INTERNATIONAL COMMITTEE OF THE RED CROSS

INTERPRETIVE GUIDANCE ON THE NOTION OF

DIRECT PARTICIPATION IN HOSTILITIES

UNDER INTERNATIONAL HUMANITARIAN LAW

ICRC

REFERENCE

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FOREWORD

The protection of civilians is one of the main goals of international humanitarian law. Pursuant to its rules on the conduct of hostilities, the civilian population and individual civilians enjoy general protection against the effects of hostilities. Accordingly, the law obliges the parties to an armed conflict to distinguish, at all times, between the civilian population and combatants and to direct operations only against military targets. It also provides that civilians may not be the object of deliberate attack. In the same vein, humanitarian law mandates that civilians must be humanely treated if and when they find themselves in the hands of the enemy. This overarching norm finds expression in many provisions of humanitarian law, including those prohibiting any form of violence to life, as well as torture or cruel, inhuman or degrading treatment.

Unusual as it may seem today, the comprehensive protection of civilians was not always a main focus of international humanitarian law. Its origins, at least in terms of treaty rules, lie at a time when civilian populations were largely spared from the direct effects of hostilities and actual fighting was carried out only by combatants. In 1864, when the first Geneva Convention was adopted, armies faced off on battlefields with clearly drawn frontlines. It was the suffering of soldiers, often tens of thousands of them who lay wounded or dying after a military engagement, that needed to be alleviated. Only later, when technological innovations in weaponry started causing massive civilian suffering and casualties in war, did the protection of civilians also need to be addressed.

Over time, and particularly after the Second World War, the law also had to regulate the consequences of more and more frequent direct participation by civilians in hostilities. Two situations were emblematic: first, wars of national liberation in which government forces faced off against "irregular" armed formations fighting for the freedom of colonized populations. In 1977, Additional Protocol I recognized that such wars

could under certain circumstances be deemed international in character. A second situation has become prevalent and remains of great concern today: armed conflicts not of an international character waged between government forces and organized non-State armed groups, or between such groups, for political, economic, or other reasons. It hardly needs to be said that these types of conflict, in which parts of the civilian population are effectively transformed into fighting forces, and in which civilians are also the main victims, continue to cause untold loss of life, injury and destruction.

International humanitarian law has addressed the trend towards increased civilian participation in hostilities by providing a basic rule, found in both Additional Protocols to the Geneva Conventions, pursuant to which civilians benefit from protection against direct attack "unless and for such time as they take a direct part in hostilities". It is the meaning of this notion - direct participation in hostilities - that the present Interpretive Guidance seeks to explain. In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application (e.g., can a person be a protected farmer by day and a targetable fighter at night?), but also had to grapple with more recent trends that further underlined the need for clarity. One such trend has been a marked shift in the conduct of hostilities into civilian population centres, including cases of urban warfare, characterized by an unprecedented intermingling of civilians and armed actors. Another has been the increased outsourcing of previously traditional military functions to a range of civilian personnel such as private contractors or civilian government employees, which has made distinguishing between those who enjoy protection from direct attack and those who do not ever more difficult. A third, particularly worrying trend has been the failure of persons directly participating in hostilities, whether civilians or members of armed forces or groups, to adequately distinguish themselves from the civilian population.

The Interpretive Guidance provides a legal reading of the notion of "direct participation in hostilities" with a view to strengthening the implementation of the principle of

distinction. In order for the prohibition of directing attacks against civilians to be fully observed, it is necessary that the armed forces of parties to an armed conflict - whether international or non-international - be distinguished from civilians, and that civilians who never take a direct part in hostilities be distinguished from those who do so on an individual, sporadic or unorganized basis only. The present text seeks to facilitate these distinctions by providing guidance on the interpretation of international humanitarian law relating to the notion of direct participation in hostilities. In so doing, it examines three questions: who is considered a civilian for the purposes of the principle of distinction, what conduct amounts to direct participation in hostilities and what modalities govern the loss of protection against direct attack.

The responses provided and the resulting interpretations included in the Interpretive Guidance tackle one of the most difficult, but as yet unresolved issues of international humanitarian law. The ICRC initiated reflection on the notion of direct participation in hostilities based both on the need to enhance the protection of civilians in practice for humanitarian reasons and on the international mandate it has been given to work for the better understanding and faithful application of international humanitarian law. In this context, it is appropriate that three observations be made: First, the Interpretive Guidance is an expression solely of the ICRC's views. While international humanitarian law relating to the notion of direct participation in hostilities was examined over several years with a group of eminent legal experts, to whom the ICRC owes a huge debt of gratitude, the positions enunciated are the ICRC's alone. Second, while reflecting the ICRC's views, the Interpretive Guidance is not and cannot be a text of a legally binding nature. Only State agreements (treaties) or State practice followed out of a sense of legal obligation on a certain issue (custom) can produce binding law. Third, the Guidance does not purport to change the law, but provides an interpretation of the notion of direct participation in hostilities within existing legal parameters.

The present text interprets the notion of direct participation in hostilities for the purposes of the conduct of hostilities only. Thus, apart from providing guidance on when and for how long a person is considered to have lost protection from direct attack, it does not address the consequences of direct participation in hostilities once he or she finds himself or herself in the adversary's hands. Other rules of international humanitarian law then govern, foremost among them being the already mentioned principle of humane treatment.

Unfortunately, there seems to be little reason to believe that the current trend towards increased civilian participation in hostilities will weaken over time. Today, more than ever, it is of the utmost importance that all feasible measures be taken to prevent the exposure of the civilian population to erroneous or arbitrary targeting based, among other things, on reliable guidance as to how to the principle of distinction should be implemented in the challenging and complex circumstances of contemporary warfare. By presenting this Interpretive Guidance, the ICRC hopes to make a contribution to ensuring that those who do not take a direct part in hostilities receive the humanitarian protection that they are entitled to under international humanitarian law.

Dr. Jakob Kellenberger
President of the International Committee of the Red Cross

ACKNOWLEDGEMENTS

The present Interpretive Guidance constitutes an institutional publication of the International Committee of the Red Cross (ICRC). It is the outcome of an expert process conducted by the ICRC from 2003 to 2008.

The conceptualization, drafting, and publication of the Interpretive Guidance would not have been possible without the commitment and contributions of many individuals, only some of whom can be thanked here. Our personal gratitude goes, first of all, to Dr. Nils Melzer, Legal Adviser at the ICRC, who has been responsible for the expert process since 2004 and who is the author of the Interpretive Guidance and most background documents and expert meeting reports produced during that process. We would also like to express our most cordial gratitude to the experts, all of whom participated in the expert meetings in their personal capacity and without whose commitment, expertise, and experience this clarification process could not have been brought to a successful conclusion. Finally, we would like to sincerely thank all our colleagues at the ICRC who contributed to the text of the Interpretive Guidance through their comments, provided valuable support in the organization and follow-up of the expert meetings, or helped with the publication of the Interpretive Guidance.

International Committee of the Red Cross
February 2009

INTRODUCTION

1. Purpose and nature of the Interpretive Guidance

The purpose of the Interpretive Guidance is to provide recommendations concerning the interpretation of international humanitarian law (IHL) as far as it relates to the notion of direct participation in hostilities. Accordingly, **the 10 recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted** in light of the circumstances prevailing in contemporary armed conflicts.

The Interpretive Guidance draws on a variety of sources including, first and foremost, the rules and principles of customary and treaty IHL and, where necessary, the *travaux préparatoires* of treaties, international jurisprudence, military manuals, and standard works of legal doctrine. Additionally, it draws on the wealth of materials produced in the course of an expert process, jointly initiated by the ICRC and the TMC Asser Institute with the aim of clarifying the notion of direct participation in hostilities under IHL.[1] Five informal expert meetings were conducted from 2003 to 2008 in The Hague and Geneva, each bringing together 40 to 50 legal experts from academic, military, governmental, and non-governmental circles, all of whom participated in their private capacity.[2]

The Interpretive Guidance is widely informed by the discussions held during these expert meetings but does not necessarily reflect a unanimous view or majority opinion of the experts. It endeavours to propose a balanced and practical

[1] All materials produced in the course of the expert process, such as reports, background documents etc., will be available at: www.icrc.org.
[2] For more information on the expert process, see the document "Overview of the ICRC's Expert Process (2003-2008)".

solution that takes into account the wide variety of concerns involved and, at the same time, ensures a clear and coherent interpretation of the law consistent with the purposes and principles of IHL. **Ultimately, the responsibility for the Interpretive Guidance is assumed by the ICRC as a neutral and independent humanitarian organization mandated by the international community of States to promote and work for a better understanding of IHL.**[3] Although a legally binding interpretation of IHL can only be formulated by a competent judicial organ or, collectively, by the States themselves, the ICRC hopes that the comprehensive legal analysis and the careful balance of humanitarian and military interests underlying the Interpretive Guidance will render the resulting recommendations persuasive for States, non-State actors, practitioners, and academics alike.

The Interpretive Guidance consists of 10 recommendations, each of which summarizes the ICRC's position on the interpretation of IHL on a particular legal question, and a commentary explaining the bases of each recommendation. Throughout the text, particularly where major divergences of opinion persisted among the experts, footnotes refer to the passages of the expert meeting reports and background documents where the relevant discussions were recorded. **The sections and recommendations of the Interpretive Guidance are closely interrelated and can only be properly understood if read as a whole.** Likewise, the examples offered throughout the Interpretive Guidance are not absolute statements on the legal qualification of a particular situation or conduct, but must be read in good faith, within the precise context in which they are mentioned and in accordance with generally recognized rules and principles of IHL. They can only illustrate the principles based on which the relevant distinctions ought to be made, but cannot replace a careful assessment of the concrete circumstances prevailing at the relevant time and place.

[3] See, e.g., Art. 5 [2] (c) and (g) Statutes of the International Red Cross and Red Crescent Movement.

Lastly, it should be emphasized that the Interpretive Guidance **examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities.** 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 liberty. Moreover, although the Interpretive Guidance is concerned with IHL only, **its conclusions remain without prejudice to an analysis of questions related to direct participation in hostilities under other applicable branches of international law, such as human rights law or the law governing the use of interstate force (*jus ad bellum*).**

2. The issue of civilian participation in hostilities

The primary aim of IHL is to protect the victims of armed conflict and to regulate the conduct of hostilities based on a balance between military necessity and humanity. At the heart of IHL lies the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations. Throughout history, the civilian population has always contributed to the general war effort of parties to armed conflicts, for example through the production and supply of weapons, equipment, food, and shelter, or through economic, administrative, and political support. However, such activities typically remained distant from the battlefield and, traditionally, only a small minority of civilians became involved in the conduct of military operations.

Recent decades have seen this pattern change significantly. A continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed

conflict. Moreover, military operations have often attained an unprecedented level of complexity, involving the coordination of a great variety of interdependent human and technical resources in different locations.

All of these aspects of contemporary warfare have given rise to confusion and uncertainty as to the distinction between legitimate military targets and persons protected against direct attacks. These difficulties are aggravated where armed actors do not distinguish themselves from the civilian population, for example during undercover military operations or when acting as farmers by day and fighters by night. As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces - unable to properly identify their adversary - run an increased risk of being attacked by persons they cannot distinguish from the civilian population.

3. Key legal questions

This trend underlines the importance of distinguishing not only between civilians and the armed forces, but also between civilians who do and, respectively, do not take a direct part in hostilities. Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations.[4] 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 taking a direct or active part in hostilities is found in many provisions of IHL. However, despite the serious legal consequences involved, neither the Conventions nor their Additional Protocols provide a definition of direct participation in hostilities. This situation calls for the clarification of three questions under IHL applicable in both international and non-international armed conflict:

[4] For the purposes of this Interpretive Guidance, the phrases "direct participation in hostilities", "taking a direct part in hostilities" and "directly participating in hostilities" will be used synonymously.

- *Who is considered a civilian for the purposes of the principle of distinction?* The answer 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.[5]
- *What conduct amounts to direct participation in hostilities?* The answer to this question determines the individual conduct that leads to the suspension of a civilian's protection against direct attack.[6]
- *What modalities govern the loss of protection against direct attack?* The answer to this question will elucidate issues such as the duration of the loss of protection against direct attack, the precautions and presumptions in situations of doubt, the rules and principles governing the use of force against legitimate military targets, and the consequences of regaining protection against direct attack.

[5] The status, rights, and protections of persons outside the conduct of hostilities does not depend on their qualification as civilians but on the precise personal scope of application of the provisions conferring the relevant status, rights, and protections (e.g., Arts 4 GC III, 4 GC IV, 3 GC I-IV, 75 AP I, and 4 to 6 AP II).

[6] For the sake of simplicity, when discussing the consequences of civilian direct participation in hostilities, the Interpretive Guidance will generally refer to loss of protection against "direct attacks". Unless stated otherwise, this terminology includes also the suspension of civilian protection against other "dangers arising from military operations" (Arts 51 [1], [3] AP I and 13 [1], [3] AP II). 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 military objectives in their proximity are attacked.

Part 1 :
RECOMMENDATIONS OF THE ICRC

concerning the interpretation of international humanitarian law

relating to the notion of direct participation in hostilities

I. The concept of civilian in international armed conflict

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

II. The concept of civilian in non-international armed conflict

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. Private contractors and civilian employees

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

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.

V. Constitutive elements of direct participation in hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

VI. Beginning and end of direct participation in hostilities

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 an integral part of that act.

VII. Temporal scope of the loss of 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 groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

VIII. Precautions and presumptions in situations of doubt

All feasible precautions 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 must be presumed to be protected against direct attack.

IX. Restraints on the use of force in direct attack

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

X. Consequences of regaining civilian protection

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

Part 2 :
RECOMMENDATIONS AND COMMENTARY

A. THE CONCEPT OF CIVILIAN

For the purposes of the principle of distinction, the definition of civilian refers to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities.[7] Where IHL provides persons other than civilians with immunity from direct attack, the loss and restoration of protection is governed by criteria similar to, but not necessarily identical with, direct participation in hostilities.[8] Before interpreting the notion of direct participation in hostilities itself, it will therefore be necessary to clarify the concept of civilian under IHL applicable in international and non-international armed conflict.

