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**DIRECT PARTICIPATION IN HOSTILITIES UNDER**  
**INTERNATIONAL HUMANITARIAN LAW**

**WORKING PAPER**

by

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**HPCR**

## WORKING PAPER

### DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW

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Derived from common [Article 3](#) to the Geneva Conventions, the notion of ‘direct’ or ‘active’ participation in hostilities<sup>1</sup> is found in multiple provisions of international humanitarian law (IHL). This paper focuses on the most common use of this notion - namely the loss of immunity from attack when civilians directly participate in hostilities and the legal regime applicable to such persons if captured or detained. Through concrete examples of state practice and scholarly writings, this study first explores the scope of activities that are considered ‘direct participation in hostilities’ (I). Secondly, it considers the challenges posed to the implementation of this concept in contemporary conflicts (II). Finally, the paper concludes with the consequences to civilians resulting from their ‘direct participation in hostilities’ (III).

#### **I. The lack of an explicit definition of the notion of “direct participation in hostilities”**

Neither the Acts of the 1949 Diplomatic Conference nor the Acts of the 1974-1977 Diplomatic Conference provided a precise definition of the notion ‘direct participation in hostilities.’ The *travaux préparatoires* of the Geneva Conventions and their Additional Protocols, however, provide some guidance on the meaning of ‘hostilities’ (1), and on the conditions defining ‘direct’ as opposed to ‘indirect’ participation (2), thereby providing markers within which differences of judgment can operate.<sup>2</sup>

##### 1) The notion of ‘hostilities’

The Geneva Conventions and their Additional Protocols make extensive use of the word ‘hostilities’ without specifically defining the term. Though sometimes used as a synonym for

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\* Legal Advisor, International Committee of the Red Cross. This paper was written in a personal capacity and does not express the institutional position of the ICRC on any aspect of the topic discussed.

<sup>1</sup> Common [Article 3](#) only uses the expression “*active part in the hostilities.*” This notion evolved later into “*direct participation in hostilities.*” Concerning the terms ‘direct’ and ‘active,’ the International Criminal Tribunal for Rwanda (*The Prosecutor v. Jean-Paul Akayesu*, Case N° ICTR-96-4-T, decision of 2 September 1998, § 629) concluded, “*these phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous.*” However, the Preparatory Committee for the Establishment of an International Criminal Court suggested a distinction between these notions in the specific context of the recruitment of children asserting 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.*”

<sup>2</sup> The existence of a margin of judgment on the matter is undeniable and expressly recognized by the [Commentary on Additional Protocol I](#), ICRC, Geneva, p. 516 § 1679. Along the same lines, the 12333 U.S. Executive order (Office of the Judge Advocate General, Department of the Army, 2 November 1989) regarding the prohibition of assassination states, “*While there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant[. . .] There is a lack of agreement on this matter, and no existing law-of-war treaty provides clarification or assistance.*”

armed conflict, ‘hostilities’ is often employed in a more restrictive sense designating defensive or offensive acts and military operations carried out by a belligerent during an armed conflict.<sup>3</sup>

From this latter use, one can deduct three essential characteristics of ‘hostilities’. First, the act or operation must be intrinsically linked with armed conflict (whether international or non-international). In the absence of an armed conflict, an act committed against a State’s armed forces or their equipment would not fall under the notion of hostilities, but would be considered a criminal act punishable under national laws. Secondly, the acts must be committed by one (or more) belligerent(s). This condition does not mean that the term ‘hostilities’ could not be used if civilians played a role in the act, but it does not include armed violence committed entirely by criminal groups acting without a nexus to an armed conflict. Finally, the notion of hostilities requires acts of violence, meaning acts involving the use of force. According to the Commentary on Additional Protocol I (AP I), direct participation in hostilities “*should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces*”.<sup>4</sup>

However, even if these elements serve to further elucidate the meaning of hostilities, they still leave the confines undefined as evidenced by the Commentary on AP I which states “[...]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.”<sup>5</sup>

## 2) Direct versus indirect participation in law and practice

### a) The legal criteria for determining ‘direct’ participation in hostilities

The Commentary on AP I states that “*to restrict this concept [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[. . . .]*”<sup>6</sup> In other words, the drafters of the Commentary underlined that any interpretation of the notion of ‘direct participation in hostilities’ should be narrow enough to protect civilians and maintain the meaning of the principle of distinction, while broad enough to meet the legitimate need of the armed forces to effectively respond to the means and methods of warfare that might be used by civilians.

