



ICRC

**REVISED DRAFT**

**Interpretive Guidance on the Notion of  
“Direct Participation in Hostilities”**

Based on the Fourth Expert Meeting  
on the Notion of "Direct Participation in Hostilities under IHL"  
(Geneva, 27 / 28 November 2006)

Co-organized by the International Committee of the Red Cross and the TMC Asser Institute

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**Remark:** This revised version of the "Interpretive Guidance on the Notion of Direct Participation in Hostilities" was drafted on behalf of the organizers by Nils Melzer, Legal Adviser of the ICRC based on discussions held and comments received during the Fourth Expert Meeting of 27/28 November 2006 on the initial Draft Interpretive Guidance. The revised Interpretive Guidance is intended to serve as an intermediate working document and, at this stage, does not necessarily 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. Likewise, all statements referred to in this document and in the materials cited therein, whether nominally attributed or not, were made in the personal capacity of each participating expert and do not necessarily express the position of any government, organization or other institution.

## **A. Introduction**

### **1. The Issue of Civilian Direct Participation in Hostilities**

The primary aim of international humanitarian law (IHL) is to protect the victims of international and non-international armed conflict and to regulate the conduct of hostilities based on a balance between considerations of military necessity and of humanity. As far as the conduct of hostilities is concerned, IHL essentially distinguishes two generic categories of persons, namely the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed to be peaceful and must be protected against the dangers arising from military operations. While it is true that, throughout history, the civilian population has always contributed to the general war effort to a greater or lesser degree, such activities typically remained relatively distant from the battlefield and included, for example, the production and provision of armaments, equipment, food and shelter, as well as economic, administrative and political support. Traditionally, only a small minority of civilians became involved in the actual conduct of military operations.

Recent decades have seen this pattern change radically. There has been a continuous shift of military operations away from distinct battlefields and into civilian population centers, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the "civilianization" of the armed forces which has introduced large numbers of private contractors, as well as secret service personnel and other civilian government employees into the reality of modern armed conflict. Moreover, in a number of contemporary armed conflicts, military operations have attained an unprecedented level of complexity and involve a great variety of interdependent human and technical resources, including remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems. Overall, the increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, the wide variety of functions and activities performed by civilians in contemporary armed conflict and the complexity of modern means and methods of warfare have caused confusion and uncertainty as to the implementation of the principle of distinction during the conduct of hostilities. These difficulties are further aggravated where armed actors do not distinguish themselves from the civilian population, such as during the conduct of clandestine or covert military operations or when persons act as "farmers by day and fighters by night". As a result, peaceful civilians are more likely to fall

victim to erroneous, unnecessary or arbitrary targeting, whereas armed forces - unable to properly identify their adversary - bear an increased risk of being attacked by persons they cannot distinguish from peaceful civilians whom they are obliged, and whom they should have been trained, to protect.

This trend has emphasized the importance of distinguishing not only between civilians and the armed forces, but also between "peaceful" civilians and civilians "directly participating in hostilities". Under IHL, the notion of "direct participation in hostilities" describes individual conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. Most notably,, for the duration of their direct participation in hostilities, civilians may be directly attacked as if they were combatants. Derived from Article 3 common to the Geneva Conventions, the notion of "direct" or "active" participation in hostilities is found in multiple provisions of IHL. However, despite the serious legal consequences involved, neither the Geneva Conventions nor their Additional Protocols provide a definition of what conduct amounts to direct participation in hostilities. This situation calls for the clarification of the following three questions under IHL applicable in both international and non-international armed conflict:

- *Who is considered a civilian for the purpose of the conduct of hostilities?* The response to this question determines the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities.<sup>1</sup>
- *What conduct amounts to direct participation in hostilities?* The response to this question determines the individual conduct which entails the suspension of civilian protection against direct attack.<sup>2</sup>
- *What are the precise modalities according to which civilians directly participating in hostilities lose their protection against direct attack?* The response to this question clarifies issues such as the duration of the loss of civilian protection, the precautions and presumptions to be observed in situations of doubt, the restraints imposed by IHL

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<sup>1</sup> Conversely, the status, rights and protections of persons outside the conduct of hostilities, whether or not their liberty has been restricted, does not necessarily depend on their civilian capacity but on the precise personal scope of application of the relevant provisions or instruments conferring the status, rights and protections in question (see, e.g., Arts 4 GC III, 4 GC IV, 3 GC I to IV, 75 AP I, 4 to 6 AP II).

<sup>2</sup> For the sake of clarity and simplicity, when discussing the consequences of civilian direct participation in hostilities, the present Interpretive Guidance will generally refer to loss of protection against "direct attacks", it being understood that, unless stated otherwise, this terminology includes also the suspension of civilian protection against other "dangers arising from military operations" (Article 51 [1] and [3] AP I; Article 13 [1] and [3] AP II). In practice, this entails, for example, that civilians directly participating in hostilities may not only be directly attacked themselves, but also do not have to be taken into account in the proportionality assessment when other military objectives in their proximity are attacked.

on the use of force against lawful targets and the consequences of regaining civilian protection.

## **2. The ICRC / TMC Asser Clarification Process**

In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the TMC Asser Institute, initiated a process of research, reflection and clarification of the notion of “direct participation in hostilities” under IHL. The aim was to identify the constitutive elements of the notion and provide guidance for its interpretation in both international and non-international armed conflict. In doing so, the process focused on clarifying the notion of “direct participation in hostilities” for the purpose of the conduct of hostilities only and did not, or only marginally, address the legal regime applicable in case of capture or detention of persons having directly participated in hostilities. Moreover, the clarification process was concerned with the analysis and interpretation of IHL only, without prejudice to questions which may be raised by the direct participation of civilians in hostilities under other frameworks of international law, such as, most notably, human rights law or, where cross-border operations are concerned, the law regulating the use of interstate force.

In the framework of the clarification process, four informal Expert Meetings entitled "Direct Participation in Hostilities under International Humanitarian Law" were organized in The Hague and Geneva. Every meeting brought together between forty and fifty legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations, each in their personal capacity. The high level of expertise of the participants provided for constructive and fruitful discussions on a wide variety of legal questions related to the notion of direct participation in hostilities. In preparation for the expert discussions the organizers provided thematic background documents, and a number of individual experts also submitted expert papers or gave presentations on specific topics during the Expert Meetings.

The *First Expert Meeting*, held in The Hague on 2 June 2003, set the foundation for the research and led to the unanimous conclusion that the notion of direct participation in hostilities required further clarification and that the ICRC should take the lead in this process. The *Second Expert Meeting*, held in The Hague on 25 and 26 October 2004, focused and deepened the discussion based on an extensive Questionnaire which was distributed to the experts before the meeting and which raised a wide range of practical examples and theoretical questions related to the notion of direct participation in hostilities. The *Third*

*Expert Meeting*, held in Geneva from 23 to 25 October 2005, addressed some of the most complex legal questions related to the concept of direct participation in hostilities, such as the implications of membership in organized armed groups in non-international armed conflict for the applicability of the rule on direct participation in hostilities, the temporal scope of the ensuing loss of protection, as well as questions raised by the presence of private contractors and civilian employees in conflict areas. Based on the results of these Expert Meetings, the organizers prepared a first draft of an Interpretive Guidance on the notion of direct participation in hostilities for discussion during the *Fourth Expert Meeting*, held in Geneva on 27 and 28 November 2006. Based on the comments received during that meeting, the present revised version of the Interpretive Guidance was drafted and submitted to the experts for a final round of written comments in July 2007.

### **3. The Present Interpretive Guidance**

The aim of the present document is to provide an Interpretive Guidance for the notion of “direct participation in hostilities”. The drafting of the present text would not have been possible without the extraordinary expertise and experience of the experts participating in the clarification process. Apart from treaty IHL, the Interpretive Guidance draws on a variety of sources, including the wide range of opinions and positions expressed by the participants during the Expert Meetings, the responses received from experts to the 2004 questionnaire, the specific papers and presentations contributed by individual experts to the Expert Meetings, as well as the various background documents provided by the organizers. An overview of the discussions and of the various views expressed is provided in the summary reports and in some of the background papers drafted for each Expert Meeting. The present document goes beyond mere reporting and endeavors to present a coherent Interpretive Guidance of IHL as far as it relates to the direct participation of civilians in hostilities. It does not necessarily reflect a unanimous view or majority opinion expressed during the Expert Meetings but, instead, tries to propose a solution which duly takes into account the wide variety of values and interests involved.

The Interpretive Guidance is divided into three main chapters, comprising a total of 10 Headings, each commented in an accompanying text: The first substantive chapter (B) analyses the concept of “civilian” under IHL applicable in international (I) and, respectively, non-international (II) armed conflict in order to determine the circle of persons who are protected against direct attack unless and for such time as they directly participate in hostilities. It concludes with a separate section reflecting on the status of private contractors

and civilian employees of a party to an armed conflict (III). The second chapter (C) determines the basic concept (IV), as well as the substantive (V) and temporal (VI) scope of the notion of "direct participation in hostilities", focusing in particular on the constitutive elements of concrete acts amounting to direct participation in hostilities. The third chapter (D) addresses the specific modalities which govern the suspension of civilian protection against direct attack in case of direct participation in hostilities. In doing so, this chapter discusses the temporal scope of the loss of protection (VII), the precautions and presumptions to be applied in situations of doubt (VIII), the general restraints imposed on the use of force in direct attack against civilians directly participating in hostilities (IX) and the basic consequences of regaining civilian protection (X).

It bears to be reiterated that, in accordance with the scope given to the ICRC/TMC Asser clarification process, the present Interpretive Guidance focuses on clarifying the notion of "direct participation in hostilities" for the purposes of the conduct of hostilities only and that its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their freedom for reasons related to their involvement in hostilities. Moreover, the Interpretive Guidance is concerned with the analysis and interpretation of IHL only, without prejudice to questions, to which civilian direct participation in hostilities may give rise under other frameworks of international law.



## B. Personal Scope: The Concept of Civilian

For the purpose of the conduct of hostilities, the primary significance of the definition of "civilian" is that it determines the circle of persons who enjoy immunity from direct attack, unless and for such time as they directly participate in hostilities.<sup>3</sup> In other words, the definition of "civilian" under IHL also determines the personal scope of applicability of the rule that direct participation in hostilities leads to loss of protection against direct attack.<sup>4</sup> Before interpreting the notion of "direct participation in hostilities" itself, it is therefore necessary to clarify the contours of the concept of "civilian" under IHL applicable in both international and non-international armed conflict.

### I. The Concept of Civilian in International Armed Conflict

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

#### 1. Mutual Exclusivity of the Concepts of Civilian, Armed Forces and Levée en Masse

According to Additional Protocol I (AP I),<sup>5</sup> civilians in international armed conflict are defined negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.<sup>6</sup> While treaty IHL predating Additional Protocol I provides little express guidance as to the definition of "civilian", the terminology used in the

<sup>3</sup> Articles 51 [3] AP I; Article 13 [3] AP II; Rule 6 of the ICRC's Customary Law Study (CLS).

<sup>4</sup> Where IHL provides persons other than civilians with immunity from direct attack, the loss and eventual restoration of that protection is governed by criteria similar to, but not identical with, direct participation in hostilities. For example, medical, religious and civil defense personnel of the armed forces lose their protection in case of "hostile" or "harmful" acts outside their privileged function (Articles 21 GC I, 11 [2] AP II and 67 [1] (e) AP I, Rule 25 CLS). Combatants *hors de combat* lose their protection if they commit a "hostile act" or "attempt to escape" (Article 41 [2] AP I).

<sup>5</sup> As of 1 July 2007, 167 states were party to AP I. At the same time, the ratification of GC I to IV was virtually universal (194 states party).

<sup>6</sup> Article 50 [1] AP I. According to Rule 5 CLS, this definition of "civilian" reflects customary IHL in international armed conflict. The categories covered by Article 4 A [1], [2] and [3] GC III are presumably already included in the general definition of "armed forces" under in Article 43 [1] AP I. See also Commentary Article 50 AP I, §§ 1916 f.

Hague Regulations (H IV R) and the Geneva Conventions (GC I to IV) nevertheless suggests that the concepts of “civilian” on the one hand, and of “armed forces” and “*levée en masse*” on the other, are mutually exclusive.<sup>7</sup> Therefore, under all instruments governing international armed conflict, the potential scope of the concept of “civilian” is negatively delimited by the definitions of “armed forces” and of “*levée en masse*”.<sup>8</sup>

## 2. Basic Concepts of Civilian, Armed Forces and Levée en Masse

As far as the *levée en masse* is concerned, all relevant instruments are based on the same definition, which refers to the inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>9</sup> With regard to the armed forces of the parties to the conflict, there is less unanimity. Although all relevant instruments recognize that the armed forces of the parties to the conflict may consist of combatants and non-combatants,<sup>10</sup> the Hague Regulations and the Geneva Conventions are based on a narrower concept of armed forces than Additional Protocol I.<sup>11</sup> More precisely, beyond the armed forces of a party to the conflict as recognized under domestic law, the concept of “armed forces” underlying the Hague

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<sup>7</sup> For example, Article 22 [2] of the Brussels Declaration (1874) and Article 29 H IV R (1907) refer to “civilians” in contradistinction to “soldiers”. Similarly, as their titles suggest, the Geneva Conventions (1949) use the generic category of “civilian persons” (GC IV) as complementary to members of the “armed forces” (GC I and GC II). Even though the scope of application of each convention does not exactly correspond to the generic categories mentioned in their respective titles, the categories of “civilian” and “armed forces” are clearly used as mutually exclusive in all four conventions. For example, GC I, GC II and GC IV refer to “civilian” wounded, sick and shipwrecked (Article 22 [5] GC I; Article 35 [4] GC II; Articles 20, 21, 22 GC IV) as opposed to the generic categories protected by GC I and GC II, namely the wounded, sick and shipwrecked of the “armed forces” (titles GC I and GC II). Similarly, Article 57 GC IV refers to “military” wounded and sick as opposed to the generic category protected by GC IV, namely “civilian persons”. Other provisions of the conventions also use the term “civilian” as opposed to “military” (Article 30 [2] GC III: “military or civilian medical unit”; Article 32 GC IV: “civilian or military agents”; Article 144 [1] GC IV: “military and civil instruction”; Article 93 [2] GC III: “civilian clothing”, presumably as opposed to military uniform; Articles 18, 19, 20, 57 GC IV: “civilian hospitals”, presumably as opposed to military hospitals; Article 144 [2] GC IV: “civilian, military, police or other authorities”) or to “combatants and non-combatants” (Article 15 GC IV). Affirmative of the mutual exclusivity between “civilians” and “armed forces” also Commentary Article 50 AP I, § 1914.

<sup>8</sup> At the 2006 Expert Meeting, this preliminary observation was widely accepted as accurate. Only one expert expressed strong disagreement with the otherwise prevailing view that civilians can be subdivided into two groups depending on whether or not they directly participate in hostilities. Instead, this expert held that civilians directly participating in hostilities should no longer be regarded as civilians and that, therefore, it was the category of combatant which should be subdivided into privileged combatants (members of armed forces) and unprivileged combatants (civilians directly participating in hostilities). See Report DPH 2006, p. 10 and, more generally, Report DPH 2006, B.I., pp. 12 ff.).

<sup>9</sup> Article 2 H IV R; Article 4 [6] GC III. See also the reference to Article 4 [6] GC III in Article 50 [1] AP I.

<sup>10</sup> Article 3 H IV R; Article 43 [2] AP I; Articles 24 f. GC I; Articles 36 f. GC II; Article 15 GC IV.

<sup>11</sup> See also the discussion in Report DPH 2006, A.5, pp. 9 ff and B.I.3, pp. 14 f.

Regulations and the Geneva Conventions includes only those "other" militias and volunteer corps belonging to a party to the conflict, which fulfill what are known as the "four requirements" of: (a) responsible command; (b) fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) operating in accordance with the laws and customs of war.<sup>12</sup> According to Additional Protocol I, the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.<sup>13</sup> The essential difference is that, under Additional Protocol I, respect for the laws and customs of war, the carrying of distinctive signs and the open carrying of arms remain legal obligations, but are not constitutive elements of "armed forces".<sup>14</sup> Therefore, under Additional Protocol I, armed actors can be regarded as "civilians" only where they do not operate in support of a party to the conflict, or where they do so on a merely spontaneous, unorganized or sporadic basis without qualifying as a *levée en masse*.

### 3. Significance of "Belonging to" a Party to the Conflict

Under treaty law predating Additional Protocol I, members of militia and volunteer corps of a party to the conflict who fail to fulfill one or more of the "four requirements" set out in the Hague Regulations and the Geneva Conventions are neither entitled to combatant privilege, nor to prisoner of war (POW) -status. Regardless of what their status upon capture might be (an issue that is outside the scope of the present document),<sup>15</sup> it does not follow from the terms of the Hague Regulations and the Geneva Conventions that any such person would necessarily have to be regarded as a civilian during the conduct of hostilities.<sup>16</sup> At least as long as armed forces, groups or units "belong to"<sup>17</sup> a party to the conflict and show a

<sup>12</sup> Article 1 H IV R; Articles 13 [1], [2], [3] and [6] GC I and GC II; Article 4 A [1], [2], [3] and [6] GC III.

<sup>13</sup> Article 43 [1] AP I; Rule 4 CLS.

<sup>14</sup> A legal obligation, but not a constitutive element, is also the duty to notify the incorporation of paramilitary or armed law enforcement agencies into the armed forces (Article 43 [3] AP I).

<sup>15</sup> In the ICRC's view, in international armed conflict, any person failing to qualify for POW-status under Article 4 GC III would remain a "protected person" within the meaning of GC IV, subject to the nationality requirements of Article 4 GC IV.

<sup>16</sup> See also Report DPH 2006, B.I.3, p. 14 f.

<sup>17</sup> The concept of "belonging to" denotes a *de facto* relationship between an armed force and a party to the conflict, which may be officially declared, but may also be expressed through tacit agreement or conclusive behavior. In international armed conflict, the notion of "belonging to" is best expressed in terms of state responsibility. Thus, an armed group can be said to "belong to" a state to the extent that its conduct is attributable to that state according to the rules of general international law on state responsibility (Report DPH 2006, B.I.4, p. 16). Based on the experience of the Second World War, the Commentary Article 4 GC III, p. 57 interprets the notion of "belonging to" as follows: "It is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find

minimum of organization, they remain a functional part of the conduct of hostilities between the opposing parties to the conflict and, therefore, should not be regarded as part of the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly or to conduct their operations in accordance with the laws and customs of war.<sup>18</sup> The resulting concept of civilian implied in the Hague Regulations and the Geneva Conventions excludes members of organized armed forces, groups or units belonging to a party to the conflict, as well as participants in a *levée en masse* and, thus, essentially corresponds to that adopted in Additional Protocol I.<sup>19</sup> Conversely, groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to that conflict, such as, for instance, "independent"<sup>20</sup> resistance groups in an occupied territory, cannot be regarded as members of the armed forces of a party to the conflict, whether under the terms of Additional Protocol I or under those of the Hague Regulations and the Geneva Conventions. Therefore, with respect to the particular international conflict in question, such independent armed actors would have to be regarded as civilians not only under Additional Protocol I, but also under the Hague Regulations and the Geneva Conventions.<sup>21</sup> To do otherwise would discard the basic dichotomy made in all armed conflicts between the armed forces *of the parties to the conflict* and the civilian population, and would contradict the definition of international armed conflicts as collective confrontations not between private individuals, but between states party to the

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expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power".

<sup>18</sup> While the prevailing opinion during the 2006 Expert Meeting was supportive of this interpretation, one expert expressed serious reservations because he feared that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV, thus giving way to their internment without review until the end of the hostilities (Report DPH 2006, pp. 15 f.).