I. The concept of civilian in international armed conflict

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

1. Mutual exclusiveness of the concepts of civilian, armed forces and *levée en masse*

According to Additional Protocol I (AP I),[9] in situations of international armed conflict, civilians 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*.[10]

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[7] Arts 51 [3] AP I; 13 [3] AP II. See also Henckaerts / Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, 2005), Rule 6 [hereafter: *Customary IHL*]. Regarding the terminology of "loss of protection against direct attacks" used in the Interpretive Guidance see above N 6.

[8] For example, medical and religious personnel of the armed forces lose their protection in case of "hostile" or "harmful" acts outside their privileged function (Arts 21 GC I, 11 [2] AP II; *Customary IHL*, above N 7, Vol. I, Rule 25). Combatants *hors de combat* lose their protection if they commit a "hostile act" or "attempt to escape" (Art. 41 [2] AP I).

[9] As of 1 November 2008, 168 States were party to AP I. At the same time, the ratification of GC I-IV was virtually universal (194 States party).

[10] Art. 50 [1] AP I. According to *Customary IHL*, above N 7, Vol. I, Rule 5, this definition of civilian reflects customary IHL in international armed conflict. The categories covered by Art. 4 A [1], [2] and [3] GC III are included in the general definition of armed forces

While treaty IHL predating Additional Protocol I does not expressly define civilians, the terminology used in the Hague Regulations (H IV R) and the four Geneva Conventions (GC I-IV) nevertheless suggests that the concepts of civilian, of armed forces, and of *levée en masse* are mutually exclusive, and that every person involved in, or affected by, the conduct of hostilities falls into one of these three categories.[11] In other words, under all instruments governing international armed conflict, the concept of civilian is negatively delimited by the definitions of armed forces and of *levée en masse*,[12] both of which shall in the following be more closely examined.

2. Armed forces

a) Basic concept

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.[13] At first glance, this broad and functional concept of armed forces seems

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in Art. 43 [1] AP I. See also Sandoz *et al*. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), §§ 1916 f. [hereafter: *Commentary AP*].

[11] For example, Art. 22 [2] of the Brussels Declaration (1874) and Art. 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 (Art. 22 [5] GC I; Art. 35 [4] GC II; Arts 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, Art. 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" (Art. 30 [2] GC III: "military or civilian medical unit"; Art. 32 GC IV: "civilian or military agents"; Art. 144 [1] GC IV: "military and civil instruction"; Art. 93 [2] GC III: "civilian clothing", presumably as opposed to military uniform; Arts 18, 19, 20, 57 GC IV: "civilian hospitals", presumably as opposed to military hospitals; Art. 144 [2] GC IV: "civilian, military, police or other authorities") or to "combatants and non-combatants" (Art. 15 GC IV). None of these instruments suggests the existence of additional categories of persons who would qualify neither as civilians, nor as members of the armed forces or as participants in a *levée en masse*.

[12] Affirmative also *Commentary AP* (above N 10), § 1914. The International Criminal Tribunal for the former Yugoslavia (ICTY) defined the concept of civilians for situations of international armed conflict as "persons who are not, or no longer, members of the armed forces" (ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment of 3 March 2000, § 180). For the relevant discussion during the expert meetings see: Report DPH 2005, pp. 43 f., 58, 74; Report DPH 2006, pp. 10, 12 ff., 19 ff.; Report DPH 2008, pp. 35, 37.

[13] Art. 43 [1] AP I; *Customary IHL*, above N 7, Vol. I, Rule 4.

wider than that underlying the Hague Regulations and the Geneva Conventions. Although these treaties do not expressly define armed forces, they require that members of militias and volunteer corps other than the regular armed forces recognized as such in domestic law fulfil four requirements: (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.[14] Strictly speaking, however, these requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict.

Thus, while members of irregular armed forces failing to fulfil the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture,[15] it does not follow that any such person must necessarily be excluded from the category of armed forces and regarded as a civilian for the purposes of the conduct of hostilities.[16] On the contrary, it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to 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. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.[17]

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[14] Art. 1 H IV R; Arts 13 [1], [2], [3] and [6] GC I and GC II; Art. 4 A [1], [2], [3] and [6] GC III.

[15] In the ICRC's view, in international armed conflict, any person failing to qualify for prisoner-of-war status under Art. 4 GC III must be afforded the fundamental guarantees set out in Art. 75 AP I, which have attained customary nature and, subject to the nationality requirements of Art. 4 GC IV, also remains a "protected person" within the meaning of GC IV.

[16] As illustrated by the treatment of spies (Arts 29-31 H IV R; Art. 46 AP I) and of other combatants failing to distinguish themselves as required by IHL (Art. 44 AP I), loss of entitlement to combatant privilege or prisoner-of-war status does not necessarily lead to loss of membership in the armed forces.

[17] While the prevailing opinion during the 2006 expert meeting was supportive of this interpretation, some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV (Report DPH 2006, pp. 15 f.). For the ICRC's position in this respect see, e.g., above N 15.

b) Meaning and significance of "belonging to" a party to the conflict

In order for organized armed groups to qualify as armed forces under IHL, they must belong to a party to the conflict. While this requirement is made textually explicit only for irregular militias and volunteer corps, including organized resistance movements,[18] it is implied wherever the treaties refer to the armed forces "of" a party to the conflict.[19] The concept of "belonging to" requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting.[20] Without any doubt, an organized armed group can be said to belong to a State if its conduct is attributable to that State under the international law of State responsibility.[21] The degree of control required to make a State responsible for the conduct of an organized armed group is not settled in international law.[22] In practice, in order for an organized armed group to belong to a party to the conflict, it appears essential that it conduct hostilities on behalf and with the agreement of that party.[23]

Groups engaging in organized armed violence against a party to an international armed conflict without belonging to another party to the same conflict cannot be regarded as members of the armed forces of a party to that conflict, whether under Additional Protocol I, the Hague Regulations, or the Geneva Conventions. They are thus civilians under those three instruments.[24] Any other view would discard the

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[18] See Arts 13 [2] GC I and GC II and Art. 4 A [2] GC III.
[19] See, e.g. Art. 3 H IV R; Art. 4 A [1] GC III; Art. 43 AP I.
[20] Pictet (ed.), *Commentary on the Third Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), p. 57 [hereafter: *Commentary GC III*].
[21] See also Report DPH 2006, p. 16.
[22] For the basic positions in this respect, see, most notably, ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua. v. United States of America*), Judgment of 27 June 1986 (Merits), § 115; ICTY, *Prosecutor v. Tadic*, Case No. IT-94-A, Judgment of 15 July 1999 (Appeals Chamber), § 145; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007, § 413; ILC, Report to the General Assembly on the work of its 53rd session (2001), UN Doc. A/56/10, Draft Article 8, Commentary § 5.
[23] See also below N 26.
[24] This was the prevailing opinion during the expert meetings (Report DPH 2006, pp. 16 ff.; Report DPH 2008, pp. 43 f.). For recent national case law reflecting this position

dichotomy in all armed conflicts between the *armed forces of the parties to the conflict* and the *civilian population*; it would also contradict the definition of international armed conflicts as confrontations between States and not between States and non-State actors.[25] Organized armed groups operating within the broader context of an international armed conflict without belonging to a party to that conflict could still be regarded as parties to a separate non-international armed conflict provided that the violence reaches the required threshold.[26] Whether the individuals are civilians or members of the armed forces of a party to the conflict would then have to be determined under IHL governing non-international armed conflicts.[27]

Lastly, it should be pointed out that organized armed violence failing to qualify as an international or non-international armed conflict remains an issue of law enforcement, whether the perpetrators are viewed as rioters, terrorists, pirates, gangsters, hostage-takers or other organized criminals.[28]

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see: Israeli High Court of Justice, *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, under IHL governing international armed conflict, independent Palestinian armed groups operating in a context of belligerent occupation necessarily qualified as civilians. With regard to the temporal scope of loss of protection for members of such groups, the Court nevertheless concluded that: "a civilian who has 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 preparation for the next hostility" (*ibid.*, § 39).

[25] See also Report DPH 2006, pp. 16 ff., 52 f.; Report DPH 2008, pp. 43 f. For States party to Additional Protocol I, the law governing international armed conflicts also applies to armed conflicts between States and national liberation movements within the meaning of Article 1 [4] AP I.

[26] According to *Commentary GC III* (above N 20), p. 57: "Resistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Art. 2, otherwise the provisions of Art. 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 international and non-international aspects within the greater context of the same armed conflict. For the relevant discussion during the expert meetings, see Report DPH 2005, p. 10; Report DPH 2006, pp. 17 ff. and 53 f.; Report DPH 2008, pp. 43 f. It should be noted that "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (Art. 1 [2] AP II) do not reach the threshold of "protracted armed violence", which is required for the emergence of a separate non-international armed conflict (ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, § 70).

[27] See below Section II.

[28] See Report DPH 2006, p. 16; Report DPH 2008, pp. 44, 49.

c) Determination of membership

For the regular armed forces of States, individual membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into State armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist.

Membership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.[29]

3. *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.[30] Participants in a *levée en masse* are the only armed actors who are excluded from the civilian population although, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces. All other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.

[29] See below Section II.3.(b) and, with regard to private contractors, Section III.2.
[30] Art. 2 H IV R; Art. 4 [6] GC III. See also the reference to Art. 4 [6] GC III in Art. 50 [1] AP I.

4. Conclusion

For the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Membership in irregularly constituted militia and volunteer corps, including organized resistance movements, belonging to a party to the conflict must be determined based on the same functional criteria that apply to organized armed groups in non-international armed conflict.

II. The concept of civilian in non-international armed conflict

For the purposes of the principle of distinction in *non-international* armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("*continuous combat function*").

1. Mutual exclusiveness of the concepts of civilian, armed forces and organized armed groups

a) Lack of express definitions in treaty law

Treaty IHL governing non-international armed conflict uses the terms "civilian", "armed forces" and "organized armed group" without expressly defining them. These concepts must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to them in their context and in the light of the object and purpose of IHL.[31]

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict).[32] Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a

[31] Art. 31 [1] Vienna Convention on the Law of Treaties.
[32] See *Customary IHL*, above N 7, Vol. I, p. 19.

continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct participation in hostilities, lose protection against direct attack for the entire duration of their membership. However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.[33] As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.

b) Article 3 common to the Geneva Conventions

Although Article 3 GC I-IV generally is not considered to govern the conduct of hostilities, its wording allows certain conclusions to be drawn with regard to the generic distinction between the armed forces and the civilian population in non-international armed conflict. Most notably, Article 3 GC I-IV provides that "each Party to the conflict" must 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*".[34] Thus, both State and non-State parties to the conflict have armed forces distinct from the civilian population.[35] This passage also makes clear that members of such armed forces, in contrast to other persons, are considered as "taking no active part in the hostilities" only once they have disengaged from their fighting function ("have laid down their arms") or are placed *hors de combat*; mere suspension of combat is insufficient. Article 3

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[33] On the danger of extending the concept of direct participation in hostilities beyond specific acts, see also below Section IV.2. During the expert meetings, the approach based on continuous direct participation in hostilities was criticized as blurring the distinction made by IHL between loss of protection based on conduct (civilians) and on status or function (members of armed forces or organized armed groups). See Background Doc. DPH 2004, p. 36; Background Doc. DPH 2005, WS IV-V, p. 10; Report DPH 2005, pp. 44, 48, 50. See also the discussions in Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.

[34] Art. 3 GC I-IV.

[35] According to *Commentary GC III* (above N 20), p. 37: "Speaking generally, it must be recognized that the conflicts referred to in Art. 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 [...]".

GC I-IV thus implies a concept of civilian comprising those individuals "who do not bear arms" on behalf of a party to the conflict.[36]

c) Additional Protocol II

While Additional Protocol II[37] has a significantly narrower scope of application and uses terms different from those in Article 3 GC I-IV, the generic categorization of persons is the same in both instruments.[38] During the Diplomatic Conference of 1974-77, Draft Article 25 [1] AP II defined the concept of civilian as including "anyone who is not a member of the armed forces or of an organized armed group".[39] Although this article was discarded along with most other provisions on the conduct of hostilities in a last minute effort to "simplify" the Protocol, the final text continues to reflect the originally proposed concept of civilian. 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";[40] 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".[41]

d) Reconciliation of terminology

In Additional Protocol II, the term "armed forces" is restricted to State armed forces, whereas the armed forces of non-State parties are referred to as "dissident armed forces" or

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[36] According to Pictet (ed.), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 40: "Article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who 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" .

[37] As of 1 November 2008, 164 States were party to AP II.

[38] For the high threshold of application of Additional Protocol II, see Art. 1 [1] AP II.

[39] Draft Art. 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 Art. 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".

[40] Art. 1 [1] AP II.

[41] Art. 13 [1] and [3] AP I. This interpretation is further supported by the respective contexts in which the Protocol refers to "civilians" (Arts 13, 14, 17 AP II) and the "civilian population" (title Part IV AP II; Arts 5 [1] (b) and (e), 13, 14, 15, 17 and 18 AP II).

"other organized armed groups". The notion of "armed forces" in Article 3 GC I-IV, on the other hand, includes all three categories juxtaposed in Article 1 [1] AP II, namely State armed forces, dissident armed forces, and other organized armed groups. Thus, similar to situations of international armed conflict, the concept of civilian in non-international armed conflict is negatively delimited by the definition of "armed forces" (Article 3 GC I-IV) or, expressed in the terminology of Additional Protocol II, of State "armed forces", "dissident armed forces" and "other organized armed groups".[42] For the purposes of this Interpretive Guidance, the armed forces of States party to a non-international armed conflict are referred to as "State armed forces", whereas the armed forces of non-State parties are described as "organized armed groups".[43] Where not stated otherwise, the concept of "organized armed group" includes both "dissident armed forces" and "other organized armed groups" (Article 1 [1] AP II).

