussed, another expert emphasized the importance of this topic and referred to the rapidly growing role of private contractors. A participant volunteered to assemble additional information on what functions were considered militarily essential and what functions could possibly be outsourced and assumed by private contractors. It was also proposed that an external expert on the matter, such as Peter Singer, author of the book "Corporate Warriors", be invited to make a presentation to the group, which could then serve as a basis for a more focused discussion.

After due note had been taken of these remarks, the chairman closed the Expert Meeting.

The Notion of Direct Participation in Hostilities under International Humanitarian Law

Second Informal Expert Meeting organized by
the International Committee of the Red Cross and the TMC Asser Institute

The Hague, The Netherlands, October 25-26, 2004

Agenda

Monday, October 25

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|----------------------|---|
| 8.30 – 9.15 | Welcome and Introductory Remarks |
| 9.15 – 10.45 | Working Session I – Discussion of Specific Categories of Situations (<i>Direct Application of Means of Destruction or Injury; Establishment and Exercise of Control over Military Personnel, Objects and Territory – based on sections 1,2 and 6 of the questionnaire</i>) |
| 10.45 – 11.00 | Coffee Break |
| 11.00 – 13.00 | Working Session II – Discussion of Specific Categories of Situations (<i>Intelligence Activities; Support Activities – based on sections 3 and 4 of the questionnaire</i>) |
| 13.00 – 14.00 | Lunch |
| 14.00 – 16.00 | Working Session III – Discussion of Specific Categories of Situations (<i>Affiliation to Armed Forces and Groups – based on section 5 of the questionnaire</i>) |
| 16.00 – 16.15 | Coffee Break |
| 16.15 – 18.00 | Working Session IV – Discussion of Specific Categories of Situations (<i>Civilian Employees and Contractors: Presentation of paper by Professor Michael N. Schmitt, comments by Louise Doswald-Beck</i>) |
| 19.30 | Dinner |

Tuesday, October 26

- 8.30 – 10.00** **Working Session V** – Discussion of Specific Categories of Situations (*Direct Participation in NIAC: Presentation of paper by Professor Michael Bothe, comments by Yves Sandoz*)
- 10.00 – 10.15** Coffee Break
- 10.15 – 12.30** **Working Session VI** – Discussion of General Questions (*Loss of Immunity from Attack: Temporal Scope of Direct Participation; Membership in Armed Groups; The "Revolving Door" Approach, etc. – based on part A of the questionnaire*)
- 12.30 – 13.30** Lunch
- 13.30 – 15.15** **Working Session VII** – Discussion of General Questions (*The Notion of Direct Participation in Hostilities: Nexus to Armed Conflict, Hostile Intent, etc. – based on part B of the questionnaire and additional questions in section 7*)
- 15.15 – 15.30** Coffee Break
- 15.30 – 16.30** **Conclusion/Way Forward**