<sup>19</sup> Article 50 [1] AP I excludes from the category of "civilian" all individuals falling within the scope of Article 43 AP I (which includes the categories covered by Article 4 [1], [2] and [3] GC III) and, additionally, those falling within the scope of Article 4 [6] GC III (*levée en masse*).

<sup>20</sup> For the purposes of this document, the term "independent" organized armed groups denotes groups not "belonging to" a party to the conflict within the meaning of Article 4 A. [2] GC III.

<sup>21</sup> This was also the predominant opinion expressed during the 2006 Expert Meeting (Report DPH 2006, pp. 16 f.). One expert, while recognizing the accuracy of that interpretation from a theoretical perspective, nevertheless found it to be counter-intuitive that armed groups failing to "belong to" a party to the surrounding international armed conflict, unless regarded as parties to a separate non-international armed conflict, should remain civilians who could only be directly attacked for such time as they carried out specific acts of direct participation in hostilities. This expert suggested that an alternative criterion (i.e. other than "belonging to" a party to the conflict) for continuous loss of civilian protection against attack could be that independent organized armed groups conducted hostilities for reasons related to the surrounding international armed conflict, even without "belonging to" one of the parties to the conflict (Report DPH 2006, pp. 17 f.). See also Israeli Supreme Court, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, (HCJ 769/02), Judgment of 13 December 2006 § 26, where the Court held that independent Palestinian armed groups operating in a context of belligerent occupation, even if described as "unlawful combatants", qualified as civilians within the meaning of IHL applicable to international armed conflict.

conflict.<sup>22</sup> This does not exclude the possibility that organized armed actors operating within the broader context of an international armed conflict without having at least a *de facto* relationship to a party to that conflict ("belonging to") could be regarded as parties to a separate non-international armed conflict, as soon as armed violence reaches the threshold of intensity or continuity<sup>23</sup> required for the applicability of Article 3 GC I to IV.<sup>24</sup> The question as to the civilian or military categorization of the involved individuals would then have to be determined by reference to IHL governing the conduct of hostilities in non-international armed conflict (see below).<sup>25</sup>

#### 4. Resulting Concept of Civilian in International Armed Conflict

As far as situations of international armed conflict are concerned, the decisive criterion for the qualification of an armed actor as a civilian is that of neither being organized under a command responsible to a party to the international armed conflict, nor participating in a *levée en masse*. In conclusion, for the purposes of the conduct of hostilities in international

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<sup>22</sup> See also the discussion in Report DPH 2006, pp. 16 ff. and 53 f. The question as to the duration for which such organized civilians engaging in "independent" armed violence lose protection against direct attack depends on how widely or narrowly the notion of direct participation in hostilities is interpreted (see below, Heading IV, pp. 22 f.).

<sup>23</sup> According to the ICTY, the decisive criterion for the qualification of a situation as a non-international armed conflict is the existence of "protracted armed violence" (ICTY, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-A, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70), whereas "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" do not reach the required threshold (Article 1 [2] AP II).

<sup>24</sup> During the 2005 Expert Meeting, it was pointed out that, in the absence of a nexus to already existing hostilities, violence used by civilians could only constitute direct participation in hostilities if it reached the threshold of intensity required for a non-international armed conflict (Report DPH 2005, p. 10). During the 2006 Expert Meeting, it was argued that the approach taken by the Interpretive Guidance with regard to "independent" armed groups could also apply to transnational armed groups operating in a situation of armed conflict. In this context, several experts recalled that, in the case *Hamdan v. Rumsfeld* (2006), the US Supreme Court ruled that the conflict between the US government and the Al Qaeda organization was governed by Article 3 GC I to IV. Other experts remained more critical with regard to what they perceived as a too generous interpretation of the concept of non-international armed conflict (Report DPH 2006, pp. 17 ff. and 53 f.). For a counter-example, see also: Israeli Supreme Court, *The Public Committee Against Torture et al. v. The Government of Israel et al.*, (HCJ 769/02), Judgment of 13 December 2006, § 18, where the Court argued that the hostilities between independent Palestinian armed groups and Israel constituted an international armed conflict. But see already Commentary Article 4 GC III, p. 57: "Resistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict' ". The *travaux préparatoires* are silent on the possible parallel existence of an international and a non-international aspect within the greater context of the same armed conflict.

<sup>25</sup> See below, Heading IV, pp. 15 f. Below the threshold of intensity or continuity required for a non-international armed conflict, all organized armed actors must be dealt with according to law enforcement standards, regardless of whether they are regarded as terrorists, pirates, gangsters or other organized criminals..

armed conflict, all persons who are neither members of an organized armed force, group or unit under a command responsible to a party to the conflict, nor participants in a *levée en masse*, are entitled to protection against direct attack unless and for such time as they directly participate in hostilities.<sup>26</sup>

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<sup>26</sup> The ICTY defined the notion of “civilians” for situations of international armed conflict as “persons who are not, or no longer, members of the armed forces” (ICTY, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment of 3 March 2000, § 180). Outside the conduct of hostilities, civilians may benefit from the protection of the Third or Fourth Geneva Convention, the First Additional Protocol and customary IHL, depending on the circumstances of each case (Article 4 [4] and [5] GC III; Article 4 [1] to [4] GC IV; Article 75 AP I).

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

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

### 1. Mutual Exclusivity of the Concepts of “Civilian” and “Armed Forces”

Although treaty IHL governing non-international armed conflict does not define the term “civilian”, both state practice and the terminology used in Article 3 GC I to IV and Additional Protocol II (AP II) reveal that “civilians” and the “armed forces” of the parties to the conflict are mutually exclusive concepts also in non-international armed conflict.<sup>27</sup> Article 3 GC I to IV provides that “each Party to the conflict” shall afford protection to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*”.<sup>28</sup> Thus, both state and non-state parties to non-international armed conflicts have “armed forces”, which are distinct from the civilian population.<sup>29</sup> This passage also clarifies that members of such armed forces, in contradistinction to other persons, are considered as “taking no active part in the hostilities” only once they lay down their arms (i.e. disengage from their fighting function) or are placed *hors de combat* - mere suspension of combat is insufficient. In very general terms, Article 3 GC I to IV can be said to imply a concept of “civilian” comprising essentially those persons “who do not bear arms” on behalf of a party to the conflict.<sup>30</sup> While Additional Protocol II has a significantly narrower

<sup>27</sup> State practice in situations of non-international armed conflict confirms that members of state armed forces are not considered to be civilians (CLS, Commentary Rule 5, Vol. I, p.19).

<sup>28</sup> Article 3 GC I to IV (emphases added).

<sup>29</sup> See Commentary Article 3 GC III, p. 37: “Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ - conflicts, in short, which are in many respects similar to an international war [...]”. Affirmative also: Commentary Article 3 GC II, p. 33; Commentary Article 3 GC IV, p. 36; Report DPH 2005, pp. 43 f. This approach was widely supported during the 2006 Expert Meeting. But see the dissenting opinion expressed by two experts, namely that treaty IHL applicable in non-international armed conflict does not exclude members of non-state armed groups from the category of civilians (Report DPH 2006, B.II.2., pp. 21 ff.).

<sup>30</sup> See also Commentary Article 3 GC IV, p. 40: “As we have already mentioned, Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who

scope of application and uses a different terminology than Article 3 GC I to IV, the generic categorization of persons is the same in both instruments.<sup>31</sup> During the Diplomatic Conference of 1974 to 1977, Draft Article 25 [1] AP II defined the notion of "civilian" as including "anyone who is not a member of the armed forces or of an organized armed group".<sup>32</sup> Although this article was subsequently discarded along with almost all other provisions relating to the conduct of hostilities in a last minute effort to "simplify" the Protocol, the originally proposed concept of "civilian" remains reflected in the final text. Thus, according to the Protocol, "armed forces", "dissident armed forces" and "other organized armed groups" have the function and ability "to carry out sustained and concerted military operations",<sup>33</sup> whereas the "civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations" carried out by these forces "unless and for such time as they take a direct part in hostilities".<sup>34</sup>

## 2. Basic Concepts of "Armed Forces" and "Civilians"

Under Additional Protocol II, the notion of "armed forces" is restricted to governmental (i.e. state) armed forces, whereas the armed forces of non-state parties are referred to as "dissident armed forces" or "other organized armed groups". Accordingly, the notion of "armed forces" in Article 3 GC I to IV includes all three categories juxtaposed in Article 1 [1] AP II, namely state "armed forces", "dissident armed forces" and "organized armed groups" under responsible command.<sup>35</sup> In principle, therefore, the concept of "civilian" in non-international armed conflict comprises anyone who is not a member of the armed forces of a party to the conflict (Article 3 GC I to IV) or, expressed in the terminology of Additional Protocol II, who is not a member of the armed forces, dissident armed forces or other

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do not take part in the hostilities. In this instance, however, the Article naturally applies first and foremost to civilians - that is to people who do not bear arms" (emphasis added).

<sup>31</sup> For the high threshold of application of Additional Protocol II, see Article 1 [1] AP II.

<sup>32</sup> Draft Article 25 [1] AP II was adopted by consensus in the Third Committee on 4 April 1975 (O.R., Vol. XV, p. 320, CDDH/215/Rev.1). See also the ICRC's Commentary (October 1973) on the original version of Article 25 [1] of the Draft of AP II submitted to the Diplomatic Conference of 1974 to 1977: "[...] sont considérés comme civils tous les êtres humains qui se trouvent sur le territoire d'une Partie contractante où se déroule un conflit armé au sens de l'article premier et qui ne font pas partie des forces armées ou groupes armés" [emphasis added].

<sup>33</sup> Article 1 [1] AP II. During the 2006 Expert Meeting, one expert was of the opinion that Article 1 AP II exclusively defined the scope of applicability of the Protocol and did not allow any conclusions as to the concept of organized armed groups underlying IHL applicable in non-international armed conflict in general (Report DPH 2006, pp. 21 f.).

<sup>34</sup> Article 13 [1] and [3] AP I. See also the respective contexts in which the Protocol refers to "civilians" (Articles 13, 14, 17 AP II) and the "civilian population" (title Part IV AP II; Articles 5 [1] (b) and (e), 13, 14, 15, 17 and 18 AP II).

<sup>35</sup> See also Draft Article 25 [1] AP II.



organized armed group belonging to a party to the conflict.<sup>36</sup> Similar to situations of international armed conflict, the concrete scope of the notion of civilian in non-international armed conflict is negatively delimited by the definitions given to the concepts of state “armed forces” and, respectively, of “dissident armed forces” and “other organized armed groups”. Particularly on the non-state side of the conflict, it may not always be easy to properly distinguish between the “party” to the conflict on the one hand and its “armed forces” on the other, whether they consist of dissident armed forces or organized armed groups. However, it is precisely this distinction which must be made in order to ensure the protection of the civilian population in accordance with the fundamental principles of IHL.<sup>37</sup>

### 3. State Armed Forces

As far as state armed forces are concerned, there is no reason to assume that states party to both Additional Protocols desired distinct definitions for situations of international and non-international armed conflict. As the *travaux préparatoires* to Additional Protocol II indicate, the notion of “armed forces” of a High Contracting Party in Article 1 [1] AP II was intended to be broad and functional enough to include armed actors which do not necessarily qualify as armed forces under domestic law, such as members of the national guard, customs, police forces or any similar force, provided that they do, in fact, assume the function of armed forces for the state party to the conflict.<sup>38</sup> In other words, comparable to the notion of “armed forces” adopted in Additional Protocol I, the concept of state armed forces underlying Additional Protocol II includes not only the regular armed forces as constituted under domestic law, but also other armed groups or units that are, in fact, organized under a command responsible to the involved state.<sup>39</sup> At least as far as regular armed forces are

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<sup>36</sup> But see the reference to the dissenting opinions expressed by two experts during the 2006 Expert Meeting, *supra*, FN 29.

<sup>37</sup> Although Article 1 AP II refers to armed conflicts between governmental armed forces and dissident armed forces or other organized armed groups, the actual “parties” to such a conflict are, of course, the involved High Contracting Party and the opposing non-state party (and not their respective armed forces).

<sup>38</sup> See Commentary Article 1 AP II, § 4462: “The term ‘armed forces’ of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, ‘regular armed forces’, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)”, referring to O.R., Vol. X, p. 94, CDDH/I/238/Rev. 1. See also the reference to direct attacks against police forces in Report DPH 2005, p. 11

<sup>39</sup> See also Bothe et al., *New Rules for Victims of Armed Conflicts*, p. 672, holding that the terms “organized” and “under responsible command” in Article 1 [1] AP II “inferentially [...] recognize the essential conditions prescribed under art. 43 of Protocol I: that the armed force be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command”.

concerned, membership in state armed forces is generally defined in domestic law and expressed through formal integration into permanent units, which are distinguishable by specific insignia and equipment. The same applies where armed units of police, border guard or similar uniformed forces are incorporated into the armed forces. In principle, members of such regularly constituted forces are not regarded as civilians, regardless of their individual conduct or their specific function within the state armed forces. Conversely, membership in irregularly constituted armed forces or groups belonging to the state, such as loosely organized militia, paramilitary or resistance groups, should be determined based on the same functional criteria that apply to non-state armed forces other than dissident armed forces.<sup>40</sup>

#### 4. Non-State Armed Forces

***Dissident Armed Forces:*** Where parts of the state armed forces turn against the government and become the armed forces of a non-state party to an armed conflict, there is no reason to assume that members of such dissident armed forces should now be regarded as civilians within the meaning of IHL. At least to the extent that dissident armed forces remain organized according to structures that are comparable to those of state armed forces, these structures should continue to determine individual membership also in dissident armed forces.<sup>41</sup>

***Other Organized Armed Groups:*** Much greater difficulty arises with regard to the definition of non-state armed forces where they consist of organized armed groups other than dissident armed forces. Membership in such organized armed groups is not regulated in domestic law, is rarely based on an official act of integration other than taking up a certain function within the group and is not, or not consistently, expressed through uniforms, fixed distinctive signs and identification cards or discs. In view of the wide variety of cultural, political and military contexts in which organized armed groups operate, membership in such groups may in one case depend on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions, such as membership in a clan, tribe or family.<sup>42</sup> In practice, the informal and often clandestine structures of most irregularly constituted armed groups make

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<sup>40</sup> See Section B.II.5, on "Functional Determination of Membership in Organized Armed Groups", *infra*, pp. 19 f.

<sup>41</sup> The notion of "dissident armed forces" refers to part of the state armed forces, which have become a non-state party to the conflict by turning against the government (Commentary Article 1 AP II, § 4460).

<sup>42</sup> BP DPH 2005 Armed Groups (IV-V), p. 15.

it impossible and meaningless to distinguish between members without combat function<sup>43</sup> and civilians accompanying or otherwise supporting such groups without taking a direct part in the hostilities.<sup>44</sup> In view of the inherently vague and elastic nature of membership in irregularly constituted armed groups, there is a considerable risk that the notion of "organized armed group" be overextended to also include persons whose support for a party to the conflict does not, or not on a continuous basis, amount to direct participation in hostilities and who, therefore, should benefit from civilian protection against direct attack unless and for such time as they actually take a direct part in hostilities. Instead, irregularly constituted armed groups should be narrowly construed as comprising only the "armed" or "military" wing of a non-state party to the conflict, namely its fighting forces in a strictly functional sense, which are charged with the conduct of hostilities on its behalf. Accordingly, individual membership in irregularly constituted organized armed groups should not depend on abstract affiliation, family ties or other criteria prone to error or abuse, but exclusively on the concrete function continuously exercised by the individual in question.<sup>45</sup>

## 5. Functional Determination of Membership in Organized Armed Groups

*In concreto*, the decisive criterion for individual "membership" in an irregularly constituted armed group belonging to a party to the conflict should be whether a person assumes continuous "combat function" for that party,<sup>46</sup> that is to say, any continuous function involving

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<sup>43</sup> See Section B.II.5, on "Functional Determination of Membership in Organized Armed Groups", *infra*, pp. 19 f.

<sup>44</sup> Depending on the concrete circumstances, both categories of persons may include, for example, cooks, secretaries, administrative, medical and religious personnel, as well as representatives and supporters of the group's political wing.

<sup>45</sup> This also resulted from the discussions on "membership" and "individual function" as determinative factors for continuous loss of civilian protection at the 2006 Expert Meeting (see Report DPH 2006, B.II.7, pp. 30 ff., *in fine*). More generally, during the Expert Meetings, a widely conceived "membership approach", which would permit direct attacks against all persons associated with an organized armed group at all times, regardless of the individual function they assume for the group, was generally discarded as unacceptable (Report DPH 2005, pp. 49, 63 ff. and, particularly, the extensive discussion on the practical problems caused by a general "membership approach" in Report DPH 2005, pp. 53 ff.) However, there also was virtually unanimous agreement that members of the fighting forces of non-state parties to a conflict should not be protected according to the same conditions and modalities as civilians directly participating in hostilities on an unorganized, sporadic or spontaneous basis (Report DPH 2005, pp. 43 f., 48, 49). The general tendency was to follow a "functional approach", according to which persons cease to be civilians within the meaning of IHL for as long as they assume a combat function on behalf of a party to a non-international armed conflict (Report DPH 2006, A.5., p. 9 ff., B.II.2, 7 and 8., pp. 21 ff., 30 ff. and 33; Report DPH 2005, pp. 43 f., 48 ff., 63 ff., 82 f. and, as a whole, Expert Paper (2004) by Prof. M. Bothe).

<sup>46</sup> During the 2006 Expert Meeting, while there was wide support for the functional approach taken in identifying fighting members of armed groups, there was some terminological controversy as to whether this function should be described as "combat", "military", "fighting" or "belligerent" function. Widely rejected was the initially proposed notion of "combatant" function because of its potential

the concerned person's direct participation in hostilities on a regular basis.<sup>47</sup> In this respect, it should be emphasized that *de facto* assumption of combat function in the context of the conduct of hostilities does not suggest, and must not be confused with, *de jure* entitlement to combatant privilege.<sup>48</sup> IHL applicable to non-international armed conflicts does not afford combatant privilege to any category of persons, regardless of whether they assume combat function for a party to the conflict. Instead, in situations of non-international armed conflict, the "right" to directly participate in hostilities is governed exclusively by domestic law. Due to its continuous nature, combat function cannot be exercised on a spontaneous, unorganized or sporadic basis, but requires the lasting integration of the concerned individual into an organized armed force or group, which exercises the role of the armed forces of a party to the conflict. Depending on the circumstances, combat function may be openly expressed through the carrying of uniforms, distinctive signs or weapons, but may also be identified based on conclusive behavior, namely where a person takes a direct part in hostilities on behalf of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, exceptional or otherwise temporary role assumed for the duration of a particular operation. Whatever criteria are applied for the determination of combat function in a concrete context, the decisive point is that they must allow to reliably distinguish between members of the actual fighting forces of a party to the conflict and civilians supporting that party through activities not amounting to direct participation in hostilities or, at the most, through direct participation in hostilities of a merely spontaneous, unorganized or sporadic nature.<sup>49</sup>

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confusion with combatant status (see Report DPH 2006, A.5. pp. 9 ff., B.II.3 (a), pp. 23 f.). In this context, it was emphasized that, in order to be operable, the "functional approach" should not be interpreted as requiring an extensive investigation into the specific functions of each and every person belonging to the adverse fighting forces, but must be operated on the basis of available intelligence and a standard of reasonableness (Report DPH 2006, B.II.4 and 5, pp. 25 ff. and, particularly, p. 28).