2. State armed forces

a) Basic concept

There is no reason to assume that States party to both Additional Protocols desired distinct definitions of State armed forces in situations of international and non-international armed conflict. According to the *travaux préparatoires* for Additional Protocol II, the concept of armed forces of a High Contracting Party in Article 1 [1] AP II was intended to be broad enough to include armed actors who do not necessarily qualify as armed forces under domestic law, such as members of the national guard, customs, or police forces, provided that they do, in fact, assume the function of armed forces.[44] Thus, comparable to the concept of armed forces in Additional

[42] Affirmative ICTY, *Prosecutor v. Martic*, Case No. IT-95-11-A, Judgment of 8 October 2008, §§ 300-302. This was the prevailing view also during the expert meetings (see Report DPH 2005, pp. 43 f.; Report DPH 2006, pp. 20 ff.; Report DPH 2008, pp. 46 ff.).

[43] Note that the concept of organized armed group is also used in IHL governing international armed conflict to describe organized armed actors other than the regular armed forces which operate under a command responsible to a party to the conflict and, therefore, qualify as part of the armed forces of that party (Art. 43 [1] AP I; see above Section I).

[44] See *Commentary AP* (above N 10), § 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

Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State.[45]

b) Determination of membership

At least as far as regular armed forces are concerned, membership in State armed forces is generally defined by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia and equipment. The same applies where armed units of police, border guard, or similar uniformed forces are incorporated into the armed forces. Members of regularly constituted forces are not civilians, regardless of their individual conduct or of the function they assume within the armed forces. For the purposes of the principle of distinction, membership in regular State armed forces ceases, and civilian protection is restored, when a member disengages from active duty and re-integrates into civilian life, whether due to a full discharge from duty or as a deactivated reservist. Just as in international armed conflict, membership in irregular State armed forces, such as militia, volunteer or paramilitary groups, generally is not regulated by domestic law and can only be reliably determined on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict.[46]

3. Organized armed groups

a) Basic concept

Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially

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forces or any other similar force)", referring to O.R., Vol. X, p. 94, CDDH/I/238/Rev.1. On the potential qualification of police forces as part of the armed forces of a party to the conflict, see also the discussion in Report DPH 2005, p. 11; Report DPH 2006, pp. 43, 52 f.; Report DPH 2008, pp. 54, 64, 68.

[45] According to Bothe *et al.*, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 672, the terms "organized" and "under responsible command" in Art. 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".

[46] See above Section I.2.(c) and below Section II.3.(b).

constitute part of a State's armed forces that have turned against the government.[47] Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.

In both cases, it is crucial for the protection of the civilian population to distinguish a non-State party to a conflict (e.g., an insurgency, a rebellion, or a secessionist movement) from its armed forces (i.e., an organized armed group).[48] As with State parties to armed conflicts, non-State parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-State party to the conflict.

b) Determination of membership

Dissident armed forces: Although members of dissident armed forces are no longer members of State armed forces, they do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the State armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well.

Other organized armed groups: More difficult is the concept of membership in organized armed groups other than dissident armed forces. Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group; and it is not

[47] See *Commentary AP* (above N 10), § 4460.

[48] Although Art. 1 AP II refers to armed conflicts "between" State armed forces and dissident armed forces or other organized armed groups, the actual parties to such a conflict are, of course, the High Contracting Party and the opposing non-State party, and not their respective armed forces.

consistently expressed through uniforms, fixed distinctive signs, or identification cards. In view of the wide variety of cultural, political, and military contexts in which organized armed groups operate, there may be various degrees of affiliation with such groups that do not necessarily amount to "membership" within the meaning of IHL. In one case, affiliation may turn on individual choice, in another on involuntary recruitment, and in yet another on more traditional notions of clan or family.[49] In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces.

As has been shown above, in IHL governing non-international armed conflict, the concept of organized armed group refers to non-State armed forces in a strictly functional sense. For the practical purposes of the principle of distinction, therefore, membership in such groups cannot depend on abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole, namely the conduct of hostilities on behalf of a non-State party to the conflict.[50] Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: "continuous combat function").[51] Continuous combat function does not imply *de jure* entitlement to combatant privilege.[52] Rather, it distinguishes

[49] Background Doc. DPH 2005, WS IV-V, P. 15.
[50] On the collective or individual nature of continuous combat function, see Report DPH 2008, pp. 55 ff.
[51] On the qualification of conduct as direct participation in hostilities, see below Section V.
[52] Combatant privilege, namely the right to directly participate in hostilities with immunity from domestic prosecution for lawful acts of war, 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* (Arts 1 and 2 H IV R; Art. 43 [1] AP I). Although all privileged combatants 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 assume continuous combat function outside the privileged categories of persons, as well as in non-international armed conflict, are not entitled to combatant privilege under IHL (see also below Section X).

members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.[53]

Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such "reservists" are civilians until and for such time as they are called back to active duty.[54]

Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.[55] Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.[56] The same applies to

[53] During the expert meetings, the prevailing view was that persons cease to be civilians within the meaning of IHL for as long as they continuously assume a function involving direct participation in hostilities ("continuous combat function") for an organized armed group belonging to a party to a non-international armed conflict (Expert Paper DPH 2004 (Prof. M. Bothe); Report DPH 2005, pp. 43 f., 48 ff., 53 ff., 63 ff., 82 f.; Report DPH 2006, pp. 9 ff., 20 ff., 29-32, 66 f.; Report DPH 2008, pp. 46-60).
[54] See also above Sections I.2.(c) and II.2.(b) and, more generally, below Section VII.2.
[55] See below Section III.
[56] Regarding the qualification of recruiting and training, financing and propaganda as direct participation in hostilities, see below Sections V.2.(a) and (b); VI.1.

individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature.[57] Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.[58] As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury.

In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behaviour, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation. Whatever criteria are applied in implementing the principle of distinction in a particular context, they must allow to reliably distinguish members of the armed forces of a non-State party to the conflict from civilians who do not directly participate in hostilities, or who do so on a merely spontaneous, sporadic or unorganized basis.[59] As will be shown, that determination remains subject to all feasible precautions and to the presumption of protection in case of doubt.[60]

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[57] Regarding the qualification as direct participation in hostilities of purchasing, smuggling, transporting, manufacturing and maintaining of weapons, explosives and equipment, as well as of collecting and providing intelligence, see below Sections V.1.(a); V.2.(a), (b) and (g); VI.1.

[58] Obviously, such lack of "membership" does not exclude that civilian supporters of organized armed groups may incur criminal responsibility for their activities under national and, in the case of international crimes, also international law. See below Section X.

[59] See also Report DPH 2006, pp. 25 ff.; Report DPH 2008, pp. 49-57.

[60] See below Section VIII.

4. Conclusion

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function").

III. Private contractors and civilian employees

Private contractors and employees of a party to an armed conflict who are civilians (see above I and II) are entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. Their activities or location may, however, expose them to an increased risk of incidental death or injury even if they do not take a direct part in hostilities.

1. Particular difficulties related to private contractors and civilian employees

In recent decades, parties to armed conflicts have increasingly employed private contractors and civilian employees in a variety of functions traditionally performed by military personnel.[61] Generally speaking, whether private contractors and employees of a party to an armed conflict 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.[62] 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.

It should also be noted that the purpose of the distinction between civilians and members of the armed forces may not be identical under domestic and international law. Depending on national legislation, membership in the armed forces may have administrative, jurisdictional, and other consequences irrelevant to the principle of distinction in the conduct of hostilities. Under IHL, the primary consequences of membership in the armed forces are the exclusion from the

[61] This trend led to an initiative by the Swiss government, in cooperation with the ICRC, to address the issue of private military and security companies. This initiative resulted in the 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict' of 17 September 2008, agreed upon by 17 participating States.
[62] On the concept of civilian, see above Sections I and II. On the concept of direct participation in hostilities, see below Sections IV to VI.

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). Where the concepts of civilian and armed forces are defined for the purpose of the conduct of hostilities, the relevant standards must be derived from IHL.[63]

The great majority of private contractors and civilian employees currently active in armed conflicts have not been incorporated into State armed forces and assume functions that clearly do not involve their direct participation in hostilities on behalf of a party to the conflict (i.e. no continuous combat function).[64] Therefore, under IHL, they generally come within the definition of civilians.[65] Although they are thus entitled to protection against direct attack, their proximity to the armed forces and other military objectives may expose them more than other civilians to the dangers arising from military operations, including the risk of incidental death or injury.[66]

In some cases, however, it may be extremely difficult to determine the civilian or military nature of contractor activity. For example, the line between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement / defence of self or others) may be thin. It is therefore particularly important in this context to observe the general rules of IHL on precautions and presumptions in situations of doubt.[67]

2. International armed conflict

Civilians, including those formally authorized to accompany the armed forces and entitled to prisoner–of-war status upon capture, were never meant to directly participate in hostilities on behalf of a party to the conflict.[68] As long as they are not

[63] See Report DPH 2005, pp. 74 f.
[64] On the concept of continuous combat function, see above Section II.3.(b).
[65] Report DPH 2005, p. 80.
[66] Report DPH 2006, pp. 34 f.
[67] See below Section VIII.
[68] Of the categories of persons entitled to prisoner-of-war status under Art. 4 [1] to [6] GC III, those described in Art. 4 [4] GC III (civilians accompanying the armed forces)

incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and or assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel. Where such personnel directly participate in hostilities 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.[69]

A different conclusion must be reached for contractors and employees who, to all intents and purposes, have been incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by being given a continuous combat function.[70] Under IHL, such personnel would become members of an organized armed force, group, or unit under a command responsible to a party to the conflict and, for the purposes of the principle of distinction, would no longer qualify as civilians.[71]

3. Non-international armed conflict

The above observations also apply, *mutatis mutandis*, in non-international armed conflicts. Thus, for such time as private contractors assume a continuous combat function for an organized armed group belonging to a non-State party, they become members of that group.[72] Theoretically, private military companies could even become independent non-

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and Art. 4 [5] GC III (civilian crew members of the merchant marine or civil aircraft) are civilians (Art. 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* (Art. 43 [1] and [2], 50 [1] AP I; Arts 1 and 2 H IV R) and, therefore, do not have a right to directly participate in hostilities with immunity from domestic prosecution. See also below Section X, as well as the brief discussion in Report DPH 2006, pp. 35 f.

[69] Report DPH 2005, p. 82.

[70] On the concept of continuous combat function, see above Section II.3.(b). On the subsidiary functional determination of membership specifically in international armed conflict, see above Section I.3.(c).

[71] The prevailing view expressed during the expert meetings was that, for the purposes of the conduct of hostilities, private contractors and employees authorized by a State to directly participate in hostilities on its behalf would cease to be civilians and become members of its armed forces under IHL, regardless of formal incorporation. It was noted that, from the historical *letters of marque and reprisal* issued to privateers to the modern combatant privilege, direct participation in hostilities with the authority of a State has always been regarded as legitimate and, as such, exempt from domestic prosecution. See Report DPH 2003, pp. 4 f.; Report DPH 2004, pp. 11 ff., 14; Expert Paper DPH 2004 (Prof. M. Schmitt), pp. 8 ff.; Report DPH 2005, pp. 74 ff. and 80 f.; Background Doc. DPH 2005, WS VIII-IX, p. 17.

[72] See Report DPH 2005, pp. 81 f.

State parties to a non-international armed conflict.[73] Private contractors and civilian employees who are neither members of State armed forces nor members of organized armed groups, however, must be regarded as civilians and, therefore, are protected against direct attack unless and for such time as they directly participate in hostilities.

4. Conclusion

Whether private contractors and employees of a party to the conflict qualify as civilians within the meaning of IHL and whether they directly participate in hostilities depends on the same criteria as are applicable to any other civilian. The geographic and organizational closeness of such personnel to the armed forces and the hostilities require that this determination be made with particular care. Those who qualify as civilians are 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. This does not rule out the possibility that, for purposes other than the conduct of hostilities, domestic law might regulate the status of private contractors and employees differently from IHL.

[73] *Ibid.*

B. THE CONCEPT OF DIRECT PARTICIPATION IN HOSTILITIES

Treaty IHL does not define direct participation in hostilities, nor does a clear interpretation of the concept emerge from State practice or international jurisprudence. The notion of direct participation in hostilities must therefore be interpreted in good faith in accordance with the ordinary meaning to be given to its constituent terms in their context and in light of the object and purpose of IHL.[74]

Where treaty law refers to hostilities, that notion is intrinsically linked to situations of international or non-international armed conflict.[75] Therefore, the concept of direct participation in hostilities cannot refer to conduct occurring outside situations of armed conflict, such as during internal disturbances and tensions, including riots, isolated and sporadic acts of violence and other acts of a similar nature.[76] Moreover, even during armed conflict, not all conduct constitutes part of the hostilities.[77] It is the purpose of the present chapter to identify the criteria that determine whether and, if so, for how long a particular conduct amounts 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. Therefore, in determining whether a particular conduct amounts to direct

[74] Art. 31 [1] Vienna Convention on the Law of Treaties.

[75] The concept of hostilities is frequently used in treaties regulating situations of international and non-international armed conflict, 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 Title and Art. 1 H III; Title Section II H IV R; Art. 3 [1] GC I-IV; Art. 17 GC I; Art. 33 GC II; Title Section II and Arts 21 [3], 67, 118, 119 GC III; Arts 49 [2], 130, 133, 134, 135 GC IV; Arts 33, 34, 40, 43 [2], 45, 47, 51 [3], 59, 60 AP I and Title Part IV, Section I AP I; Arts 4 and 13 [3] AP II; Arts 3 [1] - [3] and 4 ERW Protocol.

[76] According to Art. 1 [2] AP II, such situations do not constitute armed conflicts.

[77] In fact, armed conflict can arise without any occurrence of hostilities, namely through a declaration of war or the occupation of territory without armed resistance (Art. 2 GC I-IV). Furthermore, considerable portions of IHL deal with issues other than the conduct of hostilities, most notably the exercise of power and authority over persons and territory in the hands of a party to the conflict. See also Report DPH 2005, pp. 13, 18 f.

participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place.[78] Nevertheless, the importance of the 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 of IHL.

[78] See also below Section VIII. See further: Report DPH 2006, pp. 25 ff., 70 ff.

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. Basic components of the notion of direct participation in hostilities

The notion of direct participation in hostilities essentially comprises two elements, namely that of "hostilities" and that of "direct participation" therein.[79] While the concept of "hostilities" refers to the (collective) resort by the parties to the conflict to means and methods of injuring the enemy,[80] "participation" in hostilities refers to the (individual) involvement of a person in these hostilities.[81] Depending on the quality and degree of such involvement, individual participation in hostilities may be described as "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-IV. Although the English texts of the Geneva Conventions and Additional Protocols use the words "active"[82] and "direct", [83] respectively, the consistent use of the phrase "*participent directement*" in the equally authentic French texts demonstrate that the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities.[84] Furthermore, as the notion of

[79] Report DPH 2005, p. 17; Background Doc. DPH 2005, WS II-III, p. 2.
[80] See Art. 22 H IV R (Section II on "Hostilities"). Treaty law does not establish uniform terminology for the conduct of hostilities but refers, apart from "hostilities", also to "warfare" (Title Part III, Section I and Art. 35 [1] AP I), "military operations" (Art. 53 GC IV; Art. 51 [1] AP I; Art. 13 [1] AP II), or simply "operations" (Art. 48 AP I).
[81] See Arts 43 [2] AP I; 45 [1] and [3] AP I; 51 [3] AP I; 67 [1] (e) AP I; 13 [3] AP II.
[82] Art. 3 GC I-IV.
[83] Arts 51 [3] AP I; 43 [2] AP I; 67 [1] (e) AP I and 13 [3] AP II.
[84] This was the prevailing view also during the expert meetings (Report DPH 2005, p. 29; Report DPH 2006, p. 62). The International Criminal Tribunal for Rwanda (ICTR) affirmed the synonymous meaning of the notions of "active" and "direct" participation in hostilities: ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, § 629. At first sight, it may appear that the Preparatory Committee for the Establishment of an International Criminal Court (ICC) implied a distinction between the terms "active" and "direct" in the 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". Strictly speaking, however, the Committee made a distinction between "combat" and "military activities linked to combat", not between "active" and "direct" participation.

taking a direct part in hostilities is used synonymously in the Additional Protocols I and II, it should be interpreted in the same manner in international and non-international armed conflict.[85]

2. Restriction to specific acts

In treaty IHL, individual conduct that constitutes part of the hostilities is described as direct participation in hostilities, regardless of whether the individual is a civilian or a member of the armed forces.[86] Whether individuals directly participate in hostilities on a spontaneous, sporadic, or unorganized basis or as part of a continuous function assumed for an organized armed force or group belonging to a party to the conflict may be decisive for their status as civilians, but has no influence on the scope of conduct that constitutes direct participation in hostilities. This illustrates that the notion of direct participation in hostilities does not refer to a person's status, function, or affiliation, but to his or her engagement in specific hostile acts. [87] In essence, the concept of hostilities could be described as the sum total of all hostile acts carried out by individuals directly participating in hostilities.[88]

Where civilians engage in hostile acts on a persistently recurrent basis, it may be tempting to regard not only each hostile act as direct participation in hostilities, but even their continued intent to carry out unspecified hostile acts in the

[85] This was the prevailing view also during the expert meetings (Background Doc. DPH 2004, p. 30; Report DPH 2004, pp. 15 ff.; Report DPH 2005, p. 13). Of course, 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.

[86] See Arts 43 [2] AP I; 51 [3] AP I; 67 [1] (e) AP I; 13 [3] AP II.

[87] This was the prevailing view also during the expert meetings (see Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17-24; Report DPH 2006, pp. 37 f.; Report DPH 2008, pp. 33 ff.).

[88] For purposes of this Interpretive Guidance, the notion of "hostile" act refers to a specific act qualifying as direct participation in hostilities. According to *Commentary AP* (above N 10), § 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 of the International Law of Armed Conflict* (Geneva: ICRC, 1992), 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* (Bruxelles: Bruylant, 2001), 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 the term "hostile act" in Arts 41 [2] and 42 [2] AP I. On the meaning and interrelation of the notions of "hostilities" and "hostile acts", see further: Report DPH 2004, pp. 24 f.; Report DPH 2005, pp. 17-24; Report DPH 2006, pp. 37 f.

future.[89] However, any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction made in IHL between *temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).[90] In practice, confusing the distinct regimes by which IHL governs the loss of protection for civilians and for members of State armed forces or organized armed groups would provoke insurmountable evidentiary problems. Those conducting hostilities already face the difficult task of distinguishing between civilians who are and civilians who are not engaged in a specific hostile act (direct participation in hostilities), and distinguishing both of these from members of organized armed groups (continuous combat function) and State armed forces. In operational reality, it would be impossible to determine with a sufficient degree of reliability whether civilians not currently preparing or executing a hostile act have previously done so on a persistently recurrent basis and whether they have the continued intent to do so again. Basing continuous loss of protection on such speculative criteria would inevitably result in erroneous or arbitrary attacks against civilians, thus undermining their protection which is at the heart of IHL.[91] Consequently, in accordance with the object and purpose of IHL, the concept of direct participation in hostilities must be interpreted as restricted to specific hostile acts.[92]

3. Conclusion

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted synonymously in situations of international and non-international armed conflict. The treaty terms of "direct" and "active" indicate the same quality and degree of individual participation in hostilities.

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[89] Report DPH 2006, pp. 28 f.; Report DPH 2008, pp. 35-40. For a similar argument made in recent domestic case law, see: Israel HCJ, *PCATI v. Israel*, above N 24, § 39.

[90] See also above, Section II.3. On the distinct temporal scopes of the loss of protection for organized armed actors and civilians, see below Section VII.

[91] Report DPH 2008, pp. 36-42.

[92] This also was the prevailing view during the expert meetings (see Report DPH 2006, p. 38).

V. Constitutive elements of direct participation in hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

1. **The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (*threshold of harm*), and**
2. **there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (*direct causation*), and**
3. **the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*).**

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict.[93] Although these elements are very closely interrelated, and although there may be areas of overlap between them, each of them will be discussed separately here.

[93] On the cumulative nature of these requirements, see also Report DPH 2006, pp. 40 f., 43 ff., 49 f.

1. Threshold of harm

In order to reach the required threshold of harm, a specific act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack.

For a specific act to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold.[94] This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack. The qualification of an act as direct participation does not require the *materialization* of harm reaching the threshold but merely the objective *likelihood* that the act will result in such harm. Therefore, the relevant threshold determination must be based on "likely" harm, that is to say, harm which may reasonably be expected to result from an act in the prevailing circumstances.[95]

a) Adversely affecting the military operations or military capacity of a party to the conflict

When an act may reasonably be expected to cause harm of a specifically *military nature*, the threshold requirement will generally be satisfied regardless of quantitative gravity. In this context, military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on military personnel and objects,[96] but essentially any consequence adversely affecting the military operations or military capacity of a party to the conflict.[97]

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[94] Background Doc. DPH 2004, pp. 27 f.; Background Doc. DPH 2005, WS II-III, p. 6.
[95] Background Doc. DPH 2004, p. 25; Report DPH 2005, p. 33.
[96] The use of weapons or other means to commit acts of violence against human and material enemy forces is probably the most uncontroversial example of direct participation in hostilities (*Customary IHL*, above N 7, Vol. I, Rule 6, p. 22).
[97] During the expert meetings, there was wide agreement that the causation of military harm as part of the hostilities did not necessarily presuppose the use of armed force or the causation of death, injury or destruction (Report DPH 2005, p. 14), but essentially included "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). The concerns expressed by some experts that the criterion of "adversely affecting"

For example, beyond the killing and wounding of military personnel and the causation of physical or functional damage to military objects, the military operations or military capacity of a party to the conflict can be adversely affected by sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications. Adverse effects may also arise from capturing or otherwise establishing or exercising control over military personnel, objects and territory to the detriment of the adversary. For instance, denying the adversary the military use of certain objects, equipment and territory,[98] guarding captured military personnel of the adversary to prevent them being forcibly liberated (as opposed to exercising authority over them),[99] and clearing mines placed by the adversary[100] would reach the required threshold of harm. Electronic interference with military computer networks could also suffice, whether through computer network attacks (CNA) or computer network exploitation (CNE),[101] as well as wiretapping the adversary's high command[102] or transmitting tactical targeting information for an attack.[103]

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military operations or military capacity was too wide and vague and could be misunderstood to authorize the killing of civilians without any military necessity are addressed below in Section IX (see Report DPH 2006, pp. 41 f.).

[98] Report DPH 2005, pp. 11, 29.

[99] The prevailing view during the expert meetings was that guarding captured military personnel was a clear case of direct participation in hostilities (Background Doc. DPH 2004, pp. 9; Report DPH 2005, pp. 15 f.). Nevertheless, to the extent practically possible, the guarding of captured military personnel as a means of preventing their liberation by the enemy should be distinguished from the exercise of administrative, judicial and disciplinary authority over them while in the power of a party to the conflict, including in case of riots or escapes, which are not part of a hostile military operation. This nuanced distinction was not discussed during the expert meetings. See also the discussion on "exercise of power or authority over persons or territory", below NN 163-165 and accompanying text.

[100] Report DPH 2005, p. 31.

[101] 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" (Background Doc. DPH 2003, pp. 15 ff., with references) 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 devastating. CNE, namely "the ability to gain access to information hosted on information systems and the ability to make use of the system itself" (ibid., with references), though not of a direct destructive nature, could have equally significant military implications. 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).

[102] See Report DPH 2005, p. 29.

[103] During the expert meetings, 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 enemy forces. The decisive criterion for the qualification of her conduct as direct participation in hostilities was held to be the importance of the transmitted information for the direct causation of harm and, thus, for the execution of a concrete military operation. See Report DPH 2004, p. 5.

At the same time, the conduct of a civilian cannot be interpreted as *adversely* affecting the military operations or military capacity of a party to the conflict simply because it fails to *positively* affect them. Thus, the refusal of a civilian to collaborate with a party to the conflict as an informant, scout or lookout would not reach the required threshold of harm regardless of the motivations underlying the refusal.

b) Inflicting death, injury or destruction on persons or objects protected against direct attack

Specific acts may constitute part of the hostilities even if they are not likely to adversely affect the military operations or military capacity of a party to the conflict. In the absence of such military harm, however, a specific act must be likely to cause at least death, injury, or destruction.[104] The most uncontroversial examples of acts that can qualify as direct participation in hostilities even in the absence of military harm are attacks directed against civilians and civilian objects.[105] In IHL, attacks are defined as "acts of violence against the adversary, whether in offence or in defence". [106] The phrase "against the adversary" does not specify the target, but the belligerent nexus of an attack,[107] so that even acts of violence directed specifically against civilians or civilian objects may amount to direct participation in hostilities.[108] For example, sniper attacks against civilians[109] and the bombardment or shelling of civilian villages or urban residential areas[110] are likely to inflict death, injury, or destruction on persons and

[104] 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.; Background Doc. DPH 2004, pp. 5 f., 9 f., 28).

[105] Accordingly, Section III of the Hague Regulations (entitled "Hostilities") prohibits the "attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended" (Art. 25 H IV R).

[106] Article 49 [1] AP I. Attacks within the meaning of IHL (Art. 49 [1] AP I) should not be confused with attacks as understood in the context of crimes against humanity (see below N 167), or with armed attacks within the meaning of the *jus ad bellum*, both of which are beyond the scope of this study.

[107] On belligerent nexus, see below Section V.3. For the relevant discussions on Draft Art. 44 AP I during the Diplomatic Conference of 1974-77, see CDDH/III/SR.11, pp. 93 f.

[108] Needless to say, such attacks are invariably prohibited under IHL governing both international and non-international armed conflict. See, for example, Arts 48 AP I, 51 AP I, 13 AP II; *Customary IHL*, above N 7, Vol. I, Rule 1.

[109] For the qualification of sniping as an attack within the meaning of IHL, see, e.g. ICTY, *Prosecutor v. Galic*, Case No. Case No. IT-98-29-T, Judgment of 5 December 2003, § 27 in conjunction with § 52.

[110] ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment of 31 January 2005, §§ 282 f. in conjunction with § 289.

objects protected against direct attack and thus qualify as direct participation in hostilities regardless of any military harm to the opposing party to the conflict.

Acts that neither cause harm of a military nature nor inflict death, injury, or destruction on protected persons or objects cannot be equated with the use of means or methods of "warfare"[111] or, respectively, of "injuring the enemy",[112] as would be required for a qualification as hostilities. For example, the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons may have a serious impact on public security, health, and commerce, and may even be prohibited under IHL. However, they would not, in the absence of adverse military effects, cause the kind and degree of harm required to qualify as direct participation in hostilities.

c) Summary

For a specific act to reach the threshold of harm required to qualify as direct participation in hostilities, it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict. In the absence of military harm, the threshold can also be reached where an act is likely to inflict death, injury, or destruction on persons or objects protected against direct attack. In both cases, acts reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the requirements of direct causation and belligerent nexus.

[111] Art. 35 [1] AP I.
[112] Art. 22 H IV R (Section II on Hostilities).

2. Direct causation

In order for the requirement of direct causation to be satisfied, there must be a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.

a) Conduct of hostilities, general war effort, and war sustaining activities

The treaty terminology of taking a "direct" part in hostilities, which describes civilian conduct entailing loss of protection against direct attack, implies that there can also be "indirect" participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.[113]

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, 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, financial transactions, production of agricultural or non-military industrial goods).

[113] According to *Commentary AP* (above N 10), § 1679, "to restrict this concept [i.e. of "direct participation in hostilities"] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants [...]". Similarly *ibid*., Commentary Art. 51 AP I, § 1945. Affirmative also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment of 17 July 2008, §§ 175-176. See also the distinction between "taking part in hostilities" and "work of a military character" in Art. 15 [1] (b) GC IV. The position reflected in the Commentary corresponds to the prevailing opinion expressed during the expert meetings (Report DPH 2005, p. 21).