<sup>47</sup> During the 2006 Expert Meeting, the requirement of direct participation in hostilities on a "regular basis", although criticized by one expert, was supported by most other experts (Report DPH 2006, B.II.6., p. 30). The experts also found that the term "continuous" more accurately expressed the required degree of long-term continuity in assuming a combat function than the term "permanent" (Report DPH 2006, B.II.3 (b), p. 24). It was recognized, however, that the "membership element" inherent in the concept of organized armed group had to be identified based on the concrete acts (see *supra*, FN 45, as well as the reference to the "act element" in Report DPH 2006, D.VII.3, p. 67).

<sup>48</sup> Combatant privilege, that is to say, the "right" to directly participate in hostilities with immunity from domestic prosecution, is afforded only to members of the armed forces of parties to an international armed conflict (except medical and religious personnel), as well as to participants in a *levée en masse* (Articles 1 and 2 H IV R; Article 43 [1] AP I). Although all privileged combatants may have a "right" to directly participate in hostilities, they do not necessarily have a "function" requiring them to do so (e.g. cooks, administrative personnel). Conversely, individuals who, in fact, assume combat function outside the privileged categories of persons, as well as in non-international armed conflict, are not entitled to combatant privilege under IHL.

<sup>49</sup> See also the discussion on the practical determination of individual function in Report DPH 2006, B.II.4 and 5, pp. 26 ff.

By way of illustration, for as long as a person supports an organized armed group through his or her regular involvement in the planning, preparation, execution or command and control of concrete acts and operations amounting to direct participation in hostilities he or she may be presumed to assume a continuous combat function. Likewise, an individual recruited by an armed group and being trained and equipped to directly participate in hostilities on a continuous basis may be presumed to assume a continuous combat function already before he or she first carries out a specific hostile act. Conversely, individuals who accompany and support an irregularly constituted armed group, but whose function does not involve direct participation in hostilities, should not be regarded as members of that group, but as civilians assuming a support function similar to private contractors and civilian employees accompanying state armed forces. As civilians, they benefit from protection against direct attack unless and for such time as they carry out specific acts amounting to direct participation in hostilities. Similarly, a civilian villager who, voluntarily or involuntarily, takes a direct part in particular combat operations whenever a particular armed group is passing through the village, but who consistently resumes peaceful civilian life as soon as the group leaves the area, would lack “continuous” combat function and, therefore, remain a civilian protected against direct attack unless and for such time as he is actually engaged in a specific act of direct participation in hostilities. Of course, in each case, the determination that a person assumes a continuous combat function remains subject to all feasible precautions and to the presumption of civilian protection in case of doubt.<sup>50</sup>

## **6. Resulting Concept of Civilian in Non-International Armed Conflict**

In conclusion, for the purposes of the conduct of hostilities in non-international armed conflict, all persons who are not members of the armed forces of a party to the conflict (Article 3 GC I to IV) or, respectively, of state armed forces, dissident armed forces or other organized armed groups under a command responsible to a party to the conflict (Article 1 [1] AP II), are civilians and, therefore, are entitled to protection against direct attack unless and for such time as they directly participate in hostilities. In practice, the distinction of protected civilians from regularly constituted, uniformed state armed forces or their dissident counterparts is comparatively unproblematic. However, if erroneous and arbitrary use of force against protected civilians is to be avoided in operational reality, the distinction of protected civilians from irregularly constituted armed forces (Article 3 GC I to IV) or organized armed groups (Article 1 [1] AP II) belonging to a party to the conflict cannot be based on an

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<sup>50</sup> See Section VIII, *infra* pp. 57 ff.

abstract notion of membership, which vaguely indicates that a person supports or belongs to a group involved in the conduct of hostilities. Instead, first, the notion of "organized armed group" cannot be equated with that of a "party" to the conflict as a whole, but must be restricted to the actual "armed forces" of such a party. Second, the notion of "membership" in irregularly constituted organized armed forces or groups belonging to a party to the conflict should be determined based on the individual function actually exercised within the group and should be restricted to those persons who are assuming a continuous combat function as opposed, for example, to a political or administrative function. In this context, "combat function" denotes the assumption of a continuous function for an organized armed force or group belonging to a party to the conflict, which involves the carrying out of specific acts amounting to direct participation in hostilities on a regular basis.<sup>51</sup>

## **7. Alternative Concept of "Continuous" Direct Participation in Hostilities<sup>52</sup>**

While state practice in situations of non-international armed conflict confirms that members of state armed forces are not considered to be civilians, it should be recognized that, for the time being, neither treaty law nor state practice or international jurisprudence have unequivocally settled the question as to whether the same applies also to members of non-state armed forces, or whether the latter should be regarded as civilians directly participating in hostilities.<sup>53</sup> In principle, the exclusion of non-state armed forces from the category of civilian entails that members of such forces lose civilian protection against attack for the entire duration of their membership and, therefore, represent legitimate military objectives regardless of whether they are directly participating in hostilities at the time of attack.<sup>54</sup> Arguably, the same result could be achieved based on an alternative approach, which extends the notion of "direct participation in hostilities" beyond specific acts and interprets membership in the armed forces of party to the conflict as a "continuous" form of direct participation in hostilities. Consequently, at least members of non-state armed forces could formally be regarded as civilians but, for the duration of their membership, would not benefit from the protection afforded to civilians against direct attack. However, this alternative

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<sup>51</sup> During the Expert Meetings, the category of "fighting members" of non-state armed groups was held to include all individuals who continuously assume a function within such a group, which includes regular direct participation in hostilities on behalf of a party to a non-international armed conflict (Report DPH 2005, pp. 49, 64 f., 82).

<sup>52</sup> The concept of "continuous" direct participation in hostilities as compared to the so-called "specific-acts" approach is further discussed below, Heading IV.2, pp. 31 ff.

<sup>53</sup> See reference made *supra*, FN 27.

<sup>54</sup> Of course, apart from the principle of distinction, the lawfulness of direct attacks also depends on compliance with all other rules on the conduct of hostilities. See below Section IX, pp. 60 ff.

approach would create parties to non-international armed conflicts, whose entire armed forces remain part of the civilian population. This would not only contradict the wording and logic of Article 3 GC I to IV and Additional Protocol II but, more generally, would discard the conceptual dichotomy between the civilian population and the armed forces of the respective parties to a conflict, which is intrinsic to IHL. According to this alternative approach, some civilians would regain protection against direct attack in the temporal interval between specific acts amounting to direct participation in hostilities, while other civilians would remain legitimate military objectives based on an abstract concept of "continuous" direct participation in hostilities that has become independent of specific acts. This would create a double standard within the same category of persons, which is likely to exacerbate the risk of confusion, uncertainty and arbitrariness as to the applicable standards in concrete cases.<sup>55</sup> Overall, it therefore seems more convincing to hold that members of the armed forces of non-state parties to a non-international armed conflict cease to be civilians for as long as their membership lasts.<sup>56</sup>

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<sup>55</sup> Although this alternative approach was mentioned during the Expert Meetings (BP DPH 2004, p. 36; BP DPH 2005, WS IV-V, p. 10; Report DPH 2005, pp. 44, 48), it received only feeble support and was criticized as blurring the distinction made by IHL between "conduct" and "status" as a basis for targeting decisions. It was emphasized that only combatants could be attacked based on the collective criterion of their "status", whereas direct attacks against civilians must always be based on their individual "conduct" at the time of the attack (Report DPH 2005, p. 50). Nevertheless, one expert expressly preferred this approach, cautioning that the exclusion of members of organized armed groups from the category of civilians in non-international armed conflict was likely to lead to their internment without review (Report DPH 2006, B.II.2., pp. 21 ff.).

<sup>56</sup> For the determination of "membership" in dissident armed forces and other organized armed groups, see *supra* Section II.4 and 5, pp. 18 ff. This approach corresponds to the prevailing opinion of the participants in the Expert Meetings, to the conclusions reached in the Expert Paper of Professor Michael Bothe (2004 Expert Meeting), and is also in line with the text and logic of Article 3 GC I to IV, Articles 1 and 13 AP II and Draft Article 25 [1] AP II. Finally, the Commentary to Article 13 AP II clearly applies distinct standards to "armed forces or armed groups" and "civilians" when it states: "Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian" (Commentary Article 13 AP II, § 4789).

### III. Private Contractors and Civilian Employees

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

#### 1. General Observations

In the past decades, parties to both international and non-international armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions that were traditionally performed by military personnel. Generally speaking, whether private contractors and civilian employees are civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as would apply to any other civilian described in the preceding sections.<sup>57</sup> However, the special role of such personnel requires that these determinations be made with particular care and with due consideration for the geographic and organizational closeness of many private contractors and civilian employees to the armed forces and the hostilities in general. The great majority of private contractors and civilian employees currently active in contexts of armed conflict certainly cannot be regarded as members of the armed forces of a party to the conflict and assume functions that clearly do not amount to direct participation in hostilities.<sup>58</sup> Therefore, under IHL, private contractors and civilian employees generally come within the definition of "civilians" and, in international armed conflict, may be entitled to prisoner of war status in the event of capture, provided that they qualify as civilians accompanying the armed forces under Article 4 [4] GC III or as civilian crew members of the merchant marine or civil aircraft of a party to the conflict under Article 4 [5] GC III.<sup>59</sup> Although civilians are entitled to protection against direct attack, the geographical and organizational closeness of many

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<sup>57</sup> See above, Heading I, pp. 7 f. (international armed conflict) and Heading II, pp. 11 f. (non-international armed conflict).

<sup>58</sup> This was also the prevailing opinion during the Expert Meetings (Report DPH 2005, p. 74). However, in practice, it may be extremely difficult to determine the civilian or military nature of the activities carried out by private contractors. For example, it may be difficult to distinguish between the defense of military objectives against attacks by the adversary (direct participation in hostilities) and the protection of the same objectives against crime or violence that may be facilitated by the conflict but is not part of the conduct of hostilities (law enforcement). In case of doubt, the general rules on precautions and presumptions apply (see Heading VIII, pp. 43 f.).

<sup>59</sup> Report DPH 2005, p. 80.



private contractors and civilian employees to the armed forces and other military objectives may incur a particular exposure to the dangers arising from military operations and, thereby, may increase the risk of incidental death or injury among such personnel.<sup>60</sup>

## 2. International Armed Conflict

Civilians, including those accompanying the armed forces within the meaning of Article 4 [4] GC III and those described in Article 4 [5] GC III, were never meant to directly participate in hostilities on behalf of a party to the conflict.<sup>61</sup> Private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces or because they assume functions unrelated to the hostilities that would traditionally have been performed by military personnel. Therefore, where such personnel engage in direct participation in hostilities spontaneously, on their own initiative and without the express or tacit authorization of the state party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts.<sup>62</sup> A different conclusion must be reached with regard to contractors and employees who, although not necessarily members of the regular armed forces as constituted under national law, are *de facto* given a combat function by a party to the conflict, which involves their direct participation in hostilities on a regular basis. Under IHL governing the conduct of hostilities in international armed conflict, such personnel could be regarded as members of an organized armed force, group or unit under a command responsible to a party to the conflict and, therefore, for the purposes of the principle of distinction, would not qualify as civilians.<sup>63</sup> While it is conceivable that, in certain

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<sup>60</sup> Report DPH 2006, B.III.3, p. 36.

<sup>61</sup> Of the categories of persons entitled to prisoner of war status under Article 4 [1] to [6] GC III, those described in Articles 4 [4] and 4 [5] GC III are also included in the definition of “civilian” (Article 50 [1] AP I). As any other civilians, they are excluded from the categories entitled to combatant privilege, namely members of the armed forces and participants in a *levée en masse* (Article 43 [1] and [2] AP I; Articles 1 and 2 H IV R) and, therefore, do not have a “right” to directly participate in hostilities on behalf of a party to the conflict with immunity from domestic prosecution (see also below, Heading X, pp. 65 f., as well as the brief discussion in Report DPH 2006, B.III.4, p. 37).

<sup>62</sup> Report DPH 2005, p. 82.

<sup>63</sup> During the Expert Meetings, there was some divergence of opinion as to whether private contractors and civilian employees who are expressly or tacitly authorized by a state to directly participate in hostilities on its behalf could remain civilians subject to the rule on direct participation in hostilities or whether they would have to be regarded as members of that state's armed forces (Report DPH 2003, pp. 4 f.; Report DPH 2004, pp. 11 ff.; Report DPH 2005, pp. 74 ff. and 80 f.; BP DPH 2005, WS VIII-IX, p. 17). A few experts contended that membership in state armed forces was regulated primarily in domestic law and required a formal act of incorporation (Report DPH 2004, p. 11; Expert Paper, Prof. M. Schmitt (2004), pp. 8 ff.; Report DPH 2005, p. 80). However, the prevailing view was that, for the purposes of the conduct of hostilities, private contractors authorized by a state to take a direct part in hostilities on its behalf would have to be regarded as members of its armed forces within the meaning of IHL (Report DPH 2005, pp. 75 ff. and 80 f.; Report DPH 2004, pp. 12, 14). It was also pointed out that, the definitions of “armed forces” under IHL and in the respective domestic legislations were not

circumstances, private contractors and civilian employees of a party to the conflict may qualify as mercenaries, the high threshold required under Article 47 AP I entails that corresponding cases are likely to remain rare.<sup>64</sup>

### 3. Non-International Armed Conflict

The observations made with regard to private contractors and civilian employees in situations of international armed conflict apply, *mutatis mutandis*, also to situations of non-international armed conflict.<sup>65</sup> Thus, for the purposes of the principle of distinction in non-international armed conflict, private contractors and employees who are not members of state armed forces, dissident armed forces or other organized armed groups under a command responsible to a party to the conflict must be regarded as civilians entitled to protection against direct attack unless and for such time as they directly participate in hostilities.<sup>66</sup>

### 4. Conclusion

Whether private contractors and civilian employees of a party to the conflict are civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria that are applicable to any other civilian under IHL governing international and non-international armed conflict. However, the geographic and organizational closeness of such personnel to the armed forces and to the hostilities in general require that such

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necessarily identical and did not necessarily have the same purpose (Report DPH 2005, p. 75). Moreover, it was noted that, traditionally, direct participation in hostilities with the authority of a state has always been regarded as a legitimate part of "public war" and exempt from domestic prosecution. This was illustrated not only by the modern combatant privilege, but already by the historical *Letters of Marque and Reprisal* issued by states before the abolition of privateering in the Declaration of Paris in 1856 (Report DPH 2005, p. 76; BP DPH 2005, WS VIII-IX, p. 17).

<sup>64</sup> Report DPH 2005, pp. 79 ff. During the 2006 Expert Meeting, one expert emphasized that IHL could not be interpreted to legitimize the use of private contractors which, for all intents and purposes, fulfilled the function of mercenaries (Report DPH 2006, B.III.2., p. 35).

<sup>65</sup> During the Expert Meetings, it was held that, in determining whether private contractors were fighting on behalf of an organized armed group, a similar test could be used to that applicable to states under the law of state responsibility. If private contractors directly participated in hostilities and if, in doing so, they acted "on the instructions" and "under the direction or control" of an organized armed group, then they could be regarded as conducting hostilities on behalf of that group (Report DPH 2005, pp. 81 f.). There also appeared to be wide agreement that, in principle and despite their predominantly financial motivation, a private military company could, in certain circumstances, not only constitute an "organized armed group", but also an independent "party" to a non-international armed conflict (Report DPH 2005, pp. 81 f.).

<sup>66</sup> On the concept of civilian under IHL governing non-international armed conflict, see above, pp. 15 ff. With regard to the factual notion of "combat function", see above pp. 19 f. and accompanying text.

determination be made with particular care. Private contractors and employees who qualify as civilians under IHL remain entitled to protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities and location may expose them to an increased risk of incidental injury and death. The qualification of private contractors and employees of a party to the conflict as civilians, members of the armed forces or members of organized armed groups within the meaning of IHL does not exclude that domestic law might regulate their status differently for purposes other than the conduct of hostilities.<sup>67</sup>.

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<sup>67</sup> The purpose of the distinction between “civilians” and members of the “armed forces” is not necessarily identical under domestic and international law. Depending on the applicable national legislation, membership in the armed forces may have varying administrative, disciplinary, jurisdictional and other consequences, which are irrelevant for the implementation of the principle of distinction in the conduct of hostilities. Conversely, under IHL, the primary consequences of membership in the armed forces are the exclusion from the category of “civilian” and, in international armed conflict, the “right” to directly participate in hostilities on behalf of a party to the conflict (combatant privilege). Therefore, the definitions of “armed forces” and “civilians” under the various domestic legislations are unlikely to be identical or to completely match the corresponding IHL concepts. Where these notions are defined for the purpose of the conduct of hostilities, the relevant normative framework must be IHL.

## C. Substantive Scope: "Direct Participation in Hostilities"

International treaty law provides no express definition of "direct participation in hostilities", nor can a clear interpretation of the notion be derived from state practice or international jurisprudence.<sup>68</sup> The meaning of the notion of direct participation in hostilities must therefore be determined in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the notion within IHL.<sup>69</sup> Where international treaty law refers to the notion of "hostilities", it is intrinsically linked to situations of war and, today, international or non-international armed conflict.<sup>70</sup> Therefore, the concept of direct participation in hostilities cannot refer to conduct occurring outside situations of international or non-international armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature.<sup>71</sup> Moreover, even in situations of armed conflict, not all conduct necessarily constitutes part of the hostilities.<sup>72</sup> It is the purpose of the present chapter to identify the abstract elements and criteria that determine the substantive scope of conduct amounting to direct participation in hostilities.

In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political and military contexts. In determining whether a specific civilian conduct amounts to direct participation in hostilities, it is therefore crucial that due consideration be given to all relevant circumstances ruling at the time and

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<sup>68</sup> The only judicial decision which deals with the concept of direct participation in hostilities in some depth and detail is the judgment of the Israeli Supreme Court of 14 December 2006 in the case HCJ 769/02, PCATI v. Government of Israel.

<sup>69</sup> Article 31 [1] Vienna Treaty Convention.

<sup>70</sup> The notion of "hostilities" is frequently used in treaties regulating situations of war and, more recently, situations of international and non-international armed conflicts, for example in the following contexts: "opening of hostilities", "conduct of hostilities", "acts of hostility", persons "(not) taking part in hostilities", "effects of hostilities", "suspension of hostilities", "end of hostilities". See, *inter alia*, H III: Title and Article 1; H IV R: Title section II; GC I to IV: Article 3 [1]; GC I: Article 17; GC II: Article 33; GC III: Title section II and Articles 21 [3], 67, 118, 119; GC IV: Articles 49 [2], 130, 133, 134, 135; AP I: Articles 33, 34, 40, 43 [2], 45, 47, 51 [3], 59, 60 and title part IV, section I; AP II: Articles 4 and 13 [3]; ERW Protocol: Articles 3 [1] to [3] and 4.

<sup>71</sup> According to Article 1 [2] AP II, such situations do not constitute armed conflicts.

<sup>72</sup> This is illustrated by the fact that a situation of armed conflict within the meaning of Article 2 GC I to IV can be created without the occurrence of hostilities, for example through a declaration of war or the occupation of territory without armed resistance. Furthermore, considerable parts of the law of armed conflict deal with issues other than the conduct of hostilities: only one of three sections of the Hague Regulations on the laws and customs of war and only two of seven substantive sections of the First Additional Protocol are specifically concerned with the regulation of the conduct of hostilities. See Titles of Section II H. IV R. (Hostilities); Part III Section I AP I (Methods and Means of Warfare) and Part IV Section I AP I (General Protection against Effects of Hostilities). See also Report DPH 2005, pp. 13, 18 f.

place in question.<sup>73</sup> Nevertheless, the importance of the concrete circumstances surrounding each case should not divert attention from the fact that "direct participation in hostilities" remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles underlying international humanitarian law.