Admittedly, both the general war effort and war-sustaining activities may ultimately result in harm reaching the threshold required for a qualification as direct participation in hostilities. Some of these activities may even be indispensable to harming the adversary, such as providing finances, food and shelter to the armed forces and producing weapons and ammunition. However, unlike the conduct of hostilities, which is designed to cause – i.e. bring about the materialization of – the required harm, the general war effort and war sustaining activities also include activities that merely maintain or build up the capacity to cause such harm.[114]

b) Direct and indirect causation

For a specific act to qualify as "direct" rather than "indirect" participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm.[115] Standards such as "indirect causation of harm"[116] or "materially facilitating harm"[117] are clearly too wide, as they would bring the entire war effort within the concept of direct participation in hostilities and, thus, would deprive large parts of the civilian population of their protection against direct attack.[118] Instead, the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.[119]

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[114] According to *Commentary AP* (above N 10), § 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". Affirmative also ICTY, *Prosecutor v. Strugar*, *Appeal*, (above N 16), § 178. 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. 21, 27, 30, 34).

[115] According to *Commentary AP* (above N 10), § 4787: "The term 'direct participation in hostilities' [...] implies that there is a sufficient causal relationship between the act of participation and its immediate consequences". See also Report DPH 2005, pp. 30, 34 ff.

[116] Report DPH 2005, p. 28.

[117] Background Doc. DPH 2004, p. 27; Report DPH 2005, pp. 28, 34.

[118] See also Background Doc. DPH 2004, pp. 27 f.; Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.

[119] According to *Commentary AP* (above N 10), § 1679: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place".

In the present context, direct causation should be understood as meaning that the harm in question must be brought about in one causal step. Therefore, individual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities. For example, imposing a regime of economic sanctions on a party to an armed conflict, depriving it of financial assets,[120] or providing its adversary with supplies and services (such as electricity, fuel, construction material, finances and financial services)[121] would have a potentially important, but still indirect, impact on the military capacity or operations of that party. Other examples of indirect participation include scientific research and design,[122] as well as production[123] and transport[124] of weapons and equipment unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm. Likewise, although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect.[125] Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.[126]

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[120] Background Doc. DPH 2004, pp. 9 f.; Report DPH 2005, pp. 14 f.

[121] Background Doc. DPH 2004, pp. 14 f.

[122] Although, during the expert meetings, civilian scientists and weapons experts were generally regarded as protected against direct attack, some doubts were expressed as to whether this assessment could be upheld in extreme situations, namely 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, pp. 48 f.).

[123] During the expert meetings, there was general agreement that civilian workers in an ammunitions factory are merely building up the capacity of a party to a conflict to harm its adversary, but do not directly cause harm themselves. Therefore, unlike civilians actually using the produced ammunition to cause harm to the adversary, such factory workers cannot be regarded as directly participating in hostilities (see Report DPH 2003, p. 2; Report DPH 2004, pp. 6 f.; Report DPH 2005, pp. 15, 21, 28 f., 34, 38; Report DPH 2006, pp. 48 ff., 60; Report DPH 2008, p. 63). The experts remained divided, however, as to whether the construction of improvised explosive devices (IED) or missiles by non-State actors could in certain circumstances exceed mere capacity-building and, in contrast to industrial weapons production, could become a measure preparatory to a concrete military operation (see Report DPH 2006, pp. 48 f., 60).

[124] On the example of a civilian driver of an ammunition truck, see below Section V.2.(e).

[125] Report DPH 2004, p. 10; Report DPH 2005, pp. 35 f. For dissenting views, see: Report DPH 2006, pp. 26, 65; Report DPH 2008, p. 51, 53 ff.

[126] See below Sections V.2.(c) and VI.1.

Moreover, for the requirement of direct causation to be met, it is neither necessary nor sufficient that the act be indispensable to the causation of harm.[127] For example, the financing or production of weapons and the provision of food to the armed forces may be indispensable, but not directly causal, to the subsequent infliction of harm. On the other hand, a person serving as one of several lookouts during an ambush would certainly be taking a direct part in hostilities although his contribution may not be indispensable to the causation of harm. Finally, it is not sufficient that the act and its consequences be connected through an uninterrupted causal chain of events. For example, the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm through an uninterrupted causal chain of events, but, unlike the planting and detonation of that device, do not cause that harm directly.

c) Direct causation in collective operations

The required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations. For example, attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander.[128] While all of these persons are integral to that operation and directly participate in hostilities, only few of them carry out activities that, in isolation, could be said to directly cause the required threshold of harm. The standard of direct causation must therefore be interpreted to include conduct that causes harm only in conjunction with other acts. More precisely, where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly

[127] For the discussion during the expert meetings on "but for"-causation (i.e. the harm in question would not occur "but for" the act), see Report DPH 2004, pp. 11, 25; Report DPH 2005, pp. 28, 34.
[128] Report DPH 2005, p. 35.

causes such harm.[129] Examples of such acts would include, *inter alia*, the identification and marking of targets,[130] the analysis and transmission of tactical intelligence to attacking forces,[131] and the instruction and assistance given to troops for the execution of a specific military operation.[132]

d) Causal, temporal, and geographic proximity

The requirement of direct causation refers to a degree of *causal* proximity, which should not be confused with the merely indicative elements of *temporal* or *geographic* proximity. For example, it has become quite common for parties to armed conflicts to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps and 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 regardless of temporal or geographical proximity. Conversely, 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 the required threshold of harm to the opposing party to a conflict remains indirect. Thus, while temporal or geographic proximity to the resulting harm may indicate that a specific act amounts to direct participation in hostilities, these factors would not be sufficient in the absence of direct causation.[133] As previously noted, where the required harm has not yet materialized, the element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation ("likely" harm).[134]

[129] Report DPH 2004, p. 5; Report DPH 2005, pp. 35 f.
[130] Background Doc. DPH 2004, pp. 13; Report DPH 2004, p. 11, 25; Report DPH 2005, p. 31
[131] Report DPH 2005, pp. 28, 31. See also the example provided in N 103, which was described as the equivalent of a "fire control system".
[132] Report DPH 2004, p. 10; Report DPH 2005, pp. 33, 35 f.
[133] Report DPH 2005, p. 35.
[134] See above Section V.1.

e) Selected examples

Driving an ammunition truck: The delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities.[135] Transporting ammunition from a factory to a port for further shipping to a storehouse in a conflict zone, on the other hand, is too remote from the use of that ammunition in specific military operations to cause the ensuing harm directly. Although the ammunition truck remains a legitimate military objective, the driving of the truck would not amount to direct participation in hostilities and would not deprive a civilian driver of protection against direct attack.[136] Therefore, any direct attack against the truck would have to take the probable death of the civilian driver into account in the proportionality assessment.[137]

Voluntary human shields: The same logic applies to civilians attempting to shield a military objective by their presence as persons entitled to protection against direct attack (voluntary human shields). Where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as direct participation in hostilities.[138] This scenario may become particularly relevant in ground operations, such as in urban environments, where civilians may attempt to give physical cover to fighting personnel supported by them or to inhibit the movement of opposing infantry troops.[139]

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[135] Background Doc. DPH 2004, p. 28; Report DPH 2006, p. 48. A similar reasoning was recently adopted in domestic jurisprudence with regard to "driving a vehicle containing two surface-to-air missiles in both temporal and spatial proximity to both ongoing combat operations" (U.S. Military Commission, *USA v. Salim Ahmed Hamdan*, 19 December 2007, p. 6) and "driving the ammunition to the place from which it will be used for the purposes of hostilities" (Israel HCJ, *PCATI v. Israel*, above N 24, § 35).

[136] Report DPH 2006, p. 48.

[137] See also Report DPH 2005, pp. 32 f. Although it was recognized during the expert meetings that a civilian driver of an ammunition truck may have to face the risk of being mistaken for a member of the armed forces, it was also widely agreed 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, pp. 72 f.).

[138] This view was generally shared during the expert meetings (Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.).

[139] During the expert meetings, this scenario 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.).

Conversely, in operations involving more powerful weaponry, such as artillery or air attacks, the presence of voluntary human shields often has no adverse impact on the capacity of the attacker to identify and destroy the shielded military objective. Instead, the presence of civilians around the targeted objective may shift the parameters of the proportionality assessment to the detriment of the attacker, thus increasing the probability that the expected incidental harm would have to be regarded as excessive in relation to the anticipated military advantage.[140] The very fact that voluntary human shields are in practice considered to pose a *legal* – rather than a *physical* – obstacle to military operations demonstrates that they are recognized as protected against direct attack or, in other words, that their conduct does not amount to direct participation in hostilities. Indeed, although the presence of voluntary human shields may eventually lead to the cancellation or suspension of an operation by the attacker, the causal relation between their conduct and the resulting harm remains indirect.[141] Depending on the circumstances, it may also be questionable whether voluntary human shielding reaches the required threshold of harm.

The fact that some civilians voluntarily and deliberately abuse their legal entitlement to protection against direct attack in order to shield military objectives does not, without more, entail the loss of their protection and their liability to direct attack independently of the shielded objective.[142] Nevertheless, through their voluntary presence near legitimate military objectives, voluntary human shields are particularly exposed to the dangers of military operations and, therefore, incur an increased risk of suffering incidental death or injury during attacks against those objectives.[143]

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[140] See Art. 51 [5] (a) AP I and, for the customary nature of this rule in international and non-international armed conflict, *Customary IHL*, above N 7, Vol. I, Rule 14. For the relevant discussion during the expert meetings, see Report DPH 2004, pp. 6 f.; Report DPH 2006, pp. 44 ff.; Report DPH 2008, p. 70.

[141] While there was general agreement during the expert meetings that involuntary human shields could not be regarded as directly participating in hostilities, the experts were unable to agree on the circumstances in which acting as a voluntary human shield would, or would not, amount to direct participation in hostilities. For an overview of the various positions, see Report DPH 2004, p. 6; Report DPH 2006, pp. 44 ff.; Report DPH 2008, pp. 70 ff.

[142] See also Art. 51 [7] and [8] AP I, according to which any violation of the prohibition on using civilians as human shields does not release the attacker from his obligations with respect to the civilian population and individual civilians, including the obligation to take the required precautionary measures.

[143] See Report DPH 2004, p. 7; Report DPH 2008, pp. 71 f.

f) Summary

The requirement of direct causation is satisfied if either the specific act in question, or a concrete and coordinated military operation of which that act constitutes an integral part, may reasonably be expected to directly – in one causal step – cause harm that reaches the required threshold. However, even acts meeting the requirements of direct causation and reaching the required threshold of harm can only amount to direct participation in hostilities if they additionally satisfy the third requirement, that of belligerent nexus.

3. Belligerent nexus

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

a) Basic concept

Not every act that directly adversely affects the military operations or military capacity of a party to an armed conflict or directly inflicts death, injury, or destruction on persons and objects protected against direct attack necessarily amounts to direct participation in hostilities. As noted, the concept of direct participation in hostilities is restricted to specific acts that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities.[144] Treaty IHL describes the term hostilities as the resort to means and methods of "injuring the enemy",[145] and individual attacks as being directed "against the adversary". [146] In other words, in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus).[147]

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[144] See above Section IV.

[145] See Art. 22 H IV R (Section II on "Hostilities").

[146] See, most notably, the definition of "attacks" as acts of violence "against the adversary..." (Art. 49 [1] AP I). Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 ff.

[147] The requirement of belligerent nexus is conceived more narrowly than the general

Conversely, armed violence which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party, cannot amount to any form of "participation" in hostilities taking place between these parties.[148] Unless such violence reaches the threshold required to give rise to a separate armed conflict, it remains of a non-belligerent nature and, therefore, must be addressed through law enforcement measures.[149]

b) Belligerent nexus and subjective intent

Belligerent nexus should be distinguished from concepts such as subjective intent[150] and hostile intent.[151] These relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.[152] As an objective criterion linked to the act alone, belligerent

nexus requirement developed in the jurisprudence of the ICTY and the ICTR as a precondition for the qualification of an act as a war crime (see: ICTY, *Prosecutor v. Kunarac et al*., Case No. IT-96-23, Judgment of 12 June 2002 (Appeals Chamber), § 58; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96–3, Judgment of 26 May 2003 (Appeals Chamber), § 570). While the general nexus requirement refers to the relation between an act and a situation of armed conflict as a whole, the requirement of belligerent nexus refers to the relation between an act and the conduct of hostilities between the parties to an armed conflict. During the expert meetings, it was generally agreed that no conduct lacking a sufficient nexus to the hostilities could qualify as direct participation in such hostilities. See Report, DPH 2005, p. 25 and, more generally, Background Doc. DPH 2004, pp. 25 f.; Report DPH 2004, pp. 10, 25; Background Doc. DPH 2005, WS II-III, p. 8; Report DPH 2005, pp. 9 f., 22 ff., 27, 34.

[148] Report DPH 2006, pp. 51 f.

[149] The same applies, for example, to armed violence carried out by independent armed groups in international armed conflict (see also above, NN 24-27 and accompanying text). During the expert meetings there was general agreement regarding the importance of distinguishing, in contexts of armed conflict, between law enforcement operations and the conduct of hostilities. See Report DPH 2005, pp. 10 f.; Report DPH 2006, pp. 52 f.; Report DPH 2008, p. 49, 54, 62 ff.

[150] During the expert meetings, there was almost unanimous agreement 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. See Report DPH 2005, pp. 9, 26, 34, 66 f.; Report DPH 2006, pp. 50 f.; Report DPH 2008, p. 66.

[151] During the expert meetings, there was agreement that hostile intent is not a term of IHL, but a technical term used in rules of engagement (ROE) drafted under national law. ROE 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 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, even though they amount to direct participation in hostilities under IHL. Conversely, ROE may contain rules on the use of lethal force in individual self-defence 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.