#### IV. Direct Participation in Hostilities as a Specific Act

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

##### 1. Restriction to Specific Acts

From a conceptual perspective, the composite term "direct participation in hostilities" consists of two elements, namely that of "hostilities" and that of "direct participation" therein.<sup>74</sup> While the concept of "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,<sup>75</sup> the concept of "participation in" hostilities refers to the (individual) involvement of a particular person in the hostilities.<sup>76</sup> Depending on the quality and degree of individual involvement, a person's participation in hostilities may be described as either "direct" or "indirect". The notion of "direct participation in hostilities" has evolved from the phrase "taking no active part in the hostilities" used in Article 3 GC I to IV.<sup>77</sup> Today, the terms of "direct" and "active" participation in hostilities can be regarded as describing the same quality and degree of individual participation in hostilities in both

<sup>73</sup> This was also emphasized during the 2006 Expert Meeting (see Report DPH 2006, B.II.4 and 5, pp. 26 ff. and D.VIII.3, pp. 71 ff.). For the precautions and presumptions to be respected in situations of doubt, see Heading VIII and accompanying text, pp. 57 ff. below.

<sup>74</sup> Report DPH 2005, p. 17; BP DPH 2005, WS II-III, p. 2.

<sup>75</sup> See Articles 22 H IV R (Section II on "Hostilities") and Article 35 [1] AP I (Section I on "Methods and Means of Warfare"). Conventional law does not establish uniform terminology for conduct governed by the law of hostilities but speaks, apart from "hostilities", also of "warfare" (Title Part III, Section I AP I on "Methods and Means of Warfare"), "military operations" (Article 53 GC IV; Article 51 [1] AP I; Article 13 [1] AP II), or simply "operations" (Article 48 AP I).

<sup>76</sup> See Article 43 [2] AP I, Article 45 [1] and [3] AP I, Article 51 [3] AP I, Article 67 [1] (e) AP I, Article 13 [3] AP II.

<sup>77</sup> The variations in the wording used in the individual treaty provisions are of a purely semantic nature and do not indicate any difference in substance. See Article 51 [3] AP I and Article 13 [3] AP II ("take a direct part in hostilities"); Article 43 [2] AP I and Article 67 [1] (e) AP I ("participate directly in hostilities").

international and non-international armed conflict.<sup>78</sup>

From a practical perspective, the concepts of “hostilities” and of “direct participation” therein cannot be dissociated, as the collective concept of “hostilities” corresponds to the sum total of all “hostile acts” carried out by individuals “directly participating” in hostilities.<sup>79</sup> Hence, direct participation in hostilities does not refer to the abstract affiliation of an individual to a party to the conflict or its armed forces, but corresponds to concrete acts carried out by

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<sup>78</sup> While the reference of the English treaty texts to “active” (Article 3 GC I to IV) and, respectively, “direct” (Articles 51 [3] AP I and 13 [3] AP II) participation in hostilities could be interpreted to indicate two different degrees or qualities of participation in hostilities, the consistent use of the phrase “participant directement” in the same provisions of the equally authentic French treaty texts proves that, according to the general rules of treaty interpretation, the terms “direct” and “active” must be regarded as synonymous (affirmative also ICTR, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, decision of 2 September 1998, § 629). At first sight, it may appear that the Preparatory Committee for the Establishment of an International Criminal Court implied a distinction between the notions of “active” and “direct” in the specific context of the recruitment of children when it explained that: “The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat” (emphasis added). Strictly speaking, however, the Committee made a distinction between “combat” on the one hand and “military activities linked to combat” on the other, and not between “active” and “direct” participation in one or the other. During the Expert Meetings, one expert suggested that the term “active” was preferable to the term “direct”, because it made more clear that, where a civilian in question did not actively carry out the act in question, the qualification of his or her conduct as direct participation in hostilities became a matter of mere intention, such as an attempt or a plan, which cannot be sufficient to entail loss of civilian immunity against direct attack. Other experts preferred the term “direct”, most notably because it corresponds to the express wording of Article 51 [3] AP I and Article 13 [3] AP II. Overall, the clearly prevailing view was that the notions of “active” and “direct” should be regarded as synonymous and that the legal criteria for the qualification of an act as direct participation in hostilities are the same in international and non-international armed conflict (BP DPH 2004, p. 30; Report DPH 2004, pp. 15 ff.; Report DPH 2005, pp. 13, 29). As the notion of “direct participation in hostilities” is used synonymously in treaty law applicable in international and non-international armed conflict, there is no reason to assume that it should be interpreted differently in each context. This does not exclude that some of the consequences, particularly with regard to immunity from prosecution for having directly participated in hostilities, may be regulated differently for the various categories of persons involved in international and non-international armed conflicts.

<sup>79</sup> Thus, for the present purposes, the notion of “hostile act” refers to a specific act qualifying as direct participation in hostilities. See, for example, Commentary Article 51 AP I, § 1943: “It seems that the word “hostilities” covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”. Verri, *Dictionary LOAC*, p. 57, defines hostilities as: “acts of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience”, and Salmon, *Dictionnaire de droit international public*, p. 550 (hostilités): “Ensemble des actes offensifs ou défensifs et des opérations militaires accomplis par un belligérant dans le cadre d'un conflit armé”. See also the use of “hostile act” in Articles 41 [2] and 42 [2] AP I. During the Expert Meetings, the meaning of the notion of hostilities was discussed extensively. In general terms, it was suggested that the ordinary meaning of the notion of “hostilities” simply implied conduct that was “hostile” and essentially corresponded to the ensemble of hostile acts or all acts harmful to the adversary. The conduct in question had to be directed at the enemy or, at least, had to be related to actions against the enemy. There had to be some sort of an adversary relationship with the enemy. Hostilities included not only defensive or offensive operations, but essentially any armed contact or any armed engagement with opposing troops (Report DPH 2005, p. 22). More concretely, two widely supported proposals interpreted the notion of hostilities to comprise “all acts that adversely affect or aim to adversely affect the enemy’s pursuance of its military objective or goal” or “all military activities directed against the enemy in an armed conflict” (Report DPH 2005, pp. 22 f.). For an overview of the discussion on “hostilities”, see Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 18 ff.

individuals in relation to ongoing military confrontations between the involved parties.<sup>80</sup> In treaty IHL, individual conduct constituting part of the hostilities is described as “direct participation in hostilities”, regardless of whether the acting individual is a civilian or a combatant.<sup>81</sup> Thus, whether individuals directly participate in hostilities on a merely spontaneous, unorganized or sporadic basis or whether they do so as part of a permanent function within an organized armed force or group belonging to a party to the conflict may be decisive for the question of whether they are civilians, but has no influence on the concrete scope of conduct which qualifies as direct participation in hostilities. In other words, whether individuals may be directly attacked on a continuous basis or only for such time as they carry out concrete acts amounting to direct participation in hostilities depends on their qualification as civilians and not on different concepts of direct participation in hostilities.<sup>82</sup> Consequently, the substantive scope of the notion of direct participation in hostilities is restricted to specific acts carried out by individuals and constituting part of the collective hostilities conducted between the parties to an armed conflict.

## **2. Alternative Concept of “Continuous” Direct Participation in Hostilities**

The practical viability of equating direct participation in hostilities with specific acts depends on a concept of civilian that excludes organized armed actors. This “specific acts approach” becomes problematic if organized armed groups conducting sustained and concerted military operations are not regarded as part of the (regular or irregular) armed forces of a party to an armed conflict, but as civilians protected against direct attack unless and for such time as they directly participate in hostilities.<sup>83</sup> Under the specific acts approach, such organized armed “civilians” could only be directly attacked while they are actually carrying out a specific hostile act, but not in the temporal intervals between such acts.<sup>84</sup> The ensuing operational imbalance between state armed forces (who can be attacked at all times) and organized armed groups (who, if regarded as civilians, must remain protected during the intervals between hostile acts) can only be avoided by restricting the notion of civilians so as to

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<sup>80</sup> Despite the dissenting opinion expressed by one expert in support of the concept of “continuous” direct participation in hostilities (see below Section IV.2.), this also appeared to be the prevailing opinion during the 2006 Expert Meeting (Report DPH 2006, C. IV.2, p. 40).

<sup>81</sup> Article 43 [2] AP I; Article 51 [3] AP I; Article 13 [3] AP II.

<sup>82</sup> On the qualification of individuals as civilians, see above, pp. 9 ff. On the different temporal scopes of the suspension or, respectively, loss of protection depending on whether or not the person directly participating in hostilities is a civilian, see below, pp. 53 ff.

<sup>83</sup> On the conceptual contradictions and practical difficulties related to the qualification of organized armed groups as civilians specifically in non-international armed conflict see the more detailed discussion above, Section B.II.7, pp. 22 ff.

<sup>84</sup> See Section VII on the “revolving door” of civilian protection, below pp. 53 ff.

exclude organized armed groups or, alternatively, by extending the notion of direct participation in hostilities beyond specific acts. More concretely, membership in an organized armed group could be interpreted as a “continuous” form of direct participation in hostilities, leading to loss of civilian protection against direct attack for the entire duration of such membership.<sup>85</sup> Based on this concept of “continuous” participation, civilians conducting hostilities on an organized basis could be directly attacked regardless of their concrete conduct at the time of attack and without having to lose their capacity as civilians.

However, in addition to the conceptual and textual contradictions already discussed in relation to the definition of “civilian” in non-international armed conflict, the concept of “continuous” direct participation in hostilities gives rise to similar inconsistencies under IHL governing international armed conflict.<sup>86</sup> As has been pointed out in Section C.IV.1 above, the use of the phrase “take a direct part in hostilities” in the relevant treaty texts points towards an interpretation of the notion as referring to concrete acts. Thus, already a textual analysis of Additional Protocol I is counter-indicative to an interpretation of membership as “continuous” direct participation in hostilities. More importantly, the basic dichotomy between the civilian population and the armed forces of the respective parties to a conflict is an intrinsic part of IHL not only in non-international, but also in international armed conflict. This essential distinction would be seriously undermined if “independent” armed groups operating in the greater context of an international armed conflict without belonging to a state party to that conflict were to be regarded as civilians “continuously” engaged in direct participation in hostilities.<sup>87</sup> More concretely, the concept of “continuous” direct participation in hostilities would permit direct attacks against civilians regardless of their direct participation in hostilities at the time of attack and although the group they belong to does neither constitute nor belong to a party to an armed conflict. In doing so, this concept would decisively blur the distinction between armed violence that is part of hostilities occurring between parties to an armed conflict and armed violence which, although occurring in the greater context of an armed conflict, is not part of such hostilities and should be addressed through law enforcement measures.<sup>88</sup>

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<sup>85</sup> On the functional concept of “membership” in irregularly constituted organized armed groups, see above, Section B.II.5, pp. 19 f.

<sup>86</sup> On the conceptual contradictions and practical difficulties related to the qualification of organized armed groups as civilians specifically in non-international armed conflict, see the more detailed discussion above, Section B.II.7, pp. 22 ff.

<sup>87</sup> On “independent” armed groups in international armed conflict, see also the discussion and references, *supra*, pp. 11 ff.

<sup>88</sup> These concerns may be raised, for example, with regard to the recent application of the concept of “continuous” direct participation in hostilities by the Israeli Supreme Court to independent Palestinian armed groups operating within a situation of international armed conflict (belligerent occupation). First, the Court held that the conflict between Palestinian terrorist organizations and Israel remained of



In the final analysis, it therefore seems more convincing to hold that the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an international or non-international armed conflict and to restrict the concept of “civilian” to persons who either do not directly participate in hostilities or who do so on a merely spontaneous, unorganized or sporadic basis.<sup>89</sup>

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international character and that members of such organizations remained civilians within the meaning of IHL (Israel HCJ 769/02, PCATI v. Government of Israel, Judgment of 14 December 2006, § 26). According to the Court, a civilian who "joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities with short periods of rest between them, loses his immunity from attack 'for such time' as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than a preparation for the next hostility" (ibid. § 39). Strictly speaking, however, where part of the civilian population engages in organized armed violence without supporting one of the parties to the conflict, they can hardly be regarded as "taking part" in pre-existing hostilities between these parties. In such situations it should therefore be determined whether the intensity of violence reaches the threshold required for a separate non-international armed conflict, and whether the militant segment of the population can be regarded as the armed forces of a party to that conflict. If this is not the case, the conduct in question should be regarded as civilian unrest and would have to be dealt with according to law enforcement standards. By circumventing the test of whether such organized civilian violence reaches the threshold required for a non-international armed conflict, the concept of “continuous” direct participation in hostilities provides no safeguards against the application of military force against groups which, for lack of organization, means or other elements, cannot be regarded as equivalent to the armed forces of a party to the conflict and whose members should therefore be dealt with in accordance with law enforcement standards, unless and for such time as they actually carry out specific acts of direct participation in hostilities.

<sup>89</sup> For the concepts of civilian in international and non-international armed conflict see *supra*, Sections B.I and II.

## V. Constitutive Elements of Direct Participation in Hostilities

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

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

In analytical terms, in order to qualify as "direct participation in hostilities" specific acts must meet three cumulative requirements, namely (1) a "threshold requirement" regarding the harm likely to result from the act, (2) a requirement of "causal proximity" between the act and the expected harm, and (3) a requirement of "belligerent nexus" between the act and the hostilities taking place between the parties to the conflict.<sup>90</sup>

### 1. Threshold of Expected Harm

**In order to qualify as direct participation in hostilities, a specific act must be likely to adversely affect the military operations or military capacity of a party to the conflict or, alternatively, to inflict death, injury or destruction on persons or objects not under the effective control of the acting individual.**

In order for a specific act to qualify as direct participation in hostilities, the ensuing harm must reach a certain threshold.<sup>91</sup> This threshold can be reached in *qualitative* or *quantitative* terms.

<sup>90</sup> While there was wide agreement during the 2006 Expert Meeting that these three elements should apply cumulatively (Report DPH 2006, C.V.3 (c), pp. 45 f., C.V.3 (d), pp. 46 f.; C.V.4 (b), pp. 51 f.), some experts nevertheless argued that it would be sufficient to list them as alternative requirements (Report DPH 2006, C.IV.2, pp. 42 f.). However, these experts did not show how an alternative application of the three requirements would permit a reliable distinction between direct participation in hostilities and acts of violence carried out in the greater context of an armed conflict without being part of the hostilities.

<sup>91</sup> BP DPH 2004, pp. 27 f.; BP DPH 2005, WS II-III, p. 6.

In qualitative terms, the required threshold is reached where a specific act results in harm of a specifically military nature. Where this is not the case, the required threshold can also be satisfied in terms of quantitative gravity, namely where the act in question results in death, injury or destruction, regardless of the military or civilian character of the injured person or damaged object. In practice, the precise quality and quantity of harm caused by a specific act can only be determined once the damage has already been done. In operational reality, it must therefore be permissible to base the threshold determination on "likely" harm, that is to say, the harm which the determining person may reasonably expect to result from an act in the concrete circumstances.

**Qualitative threshold:** Where a specific act may reasonably be expected to cause harm of a specifically *military quality*, the threshold requirement will be satisfied regardless of quantitative considerations. In this context, the notion of "harm" should be interpreted as encompassing not only death, injury or destruction of military personnel and other legitimate military objectives, but essentially any consequences which may reasonably be expected to adversely affect the military operations or military capacity of a party to the conflict.<sup>92</sup> Beyond the infliction of death and injury on military personnel and physical or functional damage to military objects, equipment and supplies, the military operations or military capacity of a party to the conflict can also be "adversely affected", for example, by armed or unarmed activities preventing, restricting, interrupting or disturbing deployments, logistical movements and communication, as well as by capturing or otherwise establishing and exercising control over military personnel, objects and territory to the detriment of the adversary.<sup>93</sup> More concretely, activities reaching the required threshold of harm would include, for example, denying the adversary the military use of certain objects, equipment and territory,<sup>94</sup> guarding captured military personnel of the adversary,<sup>95</sup> clearing mines placed by the adversary,<sup>96</sup> electronic interference with military computer networks, such as through computer network attacks

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<sup>92</sup> During the 2005 Expert Meeting, this aspect was expressed in a widely supported tentative definition of the notion of hostilities as "all acts that adversely affect or aim to adversely affect the enemy's pursuance of its military objective or goal" (Report DPH 2005, pp. 22 f., 31).

<sup>93</sup> During the 2005 Expert Meeting, it was made clear that "hostilities" presupposed neither the use of armed force nor the causation of "death, injury or destruction". Regarding the measures of establishment and exercise of control, see Report DPH 2005, pp. 13 ff.; BP DPH 2004, pp. 9 ff. While the qualitative threshold of "adversely affecting" military operations or military capacity was widely accepted during the 2006 Expert Meeting, two experts nevertheless feared that this criterion was too wide and too vague to exclude that civilians could be killed without any military necessity. Therefore, one of these expert suggested that civilians should lose protection only while they actually posed a concrete military threat, and the other expert proposed to replace the term "adversely" by "significantly" (Report DPH 2006, C.V.3 (a), pp. 43 f.).

<sup>94</sup> Report DPH 2005, pp. 11, 29.

<sup>95</sup> During the 2005 Expert Meeting, the prevailing opinion was that guarding captured personnel of the adversary constituted a clear case of direct participation in hostilities (Report DPH 2005, pp. 15 f.).

<sup>96</sup> Report DPH 2005, p. 31.

(CNA) or, in some cases, computer network exploitation (CNE),<sup>97</sup> and certain intelligence operations, such as wiretapping the adversary's high command,<sup>98</sup> transmitting targeting information during an ongoing attack<sup>99</sup> or changing the road signs set up by the military police so as to mislead or hamper the military movements of the adversary.<sup>100</sup> Conversely, civilians attempting to "shield" a military objective by their mere presence as persons protected against direct attack (voluntary "human shields") would not, without more, reach the required threshold of harm.<sup>101</sup> Clearly, where civilians actively defend the shielded military objective or pose a physical obstacle to military operations directed against that objective, they adversely affect the military operations or military capacity of the attacking party to the conflict and, thereby, reach the qualitative threshold of harm required for the qualification of their conduct as direct participation in hostilities.<sup>102</sup> The qualitative threshold of harm is unlikely to be reached, however, where civilians acting as voluntary human shields do not pose an actual physical impediment to the adversary's military operation, even though their presence may complicate the proportionality assessment with regard to incidental civilian death and injury that may be expected from an attack against the shielded objective.<sup>103</sup> It should also be emphasized that the conduct of an individual cannot be

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<sup>97</sup> CNA have been tentatively defined as "operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves" and may be conducted over long distances through radio waves or international communication networks. While they may not involve direct physical damage, the resulting system malfunctions can be as devastating. CNE, namely "the ability to gain access to information hosted on information systems and the ability to make use of the system itself", though not of a direct destructive nature, could have equally significant military implications (See BP DPH 2003, pp. 15 ff.). During the Expert Meetings, CNA causing military harm to the adversary in a situation of armed conflict were clearly regarded as part of the hostilities (Report DPH 2005, p. 14).

<sup>98</sup> Report DPH 2005, p. 29.

<sup>99</sup> See Report DPH 2004, p. 5, where the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking forces. The decisive criterion was held to be the importance of the transmitted information for the direct application of violence and, thus, for the execution of a concrete military operation.

<sup>100</sup> See Report DPH 2005, p. 32, where it was pointed out that, depending on the context, such behavior could constitute either direct participation in hostilities or merely a childish trick. Which is the case will primarily depend on the additional presence of a "belligerent nexus".

<sup>101</sup> During the 2006 Expert Meeting, several experts dissented from the prevailing view that voluntary human shielding did not, in and of itself, amount to direct participation in hostilities. One of these experts held that, contrary to involuntary human shields (which should remain protected against direct attack) voluntary human shields by definition intended to create an impediment to attacks by the adversary and, therefore, should be regarded as directly participating in hostilities. Another expert supported the same conclusion because voluntary human shields would otherwise have to be taken into account in the proportionality assessment (Report DPH 2006, C.V.III (d), pp. 46 ff. See also Report DPH 2004, p. 6).

<sup>102</sup> During the Expert Meetings, it was generally agreed that, where voluntary human shields created an actual physical obstacle to military operations, which could be expected to be the case particularly during ground operations, they would have to be regarded as directly participating in hostilities (Report DPH 2006, C.V.III (d), pp. 46 ff.). This was illustrated by the concrete example of a woman who shielded two fighters with her billowing robe, allowing them to shoot at their adversary from behind her (Report DPH 2004, pp. 6 f.).

<sup>103</sup> During the Expert Meetings, the participating experts were unable to come to a comprehensive and

interpreted as *adversely* affecting the military operations or military capacity of a party to the conflict simply because it fails to *positively* affect them. For instance, the simple refusal of a civilian to collaborate with a party to the conflict, for example as an informant, scout or lookout, clearly would not reach the required threshold of harm, regardless of the personal motivations underlying the refusal.

**Quantitative threshold:** Where a specific act is unlikely to adversely affect the military operations or military capacity of a party to the conflict, the required threshold of harm can also be reached in quantitative terms, namely through the causation of death, injury or destruction.<sup>104</sup> While this alternative quantitative criterion would be redundant with regard to the infliction of death, injury or destruction on military personnel and other legitimate military objectives, it illustrates that attacks do not cease to constitute part of the hostilities simply because they are directed specifically against persons and objects protected against direct attack.<sup>105</sup> For example, in terms of the required threshold of harm, direct attacks against civilian objects and "peaceful" civilians (i.e. civilians who are not, at the time, directly participating in hostilities) remain part of the hostilities even if they are unlikely to adversely affect the military operations or the military capacity of a party to the conflict.<sup>106</sup> A specifically military quality of harm is required only where the act in question is unlikely to result in death, injury or destruction or, respectively, where the affected persons or objects find themselves within the effective control of those harming them.<sup>107</sup> Thus, for example, air attacks or armed raids against civilian villages or refugee camps are likely to cause death, injury or destruction

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unanimous agreement as to the precise circumstances in which voluntary human shielding would amount to direct participation in hostilities. Nevertheless, it was repeatedly pointed out that, particularly during air warfare, voluntary human shielding often posed a *legal* rather than a *physical* obstacle to military operations directed against the "shielded" objective, because they could not physically impede the destruction of the target but, by their presence as persons protected against direct attack, could shift the parameters of the proportionality assessment to the detriment of the attacker (Report DPH 2004, pp. 6 f.; Report DPH 2006, C.V.3 (d), pp. 46 ff.). According to several experts, the very fact that voluntary human shielding by civilians was perceived as a legal impediment to military operations in terms of the principle of proportionality proved that the civilians in question were regarded as protected against direct attack and, therefore, as not directly participating in hostilities (Report DPH 2006, C.V.3 (d), pp. 46 ff.). One expert also recalled that Article 51 [7] AP I indicated that the intentional use of civilians as human shields by the parties to the conflict was prohibited but did not constitute direct participation in hostilities by the exposed civilians. After all, civilians could only "shield" military objectives within the meaning of this provision to the extent that they remained protected against direct attack (Report DPH 2004, p. 6). In this context, several experts suggested that, where voluntary human shields remained protected against direct attack, they should not have the same weight in the proportionality assessment as ordinary civilians (Report DPH 2004, p. 7).

<sup>104</sup> During the Expert Meetings, it was held that the required threshold of harm would clearly be met where an act can reasonably be expected to cause material damage to objects or persons, namely death, injury or destruction (Report DPH 2005, pp. 30 f.; BP DPH 2004, pp. 5 f., 9 f., 28).

<sup>105</sup> Report DPH 2004, p. 4; Report DPH 2005, p. 11; Report DPH 2006, C.V.3 (b), pp. 44 f.

<sup>106</sup> Today, such operations are invariably prohibited under IHL governing both international and non-international armed conflict (see, e.g., Articles 48 AP I, 51 AP I, 13 AP II).

<sup>107</sup> See also Report DPH 2006, C.V.3 (b), p. 45, *in fine*. See also below, FN 109 and accompanying text.

and, therefore, would reach the quantitative threshold of harm regardless of whether they actually cause any military harm to the adversary. The forcible deportation of the same populations or the taking of peaceful civilians as hostages, however, although prohibited under IHL, can only be regarded as part of the hostilities if it is likely to cause death, injury or destruction or, alternatively, harm of a specifically military quality.<sup>108</sup> Furthermore, regardless of quantitative considerations, the exercise of power or authority over persons or objects finding themselves within physical custody or effective territorial control would not constitute part of the hostilities, unless they are likely to cause harm of a specifically military quality. Consequently, the use of armed force to break up riots, prevent looting and rape or to otherwise maintain or restore law and order in a conflict area, the punitive or administrative destruction of buildings, agricultural fields and other objects, and even the execution, torture or physical punishment of prisoners, hostages and other persons in physical custody would have to adversely affect the military operations or military capacity of the adverse party to the conflict in order to reach the required threshold of harm. The fact that abusive conduct directed against the civilian population or protected objects does not always reach the qualitative or quantitative threshold of harm required for a qualification as direct participation in hostilities does not exclude that such conduct may nevertheless amount to a war crime, a crime against humanity or even genocide or that armed force may be used against the perpetrators under the standards of law enforcement or individual self-defence.<sup>109</sup>

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<sup>108</sup> See also Report DPH 2005, p. 11. During the 2006 Expert Meeting, one expert argued that civilians taking other civilians as hostages should qualify as direct participation in hostilities where it was designed to put pressure on a party to the conflict and aimed to achieve a political goal related to the armed conflict. Other experts insisted, however, that the quantitative threshold of death, injury or destruction required for the qualification of an acts as direct participation in hostilities could not be lowered to deprivations of freedom. These experts recalled that what was regarded as a "lawful arrest" through civilian police officers by one party to the conflict could easily be condemned as "hostage taking" by another, and emphasized that it would be unacceptable to regard civilian police officers involved in ordinary law enforcement activities as legitimate military targets (Report DPH 2006, C.V.3 (c), pp. 45 f.). It therefore is more convincing to regard the capture of peaceful civilians as an issue of law enforcement and not of hostilities, unless it causes harm of a specifically military quality.

<sup>109</sup> In this context, it is particularly important to note that the notion of "attack" in the context of crimes against humanity does not necessarily denote conduct that would amount to direct participation in hostilities under IHL. In the Kunarac case, the ICTY stated: "The term 'attack' in the context of a crime against humanity carries a slightly different meaning than in the laws of war. In the context of a crime against humanity, 'attack' is not limited to the conduct of hostilities. It may also encompass situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target" (ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23, Judgment of 22 February 2001 (Trial Chamber), § 416, *emphasis added*. Subsequently confirmed by the Appeals Chamber in its Judgment in the same case of 12 June 2002, § 89). See also the discussion in Report DPH 2006, C.V.3 (b), pp. 44 f.

## 2. Causal Proximity

**In order for a specific act to qualify as direct participation in hostilities, there must be a direct causal link between the act in question and the harm likely to result from that act, or from a concrete and coordinated military operation of which that act constitutes an integral part.**

***Conduct of hostilities, general war effort and war sustaining activities:*** The distinction made at an individual level between a person's "direct" and "indirect" participation in hostilities corresponds, at the collective level of the parties to a conflict, to that between the "conduct of hostilities" and other activities that are part of the "war effort" or may be characterized as "war sustaining" activities. Generally speaking, beyond the actual conduct of hostilities, the general "war effort" could be said to include all activities objectively contributing to the military defeat of the adversary (e.g. design, industrial production and shipment of weapons and military equipment, construction or repair of roads, ports, airports, bridges, railways and other infrastructure outside the context of concrete military operations), while "war sustaining" activities would additionally include political, economic or media activities supporting the general war effort (e.g. political propaganda, production of non-military industrial and agricultural goods for domestic consumption or export and trade, financial transactions).<sup>110</sup> Admittedly, both the general war effort and war sustaining activities will ultimately result in harm to the adversary reaching the required qualitative or quantitative threshold. Some of these activities may even be indispensable to that end, such as, for example, the provision of finances, food and shelter to the armed forces and the industrial production of weapons, ammunition or other military equipment. However, the decisive distinction is that the conduct of hostilities is designed to *directly bring about the materialization of the required harm*, whereas war sustaining activities and the general war effort also include activities that merely *maintain or build up the capacity* to do so.<sup>111</sup>

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<sup>110</sup> During the Expert Meetings, it was pointed out that failure to clearly distinguish between the conduct of hostilities and the general war effort would entail that every civilian somehow contributing to the war effort could ultimately be regarded as directly participating in hostilities, from a housewife collecting tin cans for the metal industry and a farmer growing crops, to a nurse in a maternity ward who could be said to be nourishing future soldiers (Report DPH 2005, p. 21).

<sup>111</sup> Report DPH 2005, p. 21. The example was given of a civilian worker in an ammunitions factory who did not actually cause any harm himself but was merely building up the capacity of a party to a conflict to harm its adversary. Therefore, the worker in question was not directly participating in hostilities and retained his personal protection against direct attack. The civilian actually using that ammunition to cause harm to the adversary, however, would be directly participating in hostilities.

***Individual participation in hostilities and causation of harm:*** At the individual level of the participating person, the distinction between “direct” and “indirect” participation in hostilities corresponds to that between “direct” and “indirect” causation of harm.<sup>112</sup> In other words, while any specific act resulting in sufficient harm and having a belligerent nexus qualifies as “participation in hostilities”,<sup>113</sup> that participation should be regarded as “direct” or “indirect” depending on whether the harm is caused “directly” or “indirectly”.<sup>114</sup> The constitutive requirement of *causal* proximity must not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, while it has become quite common for parties to a conflict to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps or timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks, the causal relationship between the employment of such means and the ensuing harm remains “direct”. Conversely, for instance, although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link between such support activities and the causation of sufficient harm to the opposing party to a conflict remains “indirect”. Therefore, while temporal or geographic proximity to the resulting harm may indicate that a concrete act amounts to “direct participation in hostilities”, these factors would not be sufficient in the absence of direct causation.<sup>115</sup>

***Interpretation of the standard of “direct” causation:*** With regard to the required degree of causal proximity between a specific act and its harmful consequences, standards such as “aiding and abetting”<sup>116</sup> and “indirect” causation<sup>117</sup> of harm are clearly too wide and would mean that most civilians supporting the general war effort would lose their protection against direct attack despite general recognition that their activities do not amount to direct

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<sup>112</sup> According to the Commentary, Article 51 [3] AP I, § 1944, “[...] ‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”. During the Expert Meetings, it was emphasized that “direct participation” in hostilities is neither synonymous with “involvement in” or “contribution to” hostilities, nor with “preparing” or “enabling” someone else to directly participate in hostilities, but essentially means that an individual is personally “taking part in the ongoing exercise of harming the enemy” (Report DPH 2004, p. 10) and personally carrying out hostile acts which are “part of” the hostilities (Report DPH 2005, pp. 27, 30, 34).

<sup>113</sup> See also below, FN 104.

<sup>114</sup> During the Expert Meetings, the prevailing opinion appeared to be that, in order for a specific act to qualify as “direct participation in hostilities”, there must be a sufficiently close, “uninterrupted” and “more than just remote” causal relation between the act in question and the resulting harm (Report DPH 2005, pp. 30, 34 ff.).

<sup>115</sup> Report DPH 2005, p. 35.

<sup>116</sup> The standard of “aiding and abetting” indicates that the act in question “materially facilitates” the occurrence of harm (BP DPH 2004, p. 27; Report DPH 2005, pp. 28, 34).

<sup>117</sup> Report DPH 2005, p. 28.



participation in hostilities.<sup>118</sup> Furthermore, it is neither sufficient nor necessary that the act in question be indispensable for the causation of the required harm ("but for"-causation).<sup>119</sup> Instead, what is required for the qualification of an act as direct participation in hostilities is a standard of "direct" causation of harm which accommodates the collective nature and complexity of contemporary military operations. For example, attacks carried out by way of unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target on the ground, aircraft crews transmitting navigational data, specialists controlling the actual firing of air-to-ground missiles and an individual exercising overall command over the operation.<sup>120</sup> While all of these individuals are an integral part of a concrete operation, and while each of them directly participates in hostilities, only few of them could be said to be carrying out activities which, in and of themselves, "directly" cause harm meeting the required threshold. The standard of direct causation must therefore be interpreted to include individual conduct which causes harm only in conjunction with other acts, such as the identification and marking of targets,<sup>121</sup> the analysis and transmission of tactical intelligence to attacking forces,<sup>122</sup> the instruction and assistance given to troops with regard to the execution of a concrete military operation,<sup>123</sup> and the driving of a truck delivering ammunition to firing positions at the front line.<sup>124</sup> Conversely, the standard of direct causality must exclude from the ambit of "direct participation in hostilities" any act which falls short of being an integral part of a concrete military operation, even if it builds up or maintains the capacity of a party to the conflict to carry out such operations, for example by way of recruitment and training of personnel,<sup>125</sup> scientific research and design,<sup>126</sup> as well as production and transport of armament and equipment,<sup>127</sup> or provision of general supplies and services (such as

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<sup>118</sup> For the relevant statements made in the 2004 and 2005 Expert Meetings see: BP DPH 2004, pp. 27 f.; Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

<sup>119</sup> "But for"-causation of harm indicates that the harm in question would not occur "but for" the act (Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34).

<sup>120</sup> A similar example was provided during the 2005 Expert Meeting (Report DPH 2005, p. 35).

<sup>121</sup> BP DPH 2004, pp. 13; Report DPH 2004, p. 11, 25; Report DPH 2005, p. 31

<sup>122</sup> Report DPH 2005, pp. 28, 31. During the 2004 Expert Meeting the example was given of a civilian woman who repeatedly peeked into a building where troops had taken cover in order to indicate their position to the attacking forces. This was described as the equivalent of a "fire control system" (see above, FN 76).

<sup>123</sup> Report DPH 2004, p. 10; Report DPH 2005, pp. 33, 35 f.

<sup>124</sup> BP DPH 2004, p. 28; Report DPH 2006, C.V.4 (a), p. 50.

<sup>125</sup> Report DPH 2004, p. 10; Report DPH 2005, pp. 35 f.

<sup>126</sup> During the 2006 Expert Meeting, one expert agreed that civilian scientists and weapons experts benefited from protection against direct attack, but expressed doubts as to whether this assessment could be upheld in extreme situations where the expertise of a particular civilian was of very exceptional and potentially decisive value for the outcome of an armed conflict, such as the case of nuclear weapons experts during the Second World War (Report DPH 2006, C.V.4 (b), pp. 50 f.).

<sup>127</sup> During the Expert Meetings, there was general agreement that civilians employed in the production of weapons, particularly in the armament industry, are part of the general war effort but should not be regarded as directly participating in hostilities (e.g. Report DPH 2003, p. 2; Report DPH 2004, pp. 6 f.;

electricity, fuel, generators, construction material, finances and financial services)<sup>128</sup> outside the context of a concrete military operation. Equally excluded must be conduct, which causes harm with a merely indirect impact on the military capacity or operations of the adversary, such as depriving the adversary of financial assets.<sup>129</sup> For example, the driving of an ammunition truck from a factory to a port or a general storage place in the conflict zone cannot be regarded as an integral part of a concrete military operation. Although the ammunition truck as such remains a legitimate military objective subject to direct attack, the driving of the truck would not amount to "direct" participation in hostilities and would not deprive a civilian driver of his or her individual protection against direct attack.<sup>130</sup> The consequence of this conclusion is not that the ammunition truck may not be attacked, but that a direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.<sup>131</sup> In other words, where a specific act does not on its own directly cause the required harm, the decisive criterion for its qualification as "direct" participation in hostilities must be the degree of integration of that act into a concrete and coordinated tactical operation, which directly causes harm reaching the required quantitative or qualitative threshold.<sup>132</sup> Where the required harm has not yet materialized, the element of causal proximity must be determined by reference to the harm that can reasonably be expected to result from a concrete act or operation.<sup>133</sup>

In the final analysis, while the notion of "direct" participation in hostilities goes beyond the personal application of armed force, it cannot be extended to activities which merely support

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Report DPH 2005, pp. 15, 21, 28 f., 34, 38). During the 2006 Expert Meeting, some experts pointed out that, in contradistinction to industrial weapons production, the construction of improvised explosive devices or missiles by insurgents could in certain circumstances exceed mere capacity building and become a measure preparatory to a concrete military operation. While one expert argued that organized armed groups manufacturing missiles should always be regarded as directly participating in hostilities, others insisted that the qualification of a concrete case of weapons production as direct participation in hostilities had to be determined according to the same three cumulative criteria (i.e. threshold of harm, causal proximity and belligerent intent) regardless of whether it involved industrial employees of a state or non-state actors (Report DPH 2006, C.V.4 (b), pp. 50 f.).

<sup>128</sup> BP DPH 2004, pp. 14 f.

<sup>129</sup> BP DPH 2004, pp. 9 f.; Report DPH 2005, pp. 14 f.

<sup>130</sup> See also Report DPH 2006, C.V.4 (a), p. 50.

<sup>131</sup> See also Report DPH 2005, pp. 32 f. During the 2006 Expert Meeting, one expert recognized that civilians finding themselves inside a military truck or other military objective did not, without more, lose protection against direct attack, but argued that they had to assume the risk for their presence in that military objective and could not require an aircraft pilot to make a proportionality assessment, unless the military objective in question was located in the middle of a civilian area with a great risk of incidental casualties outside the objective itself. While it appeared to be generally recognized among the participating experts that a civilian driver of an ammunition truck operates in circumstances entailing a high probability of being mistaken for a member of the armed forces, the prevailing view nevertheless appeared to be that any civilian known to be present in a military objective had to be taken into account in the proportionality equation unless and for such time as he or she directly participated in hostilities (Report DPH 2006, D.VIII.4, pp. 74 f.).

<sup>132</sup> Report DPH 2004, p. 5; Report DPH 2005, pp. 35 f.

<sup>133</sup> BP DPH 2004, p. 25; Report DPH 2005, p. 33.

the general war effort without forming an integral part of concrete military operations.<sup>134</sup> The requirement of direct causation must be regarded as satisfied as soon as either the specific act in question, or a concrete and coordinated military operation of which it constitutes an integral part, may reasonably be expected to "directly" cause harm reaching the required quantitative or qualitative threshold. Conversely, "indirect" participation in hostilities denotes activities that support the conduct of hostilities without being a part thereof. While this criterion allows to include in the notion of direct participation in hostilities specific acts, which do not on their own directly cause harm to the adversary, it requires that such acts assume an integral logistical, intelligence, command and control or similar function within the conduct of a concrete and coordinated military operation, which directly causes the required harm.