[152] Report DPH 2005, pp. 22 f., 26, 40; Report DPH 2006, pp. 50 f.

nexus is generally not influenced by factors such as personal distress or preferences, or by the mental ability or willingness of persons to assume responsibility for their conduct. Accordingly, even civilians forced to directly participate in hostilities[153] or children below the lawful recruitment age[154] may lose protection against direct attack.

Only in exceptional situations could the mental state of civilians call into question the belligerent nexus of their conduct. This scenario could occur, most notably, when civilians are totally unaware of the role they are playing in the conduct of hostilities (e.g. a driver unaware that he is transporting a remote-controlled bomb) or when they are completely deprived of their physical freedom of action (e.g. when they are involuntary human shields physically coerced into providing cover in close combat). Civilians in such extreme circumstances cannot be regarded as performing an action (i.e. as *doing something*) in any meaningful sense and, therefore, remain protected against direct attack despite the belligerent nexus of the military operation in which they are being instrumentalized. As a result, these civilians would have to be taken into account in the proportionality assessment during any military operation likely to inflict incidental harm on them.

c) Practical relevance of belligerent nexus

Many activities during armed conflict lack a belligerent nexus even though they cause a considerable level of harm. For example, the exchange of fire between police and hostage-takers during an ordinary bank robbery,[155] violent crimes committed for reasons unrelated to the conflict, and the stealing of military equipment for private use,[156] may cause the

[153] It should be noted, however, that civilians protected under the Fourth Geneva Convention may not be compelled to do work "directly related to the conduct of military operations" or to serve in the armed or auxiliary forces of the enemy (Arts 40 [2] and 51 [1] GC IV), and that civilian medical and religious personnel may not be compelled to carry out tasks which are not compatible with their humanitarian mission (Art. 15 [3] AP I; Art. 9 [1] AP II).

[154] Therefore, all parties to an armed conflict are obliged to do everything feasible to ensure that children below the age of 15 years do not directly participate in hostilities and, in particular, to refrain from recruiting them into their armed forces or organized armed groups (Arts 77 [2] AP I; 4 [3] (c) AP II; *Customary IHL*, above N 7, Vol. I, Rule 137). Of course, as soon as children regain protection against direct attack, they also regain the special protection afforded to children under IHL (Arts 77 [3] AP I; 4 [3] (d) AP II).

[155] See also Report DPH 2005, pp. 9, 11.

[156] Report DPH 2004, p. 25.

required threshold of harm, but are not specifically designed to support a party to the conflict by harming another. Similarly, the military operations of a party to a conflict can be directly and adversely affected when roads leading to a strategically important area are blocked by large groups of refugees or other fleeing civilians. However, the conduct of these civilians is not specifically designed to support one party to the conflict by causing harm to another and, therefore, lacks belligerent nexus. This analysis would change, of course, if civilians block a road in order to facilitate the withdrawal of insurgent forces by delaying the arrival of governmental armed forces (or vice versa). When distinguishing between the activities that do and those that do not amount to direct participation in hostilities, the criterion of belligerent nexus is of particular importance in the following four situations:

Individual self-defence: The causation of harm in individual self-defence or defence of others against violence prohibited under IHL lacks belligerent nexus.[157] For example, although the use of force by civilians to defend themselves against unlawful attack or looting, rape, and murder by marauding soldiers may cause the required threshold of harm, its purpose clearly is not to support a party to the conflict against another. If individual self-defence against prohibited violence were to entail loss of protection against direct attack, this would have the absurd consequence of legitimizing a previously unlawful attack. Therefore, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities.[158]

Exercise of power or authority over persons or territory: IHL makes a basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory. As a result, the infliction of death, injury, or destruction by civilians on persons or objects that have fallen into their "hands"[159] or "power"[160] within the meaning of IHL does not, without more, constitute part of the hostilities.

[157] This was also the prevailing opinion during the expert meetings (see Report DPH 2003, p. 6; Background Doc. DPH 2004, pp. 14, 31 f.).
[158] The use of force by individuals in defence of self or others is an issue distinct from the use of force by States in self-defence against an armed attack, which is governed by the *jus ad bellum* and is beyond the scope of this study.
[159] E.g. Art. 4 GC IV.
[160] E.g. Art. 5 GC III; Art. 75 [1] AP I.

For example, the use of armed force by civilian authorities to suppress riots and other forms of civil unrest,[161] prevent looting, or otherwise maintain law and order in a conflict area may cause death, injury, or destruction, but generally it would not constitute part of the hostilities conducted between parties to an armed conflict.[162] Likewise, once military personnel have been captured (and, thus, are *hors de combat*), the suppression of riots and prevention of escapes[163] or the lawful execution of death sentences[164] is not designed to directly cause military harm to the opposing party to the conflict and, therefore, lacks belligerent nexus.[165]

Excluded from the concept of direct participation in hostilities is not only the lawful exercise of administrative, judicial or disciplinary authority on behalf of a party to the conflict, but even the perpetration of war crimes or other violations of IHL outside the conduct of hostilities. Thus, while collective punishment, hostage-taking, and the ill-treatment and summary execution of persons in physical custody are invariably prohibited by IHL, they are not part of the conduct of hostilities.[166] Such conduct may constitute a domestic or international crime and permit the lawful use of armed force against the perpetrators as a matter of law enforcement or defence of self or others.[167] Loss of protection against direct attack within the meaning of IHL, however, is not a sanction for criminal behaviour but a consequence of military necessity in the conduct of hostilities.[168]

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[161] On the belligerent nexus of civil unrest, see below N 169 and accompanying text.
[162] Treaty IHL expressly confirms the law enforcement role, for example, of occupying powers (Art. 43 H IV R) and States party to a non-international armed conflict (Art. 3 [1] AP II).
[163] E.g. Art. 42 GC III.
[164] E.g. Arts 100 and 101 GC III.
[165] See also above N 99 and accompanying text.
[166] See, for example, Arts 3 GC I-IV; 32 GC IV; 75 [2] AP I. For the divergence of opinions expressed during the expert meetings on the qualification of hostage-taking as direct participation in hostilities, see Report DPH 2004, p. 4; Report DPH 2005, p. 11; Report DPH 2006, pp. 43 f.; Report DPH 2008, pp. 67 ff.
[167] The concept of "attack" in the context of crimes against humanity does not necessarily denote conduct amounting to direct participation in hostilities under IHL. As explained by the ICTY "[t]he term 'attack' in the context of a crime against humanity carries a slightly different meaning than in the laws of war. [It] 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" (ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23, Judgment of 22 February 2001 (Trial Chamber), § 416, confirmed by the Appeals Chamber in its Judgment in the same case of 12 June 2002, § 89). See also Report DPH 2006, pp. 42 f.
[168] For the relevant discussion during the expert meetings, see Report DPH 2008, pp. 63-65.

Civil unrest: During armed conflict, political demonstrations, riots, and other forms of civil unrest are often marked by high levels of violence and are sometimes responded to with military force. In fact, civil unrest may well result in death, injury and destruction and, ultimately, may even benefit the general war effort of a party to the conflict by undermining the territorial authority and control of another party through political pressure, economic insecurity, destruction and disorder. It is therefore important to distinguish direct participation in hostilities – which is specifically designed to support a party to an armed conflict against another – from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities.[169]

Inter-civilian violence: Similarly, in order to become part of the conduct of hostilities, use of force by civilians against other civilians, even if widespread, must be specifically designed to support a party to an armed conflict in its military confrontation with another.[170] This would not be the case where civilians merely take advantage of a breakdown of law and order to commit violent crimes.[171] Belligerent nexus is most likely to exist where inter-civilian violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.

d) Practical determination of belligerent nexus

The task of determining the belligerent nexus of an act can pose considerable practical difficulties. For example, in many armed conflicts, gangsters and pirates operate in a grey zone where it is difficult to distinguish hostilities from violent crime unrelated to, or merely facilitated by, the armed conflict. These determinations must be based on the information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors.[172] In practice, the decisive question should be

[169] See also Report DPH 2004, p. 4; Report DPH 2008, p. 67.
[170] See also Report DPH 2004, p. 4; Report DPH 2005, pp. 8, 11.
[171] With regard to the existence of a general nexus between civilian violence and the surrounding armed conflict, a similar conclusion was reached in ICTR, *Prosecutor v. Rutaganda* (above N 147), § 570.
[172] Report DPH 2005, pp. 9 f., 22, 26, 28, 34, 40.

whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian's loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the person concerned must be presumed to be protected against direct attack.[173]

e) Summary

In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another. As a general rule, harm caused (a) in individual self-defence or defence of others against violence prohibited under IHL, (b) in exercising power or authority over persons or territory, (c) as part of civil unrest against such authority, or (d) during inter-civilian violence lacks the belligerent nexus required for a qualification as direct participation in hostilities.

4. Conclusion

Applied in conjunction, the three requirements of *threshold of harm, direct causation* and *belligerent nexus* permit a reliable distinction between activities amounting to direct participation in hostilities and activities which, although occurring in the context of an armed conflict, are not part of the conduct of hostilities and, therefore, do not entail loss of protection against direct attack.[174] Even where a specific act amounts to direct participation in hostilities, however, the kind and degree of force used in response must comply with the rules and principles of IHL and other applicable international law.[175]

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[173] See below Section VIII.

[174] The use of force in response to activities not fulfilling these requirements must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.

[175] See below Section IX.

VI. Beginning and end of direct participation in hostilities

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 an integral part of that act.

As civilians lose protection against direct attack "for such time" as they directly participate in hostilities, the beginning and end of specific acts amounting to direct participation in hostilities must be determined with utmost care.[176] Without any doubt, the concept of direct participation in hostilities includes the immediate execution phase of a specific act meeting the three criteria of *threshold of harm, direct causation* and *belligerent nexus*. It may also include measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, where they constitute an integral part of such a specific act or operation.[177]

1. Preparatory measures

Whether a preparatory measure amounts to direct participation in hostilities depends on a multitude of situational factors that cannot be comprehensively described in abstract terms.[178] In essence, preparatory measures amounting to direct participation in hostilities correspond to what treaty IHL describes as "military operation[s] preparatory to an attack".[179] They are of a specifically military nature and so closely linked to the subsequent execution of a specific

[176] See also the discussion in Report DPH 2006, pp. 54-63. On the temporal scope of the loss of protection, see below Section VII.
[177] See also the related discussion on direct causation in collective operations, above Section V.2. (c).
[178] For the relevant discussions during the expert meetings, see: Background Doc. DPH 2004, pp. 7, 10, 13, 21; Background Doc. DPH 2005, WS VI-VII, p. 10; Report DPH 2005, p. 19; Report DPH 2006, pp. 56-63. Regarding the distinction of preparatory measures, deployments and withdrawals entailing loss of protection against direct attack from preparations, attempts and other forms of involvement entailing criminal responsibility, see Report DPH 2006, pp. 57 ff.
[179] Art. 44 [3] AP I.

hostile act that they already constitute an integral part of that act. Conversely, the preparation of a general campaign of unspecified operations would not qualify as direct participation in hostilities. In line with the distinction between direct and indirect participation in hostilities, it could be said that preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts* do not.[180]

It is neither necessary nor sufficient for a qualification as direct participation that a preparatory measure occur immediately before (temporal proximity) or in close geographical proximity to the execution of a specific hostile act or that it be indispensable for its execution. For example, the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities. This is the case even if the operation will not be carried out until the next day, if the target will be selected only during the operation, and if great distance separates the preparatory measure from the location of the subsequent attack. Conversely, transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future would constitute a general preparatory measure qualifying as mere indirect participation.

Similarly, if carried out with a view to the execution of a specific hostile act, all of the following would almost certainly constitute preparatory measures amounting to direct participation in hostilities: equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment. Examples of general preparation not entailing loss of protection against direct attack would commonly include purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial,

[180] See above, N 114 and accompanying text, as well as Section V.2.(b).

administrative or political support to armed actors.[181] It should be reiterated that these examples can only illustrate the principles based on which the necessary 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.[182]

2. Deployment and return

Where the execution of a specific act of direct participation in hostilities requires prior geographic deployment, such deployment already constitutes an integral part of the act in question.[183] Likewise, as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*.[184] A deployment amounting to direct participation in hostilities begins only once the deploying individual undertakes a physical displacement with a view to carrying out a specific operation. The return from the execution of a specific hostile act ends once the individual in question has physically separated from the operation, for example by laying down, storing or hiding the weapons or other equipment used and resuming activities distinct from that operation.

[181] On the qualification of such activities as direct participation in hostilities see also above Section V.2.(a)(b).

[182] During the expert meetings, it was emphasized that the distinction between preparatory measures that do and, respectively, do not qualify as direct participation in hostilities should be made with utmost care so as to ensure that loss of civilian protection would not be triggered by acts too remote from the actual fighting. In order for the word "direct" in the phrase direct participation in hostilities to retain any meaning, 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, pp. 55, 60 f.).

[183] See *Commentary AP* (above N 10), §§ 1679, 1943, 4788, which recalls that several delegations to the Diplomatic Conference of 1974-77 had indicated that the concept of hostilities included preparations for combat and return from combat. In their responses to the 2004 Questionnaire, a majority of experts considered that deployment to the geographic location of a hostile act should already qualify as direct participation in hostilities and, though more hesitantly, tended towards the same conclusion with regard to the return from that location. See Background Doc. 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.

[184] While this was also the prevailing opinion during the expert meetings (see Report DPH 2005, p. 66) some experts feared that the continued loss of protection after the execution of a specific hostile act invited arbitrary and unnecessary targeting (Report DPH 2006, pp. 56 f., 61 ff.).

Whether a particular individual is engaged in deployment to or return from the execution of a specific hostile act depends on a multitude of situational factors, which cannot be comprehensively described in abstract terms. The decisive criterion is that both the deployment and return be carried out as an integral part of a specific act amounting to direct participation in hostilities. That determination must be made with utmost care and based on a reasonable evaluation of the prevailing circumstances.[185] Where the execution of a hostile act does not require geographic displacement, as may be the case with computer network attacks or remote-controlled weapons systems, the duration of direct participation in hostilities will be restricted to the immediate execution of the act and preparatory measures forming an integral part of that act.