### 3. Belligerent Nexus

**In order for a specific act to qualify as direct participation in hostilities it must be specifically designed to support a party to an armed conflict by harming another.**

In order to qualify as "direct participation in hostilities", a specific act must not only directly cause harm of a sufficient qualitative or quantitative threshold, but must also have a "belligerent nexus" to an ongoing armed conflict.<sup>135</sup>

***Nexus to the armed conflict (general nexus):*** Quite obviously, an act qualifying as "direct participation in hostilities" must be carried out for reasons closely related to an ongoing

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<sup>134</sup> During the 2006 Expert Meeting, it was questioned whether, in order to meet the requirement of causal proximity, a civilian act not directly harming the adversary had to be an "integral" part of a military operation directly causing such harm. While some experts proposed the alternative adjectives of "key", "necessary", "supportive" or "constituent" it was recalled that the adjective "integral" permitted to qualify even minor or indecisive acts as direct participation in hostilities, provided that they actually were part of a military operation (e.g. standing as a lookout in a place where it was highly unlikely that any adversary would ever pass by). Conversely, the adjectives "key" or "necessary" would require that the civilian act in question constituted a decisive or indispensable part in the causal chain of the operation, which would not only be far more restrictive than the term "integral", but also extremely difficult to define without slipping into subjective arbitrariness. The term "supportive" was perceived as inviting the confusion of acts amounting to direct participation in hostilities with support activities, which were not part of a concrete military operation, and the term "constituent" did not appear to offer any clear and perceptible advantage to the term "integral" either. At last, it was proposed to retain the adjective "integral" and to clarify that the aim of this term was to emphasize that, in order to qualify as direct participation in hostilities, a specific act had to be an actual "part of" and not merely a "contribution to" a concrete military operation (Report DPH 2006, C.V.4 (a), pp. 49 ff.).

<sup>135</sup> During the Expert Meetings, it appeared that, for most experts, the function of the nexus requirement was to determine whether harmful civilian conduct constituted part of "hostilities" (Report DPH 2005, p. 27).

international or non-international armed conflict (general nexus).<sup>136</sup> This general nexus requirement was developed in the jurisprudence of the ICTY and the ICTR as a precondition that must be fulfilled in order for an act to be considered a potential war crime.<sup>137</sup> While there is a fundamental difference between the concepts of "war crime" and "hostilities", both share the common element of representing conduct that occurs during, as well as for reasons closely related to, a situation of armed conflict. In both cases, the nexus requirement assumes the function of excluding from the concepts of "war crime" and, respectively, "hostilities" conduct that is not regulated by IHL, such as violent crimes, civil unrest or law enforcement activities occurring for reasons unrelated to the surrounding situation of armed conflict. For example, the exchange of fire between police forces and hostage takers during an ordinary bank robbery,<sup>138</sup> murders carried out for purely private motives,<sup>139</sup> and even the stealing of military equipment for the purpose of selling it on the black market or for purely private use<sup>140</sup> do not have a sufficient nexus to an armed conflict to be considered acts amounting to "direct participation in hostilities".

***Nexus to ongoing hostilities (belligerent nexus):*** While a general nexus to an armed conflict is necessary, it is not sufficient for the qualification of an act as "direct participation in hostilities". Additionally, the act in question must be so closely related to the actual hostilities occurring between the parties to the armed conflict that it constitutes "part of" or, in the words of treaty IHL, amounts to "taking a direct part in" these hostilities (belligerent nexus).<sup>141</sup> In

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<sup>136</sup> For a summary of the experts' statements in that regard see: BP DPH 2004, pp. 25 f.; Report DPH 2004, p. 25; BP DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 24, 27. The general nexus-requirement was developed in the jurisprudence of the ICTY and the ICTR as a precondition which, along with the existence of an armed conflict, must be fulfilled in order for an act to be considered as a potential war crime. See, most notably, ICTY, *Kunarac Case (Judgment of 12 June 2002)*, § 58; ICTR, *Rutaganda Case*, (Judgment, 26 May 2003), § 570.

<sup>137</sup> See, most notably, ICTY, *Kunarac Case (Judgment of 12 June 2002)*, § 58; ICTR, *Rutaganda Case*, (Judgment, 26 May 2003), § 570.

<sup>138</sup> Report DPH 2005, pp. 9, 11.

<sup>139</sup> See the following clarification provided by the ICTR in the *Rutaganda Case*, (Judgment, 26 May 2003), § 570: "For example, if a non-combatant takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, that would not, without more, constitute a war crime under Article 4 of the Statute. By contrast, the accused in *Kunarac*, for example, were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part. Second, as paragraph 59 of the *Kunarac* Appeal Judgement indicates, the determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one. Particular care is needed when the accused is a non-combatant".

<sup>140</sup> Report DPH 2004, p. 25.

<sup>141</sup> See Articles 51 [3] AP I and 13 [3] AP II. During the Expert Meetings, it was widely agreed that it would be too broad if the nexus element of "direct participation in hostilities" referred to the situation of an armed conflict in general and qualified every act of civilian violence somehow related to that armed conflict as direct participation in hostilities. Instead, it was said to be essential for a qualification as direct participation in hostilities that an act be related to actual hostilities, that there be some association with fighting or with military operations occurring in the framework of the hostilities. As the

order to be regarded as part of the hostilities taking place between two or more parties to the conflict, civilian conduct should be specifically designed to support one party to the conflict by harming another in the framework of the larger military confrontation taking place between these parties.<sup>142</sup> Conversely, civilian violence, which either is not designed to harm a party to the conflict,<sup>143</sup> or which is not designed to do so in support of another party to the conflict, cannot amount to any form of "participation" in the hostilities taking place between existing parties to an armed conflict and, therefore, can only be described as "hostilities" where such violence reaches the threshold of intensity required for the coming into existence of a separate armed conflict.<sup>144</sup> To do otherwise would make it impossible to properly distinguish situations where the use of force is governed by the standards of law enforcement and, respectively, by the rules on the conduct of hostilities.<sup>145</sup>

For example, the military operations of a party to a conflict can be adversely affected by the fact that access roads to a strategically important area are blocked by large groups of civilians fleeing the dangers arising from military operations. While the conduct in question directly causes harm to the party to the conflict (direct causation of harm), and while it occurs for reasons closely related to the armed conflict (general nexus), it is not specifically designed to support one party to the conflict against another (belligerent nexus) and, therefore, cannot be regarded as "direct participation in hostilities". However, should the

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wording of the notion clearly suggested, no conduct lacking a sufficient link or nexus to the hostilities could qualify as "direct participation in" hostilities (Report, DPH 2005, p. 25).

<sup>142</sup> During the Expert Meetings, the belligerent nature of the required nexus was expressed in terms of civilian conduct being carried out "in relation to" ongoing hostilities or military operations (Report, DPH 2004, p. 10; Report, DPH 2005, p. 10), "in support of" the military operations of one party to the conflict (Report DPH 2005, pp. 9 f.), or "directed against" another (Report DPH 2005, pp. 22 f., 34).

<sup>143</sup> To "harm" a party to the conflict is here understood as directly causing harm (see "causal proximity", *supra*, pp. 39 ff.), which reaches the required qualitative or quantitative threshold (see "threshold of expected harm", *supra*, pp. 34 ff.).

<sup>144</sup> Report, DPH 2005, p. 10. During the 2006 Expert Meeting, some experts suggested that the cumulative requirement of "in support of a party to the conflict" and "to the detriment of another" should be reformulated as an alternative requirement because, in their opinion, an act carried out to the detriment of one party to the conflict would always be in support to another and because, otherwise, independent armed groups operating in situations of international armed conflict without supporting either party to the conflict could not be considered to directly participate in hostilities and had to be dealt with through law enforcement measures. The organizers maintained, however, that a cumulative requirement was necessary because, as soon as either element was missing, armed violence would become independent from the armed struggle taking place between existing parties to a conflict, giving rise to the question as to whether such "independent" armed violence reaches the threshold of intensity or protraction required for a separate armed conflict - in the case of organized armed groups presumably of non-international character. To do otherwise would make it impossible to properly distinguish situations of law enforcement from the conduct of hostilities (see the discussion in Report DPH 2006, C.V.5 (b), pp. 53 f.). More generally on "independent" armed groups, see *supra*, sections B.I.3, pp. 11 ff. and C.IV.2, pp. 31 ff.

<sup>145</sup> During the 2006 Expert Meeting, both the organizers and the participating experts emphasized the paramount importance of distinguishing, in contexts of armed conflict, situations of law enforcement and of the conduct of hostilities (Report DPH 2006, C.V.5 (b) and (c), pp. 53 f. and 55 f.). See also Report DPH 2005, p. 11.

same civilians block the same roads in order to facilitate, for instance, the withdrawal of insurgent forces by delaying the passage of governmental armed forces (or vice versa), their conduct would be specifically designed to support one party to the conflict by adversely affecting the military operations of another and, therefore, would have the required "belligerent" nexus to the armed conflict. Similarly, violent political demonstrations and riots,<sup>146</sup> as well as abuses against the civilian population cannot be regarded as having a "belligerent" nexus, unless their primary design is to support one party to an armed conflict by directly causing the required threshold of harm to another.<sup>147</sup> Likewise, a boy changing road signs in order to cause military vehicles to go in the wrong direction may adversely affect military operations but, in the absence of belligerent nexus, would be carrying out nothing but a childish trick.<sup>148</sup> Civilian acts of individual self-defense against unlawful violence also lack belligerent nexus. For example, although the use of armed force by peaceful civilians to defend themselves against looting, rape and murder on the part of marauding soldiers, is likely to directly cause the required threshold of harm to the detriment of a party to the conflict, the objective purpose of such conduct is not to support the military operations of the opposing party to the conflict and, therefore, such use of force in individual self-defense falls short of direct participation in hostilities.<sup>149</sup> Conversely, in contradistinction to the arrest, internment and guarding of peaceful civilians, which may have a general nexus to the armed conflict, the internment and guarding of captured military personnel in support or on behalf of a party to the conflict has a belligerent nexus, because it is specifically designed to adversely affect the military capacity of the adversary through the retention of captured military personnel.<sup>150</sup> In sum, in order to fulfil the requirement of belligerent nexus, an act carried out by a civilian must be objectively designed to support one party to the conflict by harming another.

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<sup>146</sup> Report DPH 2005, p. 8.

<sup>147</sup> Report DPH 2004, p. 4; Report DPH 2005, pp. 8, 11. See also above, Heading IV, *in fine*.

<sup>148</sup> Report DPH 2005, p. 32. In principle, the age of the acting civilian has no influence on the qualification of a specific act as "direct participation in hostilities". Thus, to the extent that the objective requirements of "threshold of harm", "direct causation" and "belligerent nexus" are fulfilled, even children are at risk to lose protection against direct attack. Therefore, parties to both international and non-international armed conflicts are obliged to take all feasible measures in order that children below the age of fifteen years do not directly participate in hostilities and, in particular, must refrain from recruiting them into their armed forces (Article 77 [2] AP I; Article 4 [3] (c) AP II, Rule 137 CLS). It should be noted, however, that children who are captured after having directly participated in hostilities continue to benefit from the special protection afforded to children under IHL (Article 77 [3] AP I; Article 4 [3] (d) AP II).

<sup>149</sup> Report DPH 2003, p. 6; BP DPH 2004, pp. 31 f. If the use by civilians of armed force in self-defense were to constitute "direct participation in hostilities" and entail the loss of civilian protection against direct attack, the very act of self-defense would have the absurd consequence that the previously unlawful attack against the civilian in question would now be legitimized.

<sup>150</sup> Report DPH 2005, pp. 15 f.

***Nexus and subjective intent:*** The requirement of belligerent nexus must be distinguished from criteria such as "subjective intent"<sup>151</sup> and "hostile intent".<sup>152</sup> Admittedly, this distinction is delicate. In essence, subjective intent relates to the actual motives of the acting civilian, whereas belligerent nexus relates to the objective purpose of the act itself. Therefore, the decisive question in determining belligerent nexus must be whether a particular act carried out by a civilian, interpreted from the perspective of the person called to react to it and taking into account both the information available to that person and the circumstances prevailing at the relevant time and place, can reasonably be perceived as an activity designed to support one party to the conflict by causing harm to another. In other words, the criterion of belligerent nexus expresses an "objectivized" intent, which is not identical with subjective intent within the meaning of criminal law – it is an objective criterion expressing the notion of "directed against the enemy", which is inherent in the concept of hostilities and indicates that an act is designed as part of larger military confrontations between parties to an armed conflict.<sup>153</sup>

While the belligerent nexus of an act must be identified from the perspective of the individual called to make the determination, it must in all cases be deduced from reasonable, objectively verifiable factors, most notably from the perceptible conduct of the concerned civilian in conjunction with the surrounding context and the concrete circumstances prevailing at the relevant time and place.<sup>154</sup> In practice, the determination of the belligerent nexus of an act to an armed conflict can pose considerable difficulties for the operating forces. For example, in many armed conflicts, gangsters, pirates and mafia operate in a "grey zone" where it is difficult to distinguish the conduct of hostilities from violent crime unrelated to, or merely facilitated by, the existence of a situation of armed conflict. As the determination of belligerent nexus is part of a process that may lead to a civilian's loss of protection against

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<sup>151</sup> During the 2005 Expert Meeting, the experts agreed that the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for "split second" targeting decisions (Report DPH 2005, pp. 9, 26, 34, 66 f.).

<sup>152</sup> During the 2005 Expert Meeting, the experts agreed that "hostile intent" is not a term of IHL, but belongs to the technical terminology of Rules of Engagement (ROE) drafted under national law. ROE in turn constitute national command and control instruments designed to provide guidance to armed personnel as to their conduct in specific contexts. As such, ROE do not necessarily reflect the precise content of IHL and certainly cannot be used to define the concept of direct participation in hostilities. For example, particular ROE may for political or operational reasons prohibit the use of lethal force in response to certain activities, although they would constitute direct participation in hostilities under IHL. Conversely, ROE may contain rules on the use of lethal force in situations such as self-defense against violent acts that do not amount to direct participation in hostilities. Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to "hostile intent" for the purpose of defining "direct participation in hostilities" (see Report DPH 2005, p. 37).

<sup>153</sup> Report DPH 2005, pp. 22 f., 26, 40. See also the discussion in Report DPH 2006, C.V.5 (a), p. 53.

<sup>154</sup> Report DPH 2005, pp. 9 f., 22, 26, 28, 34, 40,

direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting. In situations of doubt, the concerned person must be presumed to be protected against direct attack.<sup>155</sup> This cautious approach imposed by the principles governing the conduct of hostilities does not exclude the use of armed force for the suppression of inter-civilian violence, ethnic cleansing or of other forms of serious crime, where absolutely necessary to maintain, restore or otherwise impose law and order in the concrete circumstances.<sup>156</sup>

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<sup>155</sup> See *infra*, Section D.VIII, pp. 57 f.

<sup>156</sup> Report DPH 2005, p. 11. In that case, the permissibility of the use of force will be governed by law enforcement standards, taking into account both the particular threat to be addressed and the particularly hazardous circumstances prevailing in situations of armed conflict. See also references *supra*, FN 145.



## VI. Beginning and End of Direct Participation in Hostilities

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

The notion of "direct participation in hostilities" is not necessarily limited to the execution of specific acts meeting the required criteria, but may also include concrete measures preparatory to the execution of such an act, as well as the immediate deployment to and return from the location of its execution.<sup>157</sup> In other words, where the execution of a specific act amounting to direct participation in hostilities is preceded by concrete preparatory measures, including geographical deployments, or where such an act is followed by a geographical return or withdrawal, these preceding and subsequent phases may be considered to constitute part of that specific act, thus extending its beginning and end beyond the phase of its actual execution.<sup>158</sup> As civilians lose protection against direct attack

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<sup>157</sup> The Questionnaire submitted to the experts prior to the 2004 Expert Meeting distinguished between "general" and "immediate" preparatory measures to activities such as the "application of means of destruction or injury" (I, 1.3.), "establishment and exercise of control over personnel and objects used by the adversary" (I, 2.4.), "intelligence activities" (I, 3.4.) and "acts against protected persons or objects" (I, 6.4.). In their responses to the Questionnaire, the majority of experts tended towards the opinion that "immediate" preparatory measures constituted a form of direct participation in hostilities, while opinions regarding "general" preparatory measures were divided, resulting in no clear majority (BP DPH 2004, pp. 7, 10, 13, 21). See also Report DPH 2005, p. 19 and, as a whole, the discussion in Report DPH 2006, C.VI., pp. 56 ff. Further, see Commentary Article 43 AP I, § 1679; Commentary Article 51 AP I, § 1943 and Commentary Article 13 AP II, § 4788, recalling that, during the course of the discussions at the Diplomatic Conference of 1974 to 1977, several delegations indicated that "hostilities" included preparations for combat and return from combat.

<sup>158</sup> During the 2006 Expert Meeting, two experts suggested that the beginning and end of direct participation in hostilities should not be determined based on the duration of an isolated specific act, but on a "chain" or "stream" of events or, in criminal law terms, a "course of conduct", which started with the first preparatory measures and ended with the execution of the attack and the subsequent withdrawal. For example, where a civilian planned to detonate an improvised explosive device (IED), the relevant course of conduct could start with the accumulation and storage of the various ingredients of the IED in a garage, continued through the repeated visits of the civilian to the garage in order to assemble the ingredients into the IED, and culminating in the actual placement and detonation of the device. These experts held that, in responding to such conduct with military force, it should be lawful to go as far "upstream" and "downstream" as possible from a concrete attack, and that it was artificial to place a theoretical dividing line anywhere within this sequence of events. However, the prevailing view among the experts was that interpreting the concept of direct participation in hostilities as a chain or stream of events rather than a specific act was prone to become a "slippery slope", which permitted to extend loss of protection not only beyond the detonation of an IED to the storage and assembly of its ingredients in a garage, but to the purchase of these ingredients on the black market and even further, unless a line was drawn at some point. In choosing that point, it was important to distinguish concepts of criminal law and IHL. While the course of conduct relevant for the penalization of preparations and attempts of crimes was determined in a judicial procedure subject to due process, the line drawn under IHL for the loss of civilian protection due to direct participation in hostilities had to serve as an operational basis for immediate decisions on the use of lethal force in situations where there could be

for such time as they directly participate in hostilities,<sup>159</sup> the determination of the beginning and end of specific acts amounting to direct participation in hostilities must be made with utmost care.<sup>160</sup>

## 1. Preparatory Measures

As far as preparatory measures are concerned, a clear distinction must be made between preparatory measures that qualify as direct participation in hostilities and preparatory measures that do not.<sup>161</sup> Since the notion of direct participation in hostilities refers to specific acts supporting one party to the conflict by directly causing harm to another,<sup>162</sup> preparatory measures amounting to direct participation in hostilities must necessarily be preparatory to a concrete and specific act amounting to direct participation in hostilities (*concrete preparation*) and not merely to a general campaign or unspecified operations (*general preparation*). Whether a particular individual is engaged in a preparatory measure qualifying as direct participation in hostilities will depend on a multitude of factors, which cannot be comprehensively described in abstract terms. Nevertheless, in essence, preparatory measures amounting to direct participation in hostilities correspond to what treaty IHL describes as "military operation[s] preparatory to an attack"<sup>163</sup> - they are of specifically military nature and so closely linked to the subsequent execution of a specific act of direct participation in hostilities, that they already constitute an intrinsic part of that act.<sup>164</sup> Conversely, it is neither necessary nor sufficient for a qualification as direct participation in hostilities that a preparatory measure occurs immediately before or in close geographical proximity to the execution of a specific hostile act, or that it be strictly indispensable for its execution. In accordance with the distinction between "direct" and "indirect" participation in hostilities it could be said that concrete preparation *aims to carry out* a concrete act qualifying as direct participation in hostilities, while general preparation merely *aims to establish the*

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no absolute certainty as to the reliability of available intelligence information (see discussion in Report DPH 2006, C.VI.4, pp. 59 ff.).

<sup>159</sup> See *infra* Section VII, pp. 55 ff.

<sup>160</sup> See, as a whole, the discussion in Report DPH 2006, C.VI., pp. 56 ff.).

<sup>161</sup> BP DPH 2005, WS VI-VII, p. 10.

<sup>162</sup> See Sections C.IV and V, *supra*, pp. 29 ff. and 34 ff.