3. Conclusion

Where preparatory measures and geographical deployments or withdrawals constitute an integral part of a specific act or operation amounting to direct participation in hostilities, they extend the beginning and end of the act or operation beyond the phase of its immediate execution.

[185] See Report DPH 2005, p. 66; Report DPH 2006, p. 55.

C. MODALITIES GOVERNING THE LOSS OF PROTECTION

Under customary and treaty IHL, civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of State armed forces or organized armed groups belonging to a party to an armed conflict.[186] In view of the serious consequences for the individuals concerned, the present chapter endeavours to clarify the precise modalities that govern such loss of protection under IHL. The following sections examine the temporal scope of the loss of protection against direct attack (VII), the precautions and presumptions in situations of doubt (VIII), the rules and principles governing the use of force against legitimate military targets (IX), and the consequences of regaining protection against direct attack (X).

In line with the aim of the Interpretive Guidance, this chapter will focus on examining loss of protection primarily in case of direct participation in hostilities (civilians), but also in case of continuous combat function (members of organized armed groups), as the latter concept is intrinsically linked to the concept of direct participation in hostilities.[187] It will not, or only marginally, address the loss of protection in case of membership in State armed forces, which largely depends on criteria unrelated to direct participation in hostilities, such as formal recruitment, incorporation, discharge or retirement under domestic law.[188] Subject to contrary provisions of IHL, this does not exclude the applicability of the conclusions reached in Sections VII to X, *mutatis mutandis*, to members of State armed forces as well.

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[186] Regarding the terminology of "loss of protection against direct attacks" used in the Interpretive Guidance see above N 6.
[187] On the concept of continuous combat function, see above Section II.3.(b).
[188] On the applicability of the criterion of continuous combat function for the determination of membership in irregularly constituted militia, volunteer corps and resistance movements belonging to States, see above Section I.3.(c).

VII. Temporal scope of the loss of 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 groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.

1. Civilians

According to treaty and customary IHL applicable in international and non-international armed conflict, civilians enjoy protection against direct attack "unless and for such time" as they take a direct part in hostilities.[189] Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended. The phrase "unless and for such time" clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities.[190] This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called "revolving door" of civilian protection).

The "revolving door" of civilian protection is an integral part, not a malfunction, of IHL. It prevents attacks on civilians who do not, at the time, represent a military threat. In contrast to members of organized armed groups, whose continuous function it is to conduct hostilities on behalf of a party to the conflict, the behaviour of individual civilians depends on a multitude of constantly changing circumstances and,

[189] Arts 51 [3] AP I; 13 [3] AP II; *Customary IHL*, above N 7, Vol. I, Rule 6. The customary nature of this rule was affirmed also in ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment of 29 July 2004, § 157, with references to earlier case law. For recent domestic jurisprudence expressly accepting the customary nature of Art. 51 [3] AP I, including the phrase "for such time as" see: Israel HCJ, *PCATI v. Israel*, above N 24, § 30.
[190] On the beginning and end of direct participation in hostilities see above Section VI.

therefore, is very difficult to anticipate. Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.[191] As the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian's protection against direct attack each time his or her engagement in a hostile act ends.[192] Until the civilian in question again engages in a specific act of direct participation in hostilities, the use of force against him or her must comply with the standards of law enforcement or individual self-defence.

Although the mechanism of the "revolving door" of protection may make it more difficult for the opposing armed forces or organized armed groups to respond effectively to the direct participation of civilians in hostilities, it remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis.

2. Members of organized armed groups

Members of organized armed groups belonging to a non-State party to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function.[193] Formally, therefore, they no longer benefit from the protection provided to civilians "unless and for such time" as they take a direct part in hostilities. Indeed, the restriction of loss of protection to the duration of specific hostile acts

[191] Regarding the practical impossibility of reliably predicting the future conduct of a civilian, see also Report DPH 2006, pp. 66 ff.

[192] According to *Commentary AP* (above N 10), § 4789: "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". See also the description of direct participation in hostilities as potentially "intermittent and discontinuous" in ICTY, *Prosecutor v. Strugar*, Appeal, (above N 16), § 178. Although, during the expert meetings, the mechanism of the revolving door of protection gave rise to some controversy, the prevailing view was that, under the texts of Art. 3 [1] GC I-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 State armed forces or in an organized armed group belonging to a non-State party to the conflict. See Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 63 f.; Report DPH 2006, pp. 64-68; Report DPH 2008, pp. 33-44.

[193] On the mutual exclusivity of the concepts of civilian and organized armed group, see above Section II.1. On the concept of continuous combat function, see above Section II.3.(b).

was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians and cannot be applied to organized armed groups. It would provide members of such groups with a significant operational advantage over members of State armed forces, who can be attacked on a continuous basis. This imbalance would encourage organized armed groups to operate as farmers by day and fighters by night. In the long run, the confidence of the disadvantaged party in the capability of IHL to regulate the conduct of hostilities satisfactorily would be undermined, with serious consequences ranging from excessively liberal interpretations of IHL to outright disrespect for the protections it affords.[194]

Instead, where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group.[195] In other words, the "revolving door" of protection starts to operate based on membership.[196] As stated earlier, membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function.[197] Disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a lasting physical distancing from the group and reintegration into civilian life or the permanent resumption of an exclusively non-combat function (e.g., political or administrative activities). In practice, assumption of, or disengagement from, a continuous combat function depends on criteria that may vary with the political, cultural, and military context.[198]

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[194] Report DPH 2005, p. 49; Report DPH 2006, p. 65.

[195] According to *Commentary AP* (above N 10), § 4789: "Those who belong to armed forces or armed groups may be attacked at any time". See also Expert Paper DPH 2004 (Prof. M. Bothe). Protection against direct attack is restored where members of armed groups fall *hors de combat* as a result of capture, surrender, wounds or any other cause (Art. 3 [1] GC I-IV. See also Art. 41 AP I.).

[196] During the expert meetings, this widely supported compromise was described as a "functional membership approach". For an overview of the discussions, see Report DPH 2003, p. 7; Background Doc. DPH 2004, pp. 34 ff.; Report DPH 2004, pp. 22 f.; Report DPH 2005, pp. 49, 59-65; 82 ff.; Report DPH 2006, pp. 29 ff., 65 f.

[197] See above Section II.3. See also Report DPH 2005, p. 59.

[198] See also above Section II.3. During the expert meetings, it was emphasized that the question of whether affirmative disengagement had taken place must be determined

That determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances, presuming entitlement to civilian protection in case of doubt.[199]

3. Conclusion

Under customary and treaty IHL, civilians directly participating in hostilities, as well as persons assuming a continuous combat function for an organized armed group belonging to a party to the conflict, lose their entitlement to protection against direct attack. As far as the temporal scope of the loss of protection is concerned, a clear distinction must be made between civilians and organized armed actors. While civilians lose their protection for the duration of each specific act amounting to direct participation in hostilities, members of organized armed groups belonging to a party to the conflict are no longer civilians and, therefore, lose protection against direct attack for the duration of their membership, that is to say, for as long as they assume their continuous combat function.

based on the concrete circumstances (Report DPH 2005, p. 63). On the precautions and presumptions to be observed in situations of doubt, see below Section VIII.

[199] During the expert meetings, it was repeatedly pointed out that, while the "revolving door" of protection was part of the rule on civilian direct participation in hostilities expressed in Arts 51 [3] AP I and 13 [3] AP II, the practical distinction between members of organized armed groups and civilians was very difficult. During reactive operations carried out in response to an attack, the operating forces often lacked sufficient intelligence and had to rely on assumptions that were 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 initiated by the armed forces based on solid intelligence regarding the function of a person within an organized armed group could also be carried out at a moment when the targeted persons were not directly participating in hostilities (see Report DPH 2006, pp. 56 f.)

VIII. Precautions and presumptions in situations of doubt

All feasible precautions 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 must be presumed to be protected against direct attack.

One of the main practical problems caused by various degrees of civilian participation in hostilities is that of doubt as to the identity of the adversary. For example, in many counter-insurgency operations, armed forces are constantly confronted with individuals adopting a more or less hostile attitude. The difficulty for such forces is to distinguish reliably between members of organized armed groups belonging to an opposing party to the conflict, civilians directly participating in hostilities on a spontaneous, sporadic, or unorganized 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. To avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, there must be clarity as to the precautions to be taken and the presumptions to be observed in situations of doubt.

1. The requirement of feasible precautions

Prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets.[200] Once an attack has commenced, those responsible must cancel or suspend the attack if it becomes apparent that the target is not a legitimate military target.[201] Before and during any attack, everything feasible must be done to determine whether the targeted person is a civilian and, if so, whether he or she is directly participating in hostilities.

[200] Art. 57 [2] (a) (i) AP I. According to *Customary IHL*, above N 7, Vol. I, Rule 16, this rule has attained customary nature in both international and non-international armed conflict.
[201] Art. 57 [2] (b) AP I. According to *Customary IHL*, above N 7, Vol. I, Rule 19, this rule has attained customary nature in both international and non-international armed conflict.

As soon as it becomes apparent that the targeted person is entitled to civilian protection, those responsible must refrain from launching the attack, or cancel or suspend it if it is already underway. This determination must be made in good faith and in view of all information that can be said to be reasonably available in the specific situation.[202] As stated in treaty IHL, "[f]easible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".[203] In addition, a direct attack against a civilian must be cancelled or suspended if he or she becomes *hors de combat*.[204]

2. Presumption of civilian protection

For the purposes of the principle of distinction, IHL distinguishes between two generic categories of persons: civilians and members of the armed forces of the parties to the conflict. Members of State armed forces (except medical and religious personnel) or organized armed groups are generally regarded as legitimate military targets unless they surrender or otherwise become *hors de combat*. Civilians are generally protected against direct attack unless and for such time as they directly participate in hostilities. For each category, the general rule applies until the requirements for an exception are fulfilled.

Consequently, in case of doubt as to whether a specific civilian conduct qualifies as direct participation in hostilities, it must be presumed that the general rule of civilian protection applies and that this conduct does not amount to direct

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[202] Report DPH 2006, p. 70 ff.

[203] Arts 3 [4] CCW Protocol II (1980); 1 [5] CCW Protocol III (1980); 3 [10] CCW Amended Protocol II (1996). See also the French text of Art. 57 AP I ("*faire tout ce qui est pratiquement possible*").

[204] 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 obliges those responsible to refrain from launching, to cancel or suspend attacks that are likely to result in incidental harm that would be "excessive" compared to the anticipated military advantage (see Art. 57 [2] (a) (ii); Art. 57 [2] (a) (iii) and Art. 57 [2] (b) AP I and, with regard to the customary nature of these rules in both international and non-international armed conflict, *Customary IHL*, above N 7, Vol. I, Rules 17, 18 and 19).

participation in hostilities.[205] The presumption of civilian protection applies, *a fortiori*, in case of doubt as to whether a person has become a member of an organized armed group belonging to a party to the conflict.[206] Obviously, the standard of doubt applicable to targeting decisions cannot be compared to the strict standard of doubt applicable in criminal proceedings but rather must reflect the level of certainty that can reasonably be achieved in the circumstances. In practice, this determination will have to take into account, *inter alia*, the intelligence available to the decision maker, the urgency of the situation, and the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision.

The presumption of civilian protection does not exclude the use of armed force against civilians whose conduct poses a grave threat to public security, law and order without clearly amounting to direct participation in hostilities. In such cases, however, the use of force must be governed by the standards of law enforcement and of individual self-defence, taking into account the threat to be addressed and the nature of the surrounding circumstances.[207]

3. Conclusion

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.

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[205] During the expert meetings, it was agreed 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.; Report DPH 2006, p. 70 ff.).

[206] For situations of international armed conflict, this principle has been codified in Art. 50 [1] AP I. With regard to non-international armed conflicts, see also *Commentary AP* (above N 10), § 4789, which states that, "in case of doubt regarding the status of an individual, he is presumed to be a civilian".

[207] See also Report DPH 2005, pp. 11 f.

IX. Restraints on the use of force in direct attack

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

Loss of protection against direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law. It is a fundamental principle of customary and treaty IHL that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited".[208] Indeed, even direct attacks against legitimate military targets are subject to legal constraints, whether based on specific provisions of IHL, on the principles underlying IHL as a whole, or on other applicable branches of international law.

1. Prohibitions and restrictions laid down in specific provisions of IHL

Any military operation carried out in a situation of armed conflict must comply with the applicable provisions of customary and treaty IHL governing the conduct of hostilities.[209] These include the rules derived from the principles of distinction, precaution, and proportionality, as well as the prohibitions of denial of quarter and perfidy. They also include the restriction or prohibition of selected weapons and the prohibition of means and methods of warfare of a nature to cause superfluous injury or unnecessary

[208] Article 22 H IV R. See also Article 35 [1] AP I: "In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited".
[209] See also Report DPH 2006, p. 76; Report DPH 2008, pp. 24, 29 ff.

suffering (*maux superflus*).[210] Apart from the prohibition or restriction of certain means and methods of warfare, however, the specific provisions of IHL do not expressly regulate the kind and degree of force permissible against legitimate military targets. Instead, IHL simply refrains from providing certain categories of persons, including civilians directly participating in hostilities, with protection from direct "attacks", that is to say, from "acts of violence against the adversary, whether in offence or in defence".[211] Clearly, the fact that a particular category of persons is not protected against offensive or defensive acts of violence is not equivalent to a legal entitlement to kill such persons without further considerations. At the same time, the absence of an unfettered "right" to kill does not necessarily imply a legal obligation to capture rather than kill regardless of the circumstances.

2. The principles of military necessity and humanity [212]

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity, which underlie and inform the entire normative framework of IHL and, therefore, shape the context in which its rules must be interpreted.[213] Considerations of military necessity and humanity neither derogate from nor override the specific

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[210] See, for example, the prohibitions or restrictions imposed on the use of poison (Art. 23 [1] (a) H IV R; 1925 Geneva Protocol prohibiting asphyxiating, poisonous or other gases and analogous liquids, materials or devices), expanding bullets (1899 Hague Declaration IV/3) and certain other weapons (CCW-Convention and Protocols of 1980, 1995 and 1996, Ottawa Convention on Anti-Personnel Mines of 1997, Convention on Cluster Munitions of 2008), as well as the prohibition of methods involving the denial of quarter (Art. 40 AP I; Art. 23 [1] (d) H IV R) and the resort to treachery or perfidy (Art. 23 [1] (b) H IV R; Art. 37 AP I). See also Report DPH 2006, p. 76; Report DPH 2008, pp. 18 f.

[211] Article 49 [1] AP I.

[212] During the expert meetings, Section IX.2. of the Interpretive Guidance remained highly controversial. While one group of experts held that the use of lethal force against persons not entitled to protection against direct attack is permissible only where capture is not possible, another group of experts insisted that, under IHL, there is no legal obligation to capture rather than kill. Throughout the discussions, however, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection against direct attack, nor that such a person could lawfully be killed in a situation where there manifestly is no military necessity to do so. For an overview of the relevant discussions see Report DPH 2004, pp. 17 ff.; Report DPH 2005, pp. 31 f., 44. ff., 50, 56 f., 67; Report DPH 2006, pp. 74-79; Report DPH 2008, pp. 7-32.

[213] See, most notably: *Commentary AP* (above N 10), § 1389.

provisions of IHL, but constitute guiding principles for the interpretation of the rights and duties of belligerents within the parameters set by these provisions.[214]

Today, the principle of military necessity is generally recognized to permit "only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources".[215] Complementing and implicit in the principle of military necessity is the principle of humanity, which "forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes".[216] In conjunction, the principles of military necessity and of humanity reduce the sum total of permissible military action from that which IHL does not expressly prohibit to that which is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[217]

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[214] Report DPH 2008, pp. 7 f., 19 f. See also the statement of Lauterpacht that "the law on these subjects [i.e. on the conduct of hostilities] must be shaped – so far as it can be shaped at all – by reference not to existing law but to more compelling considerations of humanity, of the survival of civilisation, and of the sanctity of the individual human being" (cited in: *Commentary AP* (above N 10), § 1394).

[215] United Kingdom: Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: OUP, 2004), Section 2.2 (Military Necessity). Similar interpretations are provided in numerous other contemporary military manuals and glossaries. See, for example, NATO: *Glossary of Terms and Definitions (AAP-6V)*, p. 2-M-5; United States: Department of the Army, *Field Manual 27-10* (1956), § 3; US Department of the Navy, *The Commander's Handbook on the Law of Naval Operations*, *NWP 1–14M/MCWP 5–12-1/COMDTPUB P5800.7A* (2007), § 5.3.1, p. 5-2.; France: Ministry of Defence, *Manuel de Droit des Conflits Armés* (2001), pp. 86 f.; Germany: Federal Ministry of Defence, *Triservice Manual ZDv 15/2: Humanitarian Law in Armed Conflicts* (August 1992) § 130; Switzerland: Swiss Army, *Regulations 51.007/IV, Bases légales du comportement à l'engagement* (2005), § 160. Historically, the modern concept of military necessity has been strongly influenced by the definition provided in Art. 14 of the "Lieber Code" (United States: *Adjutant General's Office, General Orders No. 100*, 24 April 1863).

[216] United Kingdom, *Manual of the Law of Armed Conflict* (above N 215), Section 2.4 (Humanity). Although no longer in force, see also the formulation provided in: United States: Department of the Air Force, *Air Force Pamphlet, AFP 110–31* (1976), § 1-3 (2), p. 1-6. Thus, as far as they aim to limit death, injury or destruction to what is actually necessary for legitimate military purposes, the principles of military necessity and of humanity do not oppose, but mutually reinforce, each other. Only once military action can reasonably be regarded as necessary for the accomplishment of a legitimate military purpose, do the principles of military necessity and humanity become opposing considerations which must be balanced against each other as expressed in the specific provisions of IHL.

[217] See *Commentary AP* (above N 10), § 1395. See also the determination of the International Court of Justice that the prohibition on the use of means and methods of warfare of a nature to cause unnecessary suffering to combatants constitutes an intransgressible principle of international customary law and a cardinal principle of

While it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances.[218] What kind and degree of force can be regarded as necessary in an attack against a particular military target involves a complex assessment based on a wide variety of operational and contextual circumstances. The aim cannot be to replace the judgment of the military commander by inflexible or unrealistic standards; rather it is to avoid error, arbitrariness, and abuse by providing guiding principles for the choice of means and methods of warfare based on his or her assessment of the situation.[219]

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become decisive where armed forces operate against selected individuals in situations comparable to peacetime

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IHL, which outlaws the causation of "harm greater than that unavoidable to achieve legitimate military objectives". See ICJ, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, § 78.

[218] See also the Declaration of St. Petersburg (1868), which states: "That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable [original French version: *mettre hors de combat*] the greatest possible number of men".

[219] It has long been recognized that matters not expressly regulated in treaty IHL should not, "for want of a written provision, be left to the arbitrary judgment of the military commanders" (Preamble H II; Preamble H IV) but that, in the words of the famous Martens Clause, "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience" (Art. 1 [2] AP I). First adopted in the Preamble of Hague Convention II (1899) and reaffirmed in subsequent treaties and jurisprudence for more than a century, the Martens Clause continues to serve as a constant reminder that, in situations of armed conflict, a particular conduct is not necessarily lawful simply because it is not expressly prohibited or otherwise regulated in treaty law. See, e.g., Preambles H IV R (1907), AP II (1977), CCW (1980); Arts 63 GC I, 62 GC II, 142 GC III, 158 GC IV (1949); ICJ, *Nuclear Weapons AO* (above N 217), § 78; ICTY, *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T-14, Judgment of January 2000, § 525). For the discussion on the Martens Clause during the expert meetings, see Report DPH 2008, pp. 22 f.).

policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.[220]

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population. Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force. Further, large numbers of unarmed civilians who deliberately gather on a bridge in order to prevent the passage of governmental ground forces in pursuit of an insurgent group would probably have to be regarded as directly participating in hostilities. In most cases, however, it would be reasonably possible for the armed forces to remove the physical obstacle posed by these civilians through means less harmful than a direct military attack on them.

[220] For recent national case law reflecting this position see: Israel HCJ, *PCATI v. Israel*, above N 24, § 40, where 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. [...] Arrest, investigation, and trial are not means which can always be used. At times the possibility does not exist whatsoever; at times it involves a risk so great to the lives of the soldiers, that it is not required [...]. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation, and trial are at times realizable possibilities [...]. Of course, given the circumstances of a certain case, that possibility might not exist. At times, its harm to nearby innocent civilians might be greater than that caused by refraining from it. In that state of affairs, it should not be used".

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.[221] In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets. Lastly, although this Interpretive Guidance concerns the analysis and interpretation of IHL only, its conclusions remain without prejudice to additional restrictions on the use of force, which may arise under other applicable frameworks of international law such as, most notably, international human rights law or the law governing the use of interstate force (*jus ad bellum*).[222]

3. Conclusion

In situations of armed conflict, even the use of force against persons not entitled to protection against direct attack remains subject to legal constraints. In addition to the restraints imposed by IHL on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

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[221] It is in this sense that Pictet's famous statement should be understood that "[i]f we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil". See Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht, Nijhoff 1985), pp. 75 f. During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations (Report DPH 2006, pp. 75 f., 78) and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or opportunity to capture rather than kill (Report DPH 2006, p. 63).

[222] According to Art. 51 [1] AP I the rule expressed in Art. 51 [3] AP I is "additional to other applicable rules of international law". Similarly, Art. 49 [4] AP I recalls that the provisions of Section I AP I (Arts 48-67) are "additional to the rules concerning humanitarian protection contained [...] in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians [...] against the effects of hostilities". While these provisions refer primarily to sources of IHL other than AP I itself, they also aim to include "instruments of more general applicability that continue to apply wholly or partially in a situation of armed conflict" (see *Commentary AP* (above N 10), §§ 128-131), such as "the regional and universal Conventions and Covenants relating to the protection of human rights" (*ibid*., Commentary Art. 49 AP I, § 1901) and other

X. Consequences of regaining civilian protection

International humanitarian law neither prohibits nor privileges civilian direct participation in hostilities. When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack, but are not exempted from prosecution for violations of domestic and international law they may have committed.

1. Lack of immunity from domestic prosecution

IHL provides an express "right" to directly participate in hostilities only for members of the armed forces of parties to international armed conflicts and participants in a *levée en masse*.[223] This right does not imply an entitlement to carry out acts prohibited under IHL, but merely provides combatants with immunity from domestic prosecution for acts which, although in accordance with IHL, may constitute crimes under the national criminal law of the parties to the conflict (the so-called combatant privilege).[224] The absence in IHL of an express right for civilians to directly participate in hostilities does not necessarily imply an international prohibition of such participation. Indeed, as such, civilian direct participation in hostilities is neither prohibited by IHL[225] nor criminalized under

applicable treaties, which "can have a positive influence on the fate of the civilian population in time of armed conflict" (*ibid*., Commentary Art. 51 [1] AP I, § 1937). During the expert meetings, some experts suggested that the arguments made in Section IX should be based on the human right to life. The prevailing view was, however, that the Interpretive Guidance should not examine the impact of human rights law on the kind and degree of force permissible under IHL. Instead, a general savings clause should clarify that the text of the Interpretive Guidance was drafted without prejudice to the applicability of other legal norms, such as human rights law (Report DPH 2006, pp. 78 f.; Report DPH 2008, p. 21 f.).

[223] Art. 43 [2] AP I (except medical and religious personnel); Arts 1 and 2 H IV R.

[224] Conversely, combatant privilege provides no immunity from prosecution under international or national criminal law for violations of IHL.

[225] This was also the prevailing view during the expert meetings (see Report DPH 2006, p. 81). The experts also agreed that the legality or illegality of an act under national or international law is irrelevant for its qualification as direct participation in hostilities (Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, p. 50).

the statutes of any prior or current international criminal tribunal or court.[226] However, because civilians – including those entitled to prisoner of war status under Article 4 [4] and [5] GC III – are not entitled to the combatant privilege, they do not enjoy immunity from domestic prosecution for lawful acts of war, that is, for having directly participated in hostilities while respecting IHL.[227] Consequently, civilians who have directly participated in hostilities and members of organized armed groups belonging to a non-State party to a conflict[228] may be prosecuted and punished to the extent that their activities, their membership, or the harm caused by them is penalized under national law (as treason, arson, murder, etc.).[229]

2. Obligation to respect IHL

The case law of international military tribunals that followed the Second World War,[230] the ICTY and the ICTR consistently affirms that even individual civilians can violate provisions of IHL and commit war crimes. It is the character of the acts and their nexus to the conflict, not the status of the perpetrator, that are decisive for their relevance under IHL.[231] There can be no doubt that civilians directly participating in hostilities must respect the rules of IHL, including those on the conduct of hostilities, and may be held responsible for war crimes just like

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[226] Neither the statutes of the Military Tribunals that followed the Second World War (i.e. the International Military Tribunal in Nuremberg and the International Military Tribunal for the Far East in Tokyo), nor the current statutes of the ICTY, the ICTR, the ICC and the Special Court for Sierra Leone (SCSL) penalize civilian direct participation in hostilities as such.

[227] The Martens Clause (above N 219) expresses a compromise formulated after the States participating in the 1899 Peace Conference had been 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. Since then, States have successively extended the combatant privilege to participants in a *levée en masse*, militias and volunteer corps (H IV R, 1907), organized resistance movements (GC I-III, 1949) and certain national liberation movements (AP I, 1977). As far as civilians are concerned, however, IHL still neither prohibits their direct participation in hostilities, nor affords them immunity from domestic prosecution.

[228] Obviously, where Additional Protocol I is applicable, members of the armed forces of national liberation movements within the meaning of Article 1 [4] AP I would benefit from combatant privilege and, thus, from immunity against prosecution for lawful acts of war, even though the movements to which they belong are non-State parties to an armed conflict,.

[229] See also Background Doc. DPH 2004, p. 26; Report DPH 2004, p. 17; Report DPH 2005, p. 9; Report DPH 2006, pp. 80 f.

[230] See above N 226.

[231] For the nexus criterion as established by the ICTY and the ICTR see, most notably, ICTY, *Prosecutor v Tadic*, Interlocutory Appeal (above N 26), §§ 67, 70; ICTY, *Prosecutor v. Kunarac et al*. (above N 147), §§ 55 ff.; ICTR, *Prosecutor v. Rutaganda* (above N 147), §§ 569 f.

members of State armed forces or organized armed groups. For example, it would be a violation of IHL if civilians were to direct hostile acts 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.

In practice, the prohibition on perfidy is of particular interest, as civilians directly participating in hostilities often do not carry arms openly or otherwise distinguish themselves from the civilian population. When civilians capture, injure, or kill an adversary and in doing so they fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack, this may amount to perfidy in violation of customary and treaty IHL.[232]

3. Conclusion

In the final analysis, IHL neither prohibits nor privileges civilian direct participation in hostilities. Therefore, when civilians cease to directly participate in hostilities, or when individuals cease to be members of organized armed groups because they disengage from their continuous combat function, they regain full civilian protection against direct attack. However, in the absence of combatant privilege, they are not exempted from prosecution under national criminal law for acts committed during their direct participation or membership. Moreover, just like members of State armed forces or organized armed groups belonging to the parties to an armed conflict, civilians directly participating in hostilities must respect the rules of IHL governing the conduct of hostilities and may be held individually responsible for war crimes and other violations of international criminal law.

[232] Arts 23 [1] (b) H IV R; 37 [1] AP I (international armed conflict). For the customary nature of this rule in non-international armed conflict, see *Customary IHL*, above N 7, Vol. I, Rule 65. Under the ICC statute, the treacherous killing or wounding of "individuals belonging to the hostile nation or army" (international armed conflict: Art. 8 [2] (b) (xi)) or of a "combatant adversary" (non-international armed conflict: Art. 8 [2] (e) (ix)) is a war crime.

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