<sup>163</sup> Article 44 [3] AP I.

<sup>164</sup> During the 2006 Expert Meeting, several experts emphasized that the distinction between "general" and "specific" preparation should be interpreted with utmost care so as to ensure that loss of civilian protection was not triggered by acts that were too remote from the actual fighting. According to these experts, in order for the word "direct" in the phrase "direct participation in hostilities" to retain any meaning, and contrary to members or armed forces and groups, civilians should be liable to direct attack exclusively during recognizable and proximate preparations, such as the loading of a gun, and during deployments in the framework of a specific military operation (Report DPH 2006, C.VI.3 and 5, pp. 58 and 62 f.).

*capacity to do so*, but is not yet focused on a specific hostile act.

For example, the loading by an individual of bombs onto an airplane for direct deployment against a specific objective constitutes a measure preparatory to a concrete military operation and, therefore, qualifies as direct participation in hostilities even if the operation is carried out only the following day and great geographical distance separates the location of the preparatory measure from the targeted objective. Conversely, transporting the same bombs from the factory to an airfield storage place and from there to a transport airplane for shipment to the conflict zone would constitute a general preparatory measure qualifying as mere "indirect" participation in hostilities. Similarly, if carried out with a view to the execution of a specific act of direct participation in hostilities, the equipment, instruction and transport of personnel, the gathering of intelligence and the preparation, transport and positioning of equipment almost certainly would constitute concrete preparation amounting to "direct" participation in hostilities. Conversely, general preparation not entailing loss of protection against direct attack would include most - but not necessarily all - cases of purchase, production, smuggling, hiding and transport of weapons, explosives and other equipment, the general recruitment and training of personnel and the provision of financial, administrative or political support to armed actors, as well as other activities merely building up or maintaining the general capacity to carry out unspecified hostile acts.<sup>165</sup>

## 2. Deployment and Return

Where the actual execution of a specific act qualifying as direct participation in hostilities requires prior geographic deployment, this deployment can amount to a concrete measure preparatory to that act.<sup>166</sup> Likewise, as long as the geographic return from the execution of a concrete hostile act remains an integral part of the preceding operation, it may constitute a

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<sup>165</sup> It must be emphasized that, in practice, extreme caution is required in determining whether preparatory measures do or not amount to direct participation in hostilities. The discussed examples can only illustrate the principles based on which the distinctions ought to be made and cannot replace a careful assessment of the totality of the circumstances prevailing in the concrete context and at the time and place of action (Report DPH 2006, C.VI.2 and 5, pp. 57 and 62 f.).

<sup>166</sup> In their responses to the Questionnaire submitted prior to the 2004 Expert Meeting, a majority of experts considered that "deployment to" the geographic location where an act of direct participation in hostilities is going to take place should also qualify as "direct participation" and, although more hesitant, tended towards the same conclusion with regard to the "return from" such location. See BP DPH 2004, pp. 7 (I, 1.3.), 10 (I, 2.4.), 13 (I, 3.4.), 20 (I, 6.4.). See also Report DPH 2005, pp. 65 f. Further, see Commentary Article 43 AP I, § 1679; Commentary Article 51 AP I, § 1943 and Commentary Article 13 AP II, § 4788, recalling that, during the course of the discussions at the Diplomatic Conference of 1974 to 1977, several delegations indicated that "hostilities" included preparations for combat and return from combat.

military withdrawal and, as such, has nothing in common with surrender or otherwise falling *hors de combat*.<sup>167</sup> A deployment amounting to direct participation in hostilities only begins once the deploying individual undertakes a physical displacement with a view to the execution of an already planned, concrete operation. The return from the execution of a specific act ends once the returning individual has physically dissociated from the operation in question, for example by laying down, storing or hiding the weapons, uniforms or other equipment used and resuming activities that can no longer objectively be identified as part of that operation. Similarly as with preparatory measures, whether a particular individual is engaged in deployment to, or return from, the execution of a specific act of direct participation in hostilities will depend on a multitude of factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both "deployment to..." and "return from..." must be carried out as part of the execution of a specific act amounting to direct participation in hostilities. The relevant determination must be based on a reasonable evaluation in view of the objective circumstances prevailing in each case.<sup>168</sup> Where the execution of a specific hostile act does not require geographic displacement, such as may be the case for computer network attacks or for the remote-controlled operation of unmanned weapons systems, the duration of direct participation in hostilities will be restricted to the duration of the execution of the specific hostile act including any concrete measures preparatory to that act.

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<sup>167</sup> Report DPH 2005, p. 66. See also *supra*, FN 166. During the 2006 Expert Meeting, the qualification of the "return from" a concrete military operation as direct participation in hostilities gave rise to serious concerns. While one expert did not see how the loss of civilian protection during the withdrawal phase could be deduced from the text of the Additional Protocols, some experts saw a danger that direct attacks carried out while the targeted civilians were already returning to their civilian activities could amount to a form of punishment or vengeance for having directly participated in hostilities instead of addressing an existing military threat. However, other experts warned that, in reality, it would be unrealistic and unacceptable to prohibit operational forces from using military force against civilians during their withdrawal from a previous attack. Instead, loss of civilian protection had to continue throughout the withdrawal phase until there no longer was any connection to the perpetrated act of direct participation in hostilities. It was also pointed out that the use of lethal force against civilians having directly participated in hostilities did not necessarily presuppose their loss of protection against direct attack but, to the extent necessary to effect an arrest or prevent an escape, could also be permissible under law enforcement standards (Report DPH 2006, C.VI.3 and 6, pp. 59 and 63 ff.).

<sup>168</sup> Therefore, the *caveat* made in FN 165 above with regard to preparatory measures also applies to the "deployment to" and "return from" the execution of specific acts of direct participation in hostilities (see also Report DPH 2005, p. 66, Report DPH 2006, C.VI.2, p. 57).

## D. Modalities of the Suspension of Civilian Protection

### VII. The Temporal Scope of the Suspension of Civilian Protection

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

#### 1. Spontaneous, Unorganized or Sporadic Direct Participation in Hostilities

According to treaty and customary IHL applicable in both international and non-international armed conflict, civilians enjoy general protection against the dangers arising from military operations and, most notably, from direct attack "unless and for such time as" they take a direct part in hostilities.<sup>169</sup> First, this provision as a whole makes clear that civilians directly participating in hostilities do not cease to be part of the civilian population, but that their protection against direct attack is temporarily suspended. Second, the phrase "unless and for such time" clarifies that such suspension of civilian protection lasts exactly as long as, and can neither begin before, nor extend beyond, the corresponding civilian engagement in direct participation in hostilities. Accordingly, in the period before or after an engagement in direct participation in hostilities, the concerned civilians may not be directly attacked.<sup>170</sup> In view of the temporal identity between the duration of direct participation in hostilities and the duration of the ensuing loss of civilian protection against direct attack, determining the temporal scope of the suspension of protection is equivalent to determining the beginning and end of concrete conduct which qualifies as direct participation in hostilities.<sup>171</sup> Consequently, the phrase "unless and for such time" necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their direct participation in hostilities (so-called "revolving door" of civilian protection). The "revolving door" of civilian protection is not

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<sup>169</sup> Articles 51 [3] AP I; 13 [3] AP II. The ICRC's Customary Law Study considers this rule, including the phrase "for such time as", to have attained customary nature in both international and non-international armed conflict (Rule 6 CLS). Affirmative on the customary nature of Article 51 [3] AP I, including the phrase "for such time as", also the Israeli Supreme Court in: Israel HCJ 769/02, PCATI v. Government of Israel, Judgment of 14 December 2006, § 30.

<sup>170</sup> Of course, civilian immunity against direct attack does not exclude the use of force against the civilians in question under the standards of law enforcement or individual self-defence.

<sup>171</sup> On the beginning and end of "direct participation in hostilities" see *supra*, Section C.VI, pp. 49 ff.

a malfunction of IHL, but constitutes an integral and intended part thereof. Its primary purpose is to protect peaceful civilians from erroneous or arbitrary attacks, but it is also a practical expression of the fundamental principles of military necessity and of humanity underlying the entire body of IHL. Admittedly, the “revolving door” of civilian protection entails that individual civilians can repeatedly lose and regain protection against direct attack within a short period of time. More precisely, as the notion of “direct participation in hostilities” refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict, civilians lose and regain protection against direct attack in parallel with the beginning and end of each specific act amounting to direct participation in hostilities.<sup>172</sup> While this mechanism may make it more difficult for the opposing armed forces to respond effectively to the direct participation of civilians in hostilities, it remains both necessary for the protection of peaceful civilians from erroneous and arbitrary attack and acceptable for the operating forces as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.

## 2. Membership in Organized Armed Forces or Groups

A “revolving door” of protection based on the beginning and end of specific acts becomes extremely problematic as soon as it is applied to well organized, trained and equipped armed groups, allowing them to abuse civilian protection by operating as “farmers by day and fighters by night”, thus causing a significant operational imbalance between state armed

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<sup>172</sup> During the 2006 Expert Meeting, some experts doubted whether the text of the Additional Protocols, which simply referred to loss of protection “for such time as” civilians took a direct part in hostilities, could be interpreted to impose a temporal limitation of the loss of protection to *the duration of each specific act* of direct participation in hostilities. These experts supported an alternative approach, which stipulated that civilians who directly participate in hostilities on a recurrent basis should lose their protection from attack even during short intervals (namely intervals of hours, days, or even weeks, but certainly not months) between their engagements in such activities. According to these experts, once a civilian had directly participated in hostilities twice with a merely short interval, the presumption of civilian protection should be replaced by a revertible presumption of loss of protection (Report DPH 2006, D.VII.2 and 3, pp. 67 f. and 68 ff.). This proposal was widely criticized, most notably because, under the texts of both Article 3 [1] GC I to IV and the Additional Protocols, continuous loss of civilian protection could not be based on “recurrent acts” by individual civilians, but exclusively on the concept of “membership” in the armed forces of a governmental or non-state party to the conflict. Therefore, as far as unorganized, sporadic or spontaneous direct participation in hostilities was concerned, the international *lex lata* did not permit the extension of the ensuing loss of protection beyond the duration of a specific act qualifying as direct participation in hostilities. Even if the “short interval”-criterion of the alternative proposal were to be introduced *de lege ferenda*, it would leave soldiers without guidance as to how to decide whether a concrete civilian, whose specific act of direct participation in hostilities had come to an end, was at the beginning of a short interval and could still be attacked, or whether he had regained protection because this had been the last hostile act to be carried out by him (Report DPH 2006, D.VII.3, pp. 68 ff.).

forces and organized armed groups.<sup>173</sup> Clearly, such a situation would undermine the respect for IHL by the parties to the conflict and, ultimately, would lead to unacceptable risks for the peaceful civilian population. Therefore, where civilians leave the realm of merely spontaneous, unorganized or sporadic direct participation in hostilities by joining an organized armed force or group belonging to a party to the conflict, the “revolving door” of civilian protection starts operating based on “membership” rather than “specific acts”.<sup>174</sup> In other words, members or organized armed forces or groups belonging to a party to the conflict lose civilian protection against direct attack for as long as their membership lasts.<sup>175</sup> Generally speaking, such membership begins in the moment when a civilian formally joins the regular armed forces or, respectively, *de facto* begins to assume continuous combat function for an irregularly constituted organized armed group, and lasts until he or she formally retires from the regular armed forces or ceases to assume combat function for an organized armed group in a manner objectively recognizable to the adversary.<sup>176</sup> Such “affirmative” disengagement does not necessarily have to be openly declared, but can also be expressed through conclusive behavior, such as a lasting physical distancing from the armed group and reintegration into civilian life or the permanent resumption of an exclusive non-combat function, such as a political role or civilian support activities.<sup>177</sup> Whether a particular individual assumes, or has disengaged from, continuous combat function depends on objective criteria which may vary depending on the political, cultural and military

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<sup>173</sup> See also Section C.IV.2, *supra* p. 31.

<sup>174</sup> During the Expert Meetings, a wider agreement emerged that a distinction had to be made between unorganized and organized armed actors. There was a preference for applying the “specific acts approach” to unorganized civilians and the “affirmative disengagement approach” to fighting members of organized armed groups (Report DPH 2005, pp. 49, 60 f., 62 f. 64 f., 82 ff.). This emerging compromise was described as a “limited” or “functional membership approach” and found increasing support among the participants (Report DPH 2005, pp. 64 f., 82 ff.; Report DPH 2006, Section B.II.7, pp. 30 ff. For the discussions on the various approaches, see: Report DPH 2003, p. 7; BP DPH 2004, pp. 34 ff.; Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 59 ff.; 82 ff.). The application of distinct temporal scopes of loss of protection to organized armed actors and civilians was held to be necessary because it was the only way to avoid the “farmers by day - fighters by night” scenario, while at the same time preserving the protection of civilians who do not, or no longer, directly participated in hostilities (Report DPH 2006, D.VII.2, pp. 67 f.).

<sup>175</sup> More precisely, members of organized armed forces or groups belonging to a party to an international or non-international armed conflict lose their capacity as civilians for the entire duration of their membership or, according to an alternative approach, can be regarded as “continuously” directly participating in hostilities. In either case, they lose civilian protection against direct attack for as long as their membership lasts. For a critical discussion of the alternative concept of “continuous” direct participation in hostilities, see Sections B.II.7 and C.IV.2, *supra* pp. 22 ff. and 31 ff. On the concept of “civilian” in international and non-international armed conflict, see Sections B.I and II, *supra*, pp. 9 ff.

<sup>176</sup> Report DPH 2005, p. 59. On the difference between the *formal* (regular armed forces) and the *functional* (irregularly constituted armed groups) concept of “membership”, see Section II.3 to 5, *supra* pp. 17 ff.

<sup>177</sup> Obviously, a member of an organized armed force or group also benefits from protection against direct attack as soon as he or she has fallen *hors de combat* as a result of capture, surrender, wounds, sickness or any other reason (see, e.g., Article 3 [1] GC I to IV, Article 41 AP I).

context.<sup>178</sup> In any case, the determination must be made based on concrete, objectively verifiable facts and on the standards of good faith and reasonableness in the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.<sup>179</sup>

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<sup>178</sup> During the 2006 Expert Meeting, some experts pointed out that, in practice, it was very difficult to clearly distinguish between members of armed groups and civilians and, consequently, to know when to apply the functional membership approach and when the specific acts approach. Several experts responded that, in operational reality, there were essentially two kinds of military operations. During *reactive* operations carried out in response to an attack, the operating forces often lacked sufficient intelligence on those involved in that attack and had to rely on assumptions made based on individual conduct. Therefore, such operations would generally be restricted to the duration of the concrete hostile acts to which they responded. Conversely, *proactive* operations that were initiated by the armed forces based on solid intelligence regarding the leadership, membership or function of a person within an armed group could also be carried out in a moment when the targeted persons were not directly participating in hostilities and, therefore, required a reliable distinction between civilians and members of armed groups. While one expert suggested that these difficulties could be resolved by simply prohibiting direct attacks against any person who was not, at the time, directly participating in hostilities, several other experts rejected this proposal and insisted that practical difficulties in distinguishing civilians from members of armed forces or groups could not justify to simply discard that distinction. As a matter of law, the revolving door of protection operating on the basis of specific acts was part of the rule on civilian direct participation in hostilities expressed in Article 51 [3] AP I and Article 13 [3] AP II and could not, as such, be extended to members of armed forces or groups. Instead, it was necessary to clarify the law and to try to cope with the resulting practical difficulties by way of precautions and presumptions (Report DPH 2006, C.VI.3, pp. 58 f.)

<sup>179</sup> During the Expert Meetings, it was emphasized that a determination as to whether affirmative disengagement had taken place would depend on the concrete circumstances of the context and could not be defined in advance (Report DPH 2005, p. 63). On the precautions and presumptions to be followed in situations of doubt, see Section D. VIII, *infra*, pp. 57.



## VIII. Precautions and Presumptions in Situations of Doubt

**All feasible precautionary measures must be taken in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities. In case of doubt, the person in question must be presumed to be entitled to civilian protection against direct attack.**

### 1. Particular Risks of Situations of Doubt

One of the main practical problems caused by civilian participation in hostilities is that of doubt as to the identity of the adversary. For example, armed forces involved in counter-insurgency operations will constantly be confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to reliably distinguish between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, unorganized or sporadically basis, and civilians who may or may not be providing support to the adversary, but who do not, at the time, directly participate in hostilities ("peaceful" civilians). In order to avoid the erroneous or arbitrary targeting of peaceful civilians, there must be clarity as to the precautions and presumptions to be followed in situations of doubt.

### 2. The Requirement of Feasible Precautions

Prior to any attack, all feasible precautions have to be taken to assert that targeted persons actually constitute legitimate targets.<sup>180</sup> Moreover, once an attack has commenced, those responsible for its conduct must do everything feasible to cancel or suspend the attack if it becomes apparent that the target is not a military objective.<sup>181</sup> Therefore, both before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if yes, whether that civilian is engaged in direct participation in hostilities. As soon as it becomes apparent that the targeted person is entitled to civilian protection against direct attack, those responsible must refrain from launching, cancel or suspend the attack. This determination must be made in good faith and in view of all

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<sup>180</sup> Article 57 [2] (a) (i) AP I; Rule 16 CLS.

<sup>181</sup> Article 57 [2] (b) AP I; Rule 19 CLS.

information reasonably available in the concrete situation.<sup>182</sup> "Feasible" precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.<sup>183</sup> In practice, a direct attack against a civilian deemed to directly participate in hostilities must be cancelled or suspended not only when that civilian was from the outset mistakenly regarded as a legitimate military objective, but also when he or she falls *hors de combat* or otherwise ceases to directly participate in hostilities in the course of an ongoing operation.<sup>184</sup>

### 3. Presumption of Civilian Protection

For the purposes of the conduct of hostilities, IHL can be said to distinguish between two basic categories of persons: civilians and members of the armed forces of the parties to the conflict. A general rule applies to each category, subject to certain exceptions. Members of the armed forces are generally regarded as legitimate military objectives, unless they serve as medical or religious personnel, and until they surrender or otherwise fall "*hors de combat*". Conversely, civilians are generally protected against direct attack, unless and for such time as they directly participate in hostilities. For each category, the general rule established in the law applies until the requirements for an exception are fulfilled. Consequently, as far as civilians are concerned, the presumption in a situation of doubt must be that they are protected.<sup>185</sup> Therefore, in case of doubt as to whether a concrete example of civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that such conduct does not amount to direct participation in hostilities. The presumption of civilian protection must also apply, *a fortiori*, in case of doubt as to whether a civilian has become a member of an organized armed force or group belonging to a party to the conflict and, therefore has lost civilian protection against direct attack for the entire duration of such membership.<sup>186</sup> Obviously, the standard of doubt

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<sup>182</sup> Report DPH 2006, D.VIII.3, p. 73.

<sup>183</sup> Article 3 [4] CCW Protocol II (1980); Article 1 [5] CCW Protocol III (1980); Article 3 [10] CCW Amended Protocol II (1996). See also the French text of Article 57 AP I ("faire tout ce qui est pratiquement possible").

<sup>184</sup> Of course, apart from the determination as to whether a civilian is directly participating in hostilities, the principle of precaution in attack also requires that all feasible precautions be taken to avoid and in any event minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. It also requires them to refrain from launching, to cancel or suspend attacks that are likely to result in excessive "collateral damage" (Articles 57 [2] (a) (ii) and Rule 17 CLS; Article 57 [2] (a) (iii) and Rule 18 CLS; Article 57 [2] (b) AP I and Rule 19 CLS).

<sup>185</sup> During the Expert Meetings, the prevailing opinion was that, in case of doubt as to whether a civilian constituted a legitimate military target, that civilian had to be presumed to be protected against direct attack (Report DPH 2005, pp. 44 f., 67 f.).

<sup>186</sup> Report DPH 2005, p. 82. This principle is also expressed in Article 50 [1] AP I for international

applicable to targeting decisions during the conduct of hostilities cannot be compared to the strict standards of doubt known from criminal proceedings but must correspond to the level of certainty that can reasonably be achieved in the prevailing circumstances, taking into account, *inter alia*, the means and intelligence at the disposal of the decision maker, the urgency of the situation, as well as the damage likely to result from an erroneous decision for the operating forces or innocent bystanders. Clearly, the presumption of civilian protection against direct attack does not exclude the use of armed force against civilians whose conduct poses a grave threat to law and order without clearly amounting to direct participation in hostilities. However, in such cases, the permissibility of the use of armed force will be governed by the standards of law enforcement and of individual self-defense, taking into account both the concrete threat to be addressed and the nature of the surrounding circumstances.<sup>187</sup>

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armed conflict. With regard to non-international armed conflicts, see also *supra*, FN 56, quoting the following section of the Commentary to Article 13 AP II, § 4789: "Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian".

<sup>187</sup> Report DPH 2005, p. 11.

## IX. General Restraints on the Use of Force in Direct Attack

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

Civilians lose their protection against direct attack for such time as they directly participate in hostilities or, alternatively, for such time as they cease to be civilians due to their continuous assumption of combat function within an organized armed group. Such loss of protection does not mean that the concerned persons fall outside the law. It only entails that the lawfulness of the use of force against the concerned persons is no longer exclusively governed by the standards of law enforcement and individual self-defense, but that operations may now also be based on the standards of the conduct of hostilities.<sup>188</sup> In contrast to situations of law enforcement or individual self-defense, the lawful use of armed force in the conduct of hostilities presupposes neither that the targeted persons have perpetrated a crime nor that they represent an imminent threat, but that they constitute legitimate military objectives.<sup>189</sup> However, even direct attacks against legitimate military objectives are subject to legal constraints, whether based on specific prohibitions imposed by IHL or on more general considerations of humanity.

Clearly, military operations, even if directed against persons not entitled to protection against direct attack, must comply with all applicable provisions of treaty and customary IHL governing the conduct of hostilities. This includes not only the principles of distinction, precaution and proportionality, but also other restraints imposed on the means and methods of warfare, such as the prohibition of denial of quarter, the prohibition of persons *hors de*

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<sup>188</sup> This observation does not exclude the continued applicability during the conduct of hostilities of normative frameworks other than IHL, such as human rights law, which depends on circumstances that cannot be discussed within the scope of this Interpretive Guidance (Report DPH 2006, D.IX.2, 3 and 4, pp. 77 f., 80). As specifically stated in Article 51 [1] AP I, the rule on “direct participation in hostilities” expressed in Article 51 [3] AP I is “additional to other applicable rules of international law”.

<sup>189</sup> BP DPH 2005, WS VI–VII, p. 12; Report DPH 2005, pp. 31, 67. During the Expert Meetings, there was general agreement among the experts that loss of civilian protection from direct attack due to direct participation in hostilities is not a sanction for “bad” behavior and that, similarly, the granting of protection was not a reward for “good” behavior (Report DPH 2005, p. 44). The experts also distinguished direct attacks against civilians directly participating in hostilities from the preventive use of lethal force in situations of self-defense (Report DPH 2003, p. 6; Report DPH 2004, p. 14; Report DPH 2005, pp. 31, 36, 37, 38 and 67).

*combat*, the prohibition of perfidy and the restriction or prohibition of certain weapons.<sup>190</sup> Moreover, it should be recognized that, in regulating the use of force against legitimate military targets, IHL does neither impose an obligation to "capture rather than kill", as would be the case under law enforcement standards, nor does it provide an express "license to kill". Instead, IHL simply does not provide certain categories of person, including civilians directly participating in hostilities, with protection against direct attack. While the use of force against such persons clearly is not governed by law enforcement standards, considerations of humanity require that no more death, injury or destruction be caused than is reasonably necessary to achieve a lawful objective. In other words, persons who constitute legitimate military targets may be directly attacked for the purpose of rendering them *hors de combat* and may be lawfully killed to the extent that this is reasonably required to achieve that purpose in the in the concrete circumstances.<sup>191</sup>

More concretely, while the operating forces can hardly be required to take additional risks in order to capture rather than kill an armed adversary, it would defy basic notions of humanity to shoot to kill an adversary or to refrain from giving him or her an opportunity to surrender where the circumstances are such that there manifestly is no necessity for the immediate application of lethal force. Whether and to what extent considerations of humanity require an adaptation of the quality and degree of force used against persons not entitled to protection against direct attack must be determined separately for each specific case in light of the concrete circumstances. Clearly, circumstances which could require an attempt at capture or the issuing of a warning prior to the use of lethal force are more likely to exist in territory over which the operating forces exercise effective control. Such circumstances may exist, for example, where an otherwise unarmed civilian is observed while transmitting targeting information to the adversary, marking targets on the ground, transporting ammunition to a firing position or sabotaging military installations, always provided that the circumstances are such that this civilian can be confronted and arrested without additional risk to the safety of the operating forces.<sup>192</sup>

The binding nature of such overriding considerations of humanity, which are also expressed

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<sup>190</sup> Affirmative Report DPH 2006, D.IX.2, pp. 77 f.

<sup>191</sup> Of course, such direct attacks become unlawful as soon as the targeted civilians cease to directly participate in hostilities and, in the case of members of the armed forces or organized armed groups belonging to a party to the conflict, as soon as they affirmatively disengage, or as soon as they surrender or otherwise fall *hors de combat*.

<sup>192</sup> During the 2006 Expert Meeting, it was pointed out, however, that armed forces operating in situations of armed conflict did not always have the means to carry out arrests, even if they were equipped with sophisticated weaponry and means of observation (Report DPH 2006, C.VI.6, p. 65). More generally on the discussion of this principle during the Expert Meetings, see *infra* FN 197.

in certain provisions of treaty IHL,<sup>193</sup> has been based on essentially three distinct theoretical arguments. First, it has been argued that, in situations where operating forces exercise sufficient territorial control to carry out an arrest, the parallel applicability of human rights law influences IHL regulating the conduct of hostilities so as to impose considerations of humanity even in the execution of direct attacks on legitimate targets.<sup>194</sup> Second, a similar argument has been made based on a general requirement of proportionality, which is held to be recognized as a general principle of international law.<sup>195</sup> In contrast to the specific proportionality test stipulated by IHL for the conduct of hostilities, this general principle of proportionality would thus balance the military advantage expected to result from an attack not only against expected incidental civilian death, injury or destruction, but also against death and injury likely to be inflicted on the targeted persons themselves. Third, and most relevant for the present discussion under IHL, the principle in question can be derived directly from the fundamental principles of military necessity and humanity underlying and informing the entire body of IHL on the conduct of hostilities.

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<sup>193</sup> Most notably, although Article 41 [2] AP I leaves no doubt that prisoners of war attempting to escape lose protection against direct attack, Article 42 GC III declares that the use of weapons against them shall constitute an "extreme measure, which shall always be preceded by warnings appropriate to the circumstances". More generally, the 1868 St. Petersburg Declaration clarifies that the aim of hostilities is to *disable* adversaries and not to *render their death inevitable*. See also the following statement made in the ICRC's Report on the Work of Experts relating to "Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects" (1973), p. 13 (§ 23): "[...] if a combatant can be put out of action by taking him prisoner, he should not be injured; if he can be put out of action by injury, he should not be killed; and if he can be put out of action by light injury, grave injury should be avoided". Nevertheless, during the 2006 Expert Meeting, both the organizers and individual experts specified that the approach proposed in the 1973 Report on the Work of Experts is unlikely to be operable in open battlefield situations such as artillery barrages and other large scale confrontations (Report DPH 2006, D.IX.2 and 4, pp. 77 f., 81).

<sup>194</sup> During the 2006 Expert Meeting, some experts suggested that the arguments made in Section IX of the Interpretive Guidance were arguments of human rights law and, therefore, should be addressed based on concrete human rights provisions, such as those on the right to life, rather than on vague concepts of IHL, such as military necessity and humanity. Nevertheless, most experts rejected this proposal and pointed out that the notion of direct participation in hostilities was a genuine concept of international humanitarian law. They did not exclude that, if applied to the same circumstances, human rights law and IHL would lead to the same results (Report DPH 2006, D.IX. 3, pp. 78 ff.).

<sup>195</sup> This argument has most recently been made by the Israeli Supreme Court in its judgments on a particular section of the West Bank Barrier (2004) and on the Israeli policy of targeted killing (2006). In Israeli Supreme Court, *Beit Sourik Village Council v. The Government of Israel et al.* (HCJ 2056/04), Judgment of 30 June 2004, § 37 the Court held: "Proportionality is recognized today as a general principle of international law. [...] From the foregoing principle springs the Principle of Humanitarian Law (or that of the law of war): Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the strength of the enemy". Furthermore, in Israeli Supreme Court, *The Public Committee Against Torture et al. v. The Government of Israel et al.* (HCJ 769/02), Judgment of 13 December 2006, § 40, the Court held that "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed. In our domestic law, that rule is called for by the principle of proportionality. Indeed, among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated, and tried, those are the means which should be employed [...]. Trial is preferable to use of force. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force".

In the conduct of hostilities, the strict requirement of “absolute necessity”, which governs the use of armed force against persons in situations of law enforcement and individual self-defense, is replaced by the more widely conceived requirement of “military necessity”, which no longer refers to the removal of an imminent threat or the prevention of crime, but to the achievement of a legitimate military aim. Today, the principle of military necessity is generally recognized as requiring that all military action fulfill the dual requirement, first, of being necessary for the submission of the enemy at the earliest possible time with the least possible expenditure of personnel and resources and, second, of not being otherwise prohibited under IHL.<sup>196</sup> In other words, expressed in *permissive* terms, the principle of military necessity justifies military action that is both reasonably necessary for the submission of the enemy and not otherwise prohibited by IHL. Expressed in *restrictive* terms, the principle reduces the sum total of lawful military action from that which is not expressly prohibited under IHL to that which is reasonably necessary for the submission of the enemy in the concrete circumstances.<sup>197</sup> As far as the targeting of persons is concerned, the

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<sup>196</sup> This longstanding interpretation of the principle of military necessity is confirmed in contemporary military manuals. See, for example, NATO: Glossary of Terms and Definitions, p. 2-M-5; United States: US Army Field Manual 27-10 (1956), § 3; US Navy / Marine Corps / Coast Guard, Commander's Handbook on the Law of Naval Operations (1995), § 6.2.5.5.2; United Kingdom: Manual of the Law of Armed Conflict (2004), Sections 2.2. to 2.4.; France: Manuel de Droit des Conflits Armés (2001), pp. 86 f.; Germany: Triservice Manual ZDv 15/2, § 130; Switzerland: Army Regulations 51.007/IV, § 160. The contemporary notion of “military necessity” has been strongly influenced by the following definition provided in Article 14 Lieber Code (1863): “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war” (emphases added). This definition is complemented by the following concrete examples: Article 15: “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; [...]. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God” (emphases added). Article 16: “Military necessity does not admit of: cruelty - that is, the infliction of suffering for the sake of suffering or for revenge; maiming or wounding except in fight; [...]; in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult” (emphases added).

<sup>197</sup> During the 2006 Expert Meeting, some experts held that the interpretation of the principles of military necessity and of humanity in Section IX of the Interpretive Guidance made a novel argument unknown under contemporary IHL. According to these experts, both principles had already been taken into account in the formulation of the particular provisions of IHL. Therefore, military necessity neither justified exceptions from concrete provisions of IHL unless expressly foreseen in that provision, nor did it constitute a requirement superimposed on existing rules of IHL (Report DPH 2006, D.IX. 2, pp. 77 f.). However, several other experts expressed their support for the view expressed in Section IX of the Interpretive Guidance and rejected any suggestion to delete it. According to these experts, the interpretation provided in Section IX accurately reflected contemporary IHL as understood and applied in recent international jurisprudence and constituted an important counterbalance to the application of a functional membership approach to members of organized armed groups (Report DPH 2006, D.IX.4, pp. 80 f.). Also during previous Expert Meetings, diverging views were expressed about the relevance of the principle of military necessity for the lawfulness of direct attacks against civilians directly participating in hostilities. While one group of experts held that IHL permits the killing of adversaries only to the extent that capture is not possible, others insisted that there is no legal obligation to “capture rather than kill”. However, throughout the discussions, it was neither claimed that there was

restrictive aspect of the principle of military necessity gives expression to the principle of humanity.<sup>198</sup> In conclusion, in the conduct of hostilities, the means and methods resorted to, as well as the quality and degree of force used against persons not entitled to protection against direct attack must be both reasonably required in the concrete circumstances and not otherwise prohibited by international humanitarian law.

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an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection from direct attack, nor that such a person can lawfully be killed in a situation where there manifestly is no military necessity to do so. In fact, while each group of experts emphasized a different (namely the *restrictive* and the *permissive*) aspect of the principle of military necessity, the respective views remained reconcilable and, in conjunction, compatible with the generally recognized interpretation of the principle in contemporary military manuals and in prevailing legal doctrine (see FN 196 above and also Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 45. f., 56 f., 67).

<sup>198</sup> In conjunction, the permissive and restrictive aspects of the principle of military necessity give rise to the generally recognized duty of the parties to any armed conflict to "diminish the evils of war, as far as military requirements permit" (Preamble Hague Convention IV (1907). Similar also: Preamble Hague Convention II (1899)).



## X. Consequences of Regaining Civilian Protection

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

When civilians cease to directly participate in hostilities or, respectively, when members affirmatively disengage from an organized armed force or group belonging to a party to an armed conflict, they regain full civilian protection against direct attack.<sup>199</sup> However, they remain subject to prosecution for violations of domestic and international law they may have committed in the course of direct participation in hostilities or during their membership in an organized armed force or group.

### 1. Lack of Immunity from Domestic Prosecution

IHL foresees an express "right" to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts.<sup>200</sup> On the one hand, the "right" to directly participate in hostilities does not imply a right to carry out acts that would otherwise be prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under national criminal law of the parties to the conflict (the so called "combatant privilege").<sup>201</sup> On the other hand, the absence of a "right" of civilians to directly participate in hostilities does not imply a prohibition of civilian direct participation in hostilities under IHL.<sup>202</sup> Direct participation

<sup>199</sup> Of course, both civilians directly participating in hostilities and members of organized armed forces or groups also gain protection as soon as they fall *hors de combat* due to wounds, sickness, capture, surrender or any other reason.

<sup>200</sup> Article 43 [2] AP I (except medical and religious personnel) and Article 1 H IV R. The combatant privilege is also given to members of a *levée en masse* (Article 2 H IV R).

<sup>201</sup> Conversely, combatant privilege does provide immunity from prosecution under international or national criminal law in case of violations of IHL.

<sup>202</sup> See also the Marten's Clause, which was incorporated into the Preamble of the Hague Convention (II) of 1899 after the states participating in the 1899 Peace Conferences were unable to agree on whether civilians taking up arms against an established occupying power should be treated as privileged combatants or as *franc-tireurs* subject to execution. With a view to achieving a generally acceptable compromise, the Marten's Clause provided that, in cases not regulated by treaty law "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience". The clause has since been reformulated and integrated in numerous international instruments (Preamble H IV R; Article 63 GC I; Article 62 GC II; Article 142 GC III; Article 158 GC IV; Article 1 [2] AP I; Preamble AP II; Preamble CCW). Since then,

of civilians in hostilities as such is neither prohibited by IHL,<sup>203</sup> nor criminalized under the statutes of any of the previous or current international criminal tribunals and courts.<sup>204</sup> However, as civilians - including those entitled to prisoner of war status under Article 4 [4] and [5] GC III - are not entitled to combatant privilege, they do not enjoy immunity from domestic prosecution for "lawful acts of war", that is to say, for having directly participated in hostilities in accordance with the rules and principles of IHL. Consequently, civilians who have directly participated in hostilities may be prosecuted and punished by their captor to the extent that direct participation in hostilities, or the harm caused in doing so, is penalized under applicable domestic law (e.g. as treason, murder etc.).<sup>205</sup>

## 2. Obligation to Respect International Humanitarian Law

The case law of the post-Second World War International Military Tribunals (IMT and IMTFE),<sup>206</sup> the ICTY and the ICTR consistently asserts that even individual civilians can violate provisions of IHL and commit war crimes. It is not the status of the perpetrator, but the character of the acts and their "nexus" to the conflict that are decisive for their relevance under IHL.<sup>207</sup> In the *Rutaganda Case*, the ICTR held that in the determination of whether individual conduct has a nexus to an armed conflict, "[p]articular care is needed when the accused is a non-combatant".<sup>208</sup> Direct participation of civilians in hostilities is necessarily of a military character and closely related to the surrounding situation of armed conflict. Consequently, there can be no doubt that civilians directly participating in hostilities must respect the rules of IHL on the conduct of hostilities and may be held individually responsible for war crimes just as members of the armed forces of the parties to the conflict. For

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states have successively extended the combatant privilege to participants in a *levée en masse*, to militias and volunteer corps (since 1949 including organized resistance movements inside and outside occupied territory) and, under AP I, to certain national liberation movements. However, as far as civilians are concerned, IHL still neither prohibits their direct participation in hostilities, nor affords them immunity from domestic prosecution.

<sup>203</sup> With the exception of one expert, this view remained unopposed throughout the Expert Meetings (Report DPH 2006, D.X.2, p. 82). The experts also generally agreed that the legality or illegality under domestic or international law is irrelevant for the qualification of an act as direct participation in hostilities (BP DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006 V.4 (b), p. 51).

<sup>204</sup> Neither the statutes of the post Second World War Military Tribunals (IMT and IMTFE), nor the current statutes of the ICTY, the ICTR, the ICC and the SCSL (Special Court for Sierra Leone) penalize civilian direct participation in hostilities as such.

<sup>205</sup> This view was repeatedly confirmed during the Expert Meetings (BP DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, D.X.2, pp. 81 f.).

<sup>206</sup> IMT: International Military Tribunal (Nuremberg Tribunal). IMTFE: International Military Tribunal for the Far East (Tokyo Tribunal).

<sup>207</sup> For the nexus criterion see, *inter alia*, ICTY, *Kunarac Case (Judgment of 12 June 2002)*, §§ 57 ff.; ICTY, *Vasiljevic Case (Judgment 29 November 2002)*, §§ 24 ff.

<sup>208</sup> ICTR, *Rutaganda Case*, (Judgment, 26 May 2003), §§ 569 f.

example, it would constitute a violation of IHL for civilians to engage in hostilities directed against persons and objects protected against direct attack, to deny quarter to adversaries *hors de combat* or to capture, injure or kill an adversary by resort to perfidy. The prohibition of perfidy is of particular interest in view of the fact that civilians directly participating in hostilities often do so without carrying arms openly or otherwise distinguishing themselves from peaceful civilians. Where civilians carry out military operations aiming to capture, injure or kill an adversary and do so without distinguishing themselves from peaceful civilians in order to lead the adversary to believe that they are in fact entitled to civilian protection against direct attack, such conduct may amount to perfidy in violation of treaty and customary IHL.<sup>209</sup>

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<sup>209</sup> Article 23 [1] (b) H IV R; Article 37 [1] AP I (international armed conflict); Rule 65 CLS (non-international armed conflict). Under the ICC statute the treacherous killing or wounding of "individuals belonging to the hostile nation or army" (international armed conflict: Article 8 [2] (b) (xi)) or, respectively, of a "combatant adversary" (non-international armed conflict: Article 8 [2] (e) (ix)) is a war crime.