In an attempt to balance these legitimate though opposing interests, the Commentary on AP I states that “*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*

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<sup>3</sup> Dictionnaire de la terminologie du droit international (sous la direction de SALMON, J.), Bruylant, Bruxelles, 2001, p. 550. Likewise, P. VERRI, (Dictionary of the International Law of Armed Conflict, ICRC, Geneva, 1992, p. 57) defines hostilities as an “*act of violence by a belligerent against an enemy in order to put an end to his resistance and impose obedience.*”

<sup>4</sup> Commentary on AP I, *ibid.*, p. 618 (§ 1942).

<sup>5</sup> Commentary on AP I, *ibid.*, pp. 618-619 (§ 1943).

<sup>6</sup> Commentary on AP I, *ibid.*, p. 516 (§ 1679). See also DAVID, E., Principes de droit des conflits armés, 3<sup>ème</sup> éd. Bruylant, Bruxelles, 2002, p. 249 (§ 2.17); ROGERS, A.P.V., Law on the battlefield, Manchester University Press, Melland Schill Studies in International Law, p. 7.

*activity takes place.*”<sup>7</sup> In other words, the behavior of a civilian must constitute a direct and immediate military threat to the adversary.

This criterion, however, has been challenged by some scholars - and to a certain extent by state practice - in an attempt to enlarge the notion. For example, some have argued that direct participation includes not only activities involving the delivery of violence, but also acts aimed at protecting personnel, infrastructure or material.<sup>8</sup> One author has posited that civilians directly participate in hostilities when integrated in a combat operation, integration being defined as “*an uninterrupted, indispensable part of an activity such that the activity cannot function without that person’s presence.*”<sup>9</sup> Going even further, it has been suggested that the determination of direct participation rests on an appreciation of the added value brought to the war effort by a civilian post as compared to a purely military function.<sup>10</sup>

#### b) Direct or indirect participation in hostilities through concrete examples

Little doubt exists that a civilian carrying out an attack would be directly participating in hostilities. The notion of ‘attack’ as defined in [Article 49](#) AP I, encompasses “*acts of violence against the adversary, whether in offence or in defence.*” According to the Commentary on AP I, ‘attack’ means “*combat action*” and “*refers simply to the use of armed force to carry out a military operation.*”<sup>11</sup> These definitions seem to point to direct acts of physical fighting. However, the effect of such direct acts - their violent consequences - does not necessarily have to be immediate (e.g. giving orders to attack, placing explosive devices). Therefore, the term attack can be construed as covering any act of violence carried out in relation to the conflict aimed at causing harm to the life, limb or property of the adversary or the civilian population, either immediately or with delayed effect.

The Commentary to AP I acknowledges that ‘direct participation in hostilities’ is not restricted to an attack, but also extends to the preparation or returning from an attack.<sup>12</sup> The [Commentary to Article 51](#) § 3 AP I pertaining to direct participation in hostilities does not

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<sup>7</sup> [Commentary on AP I](#), *ibid.*, p. 516 (§ 1679). Along the same lines, the [Commentary on AP II](#) reads, “*the notion of direct participation in hostilities implies that there is a sufficient causal relationship between the act of participation and its immediate consequences,*” *ibid.*, p. 1453 (§ 4787). No explanation is provided on the eventual difference between a ‘direct’ and a ‘sufficient’ causal relationship.

<sup>8</sup> See for example the [U.S. Air Force Commander’s Handbook](#) (1980, § 2-8) which states that “*rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack.*” The Handbook notes, however, that care of the wounded on land, and the rescue of persons downed at sea or shipwrecked, are protected activities under international law.

<sup>9</sup> This same author defines combat operations as “*any military activities that are intended to disrupt enemy operations or destroy enemy forces or installations*”; GUILLORY, M. E., “[Civilianizing the Force: Is the United States Crossing the Rubicon?](#)”, [Air Force Law Review](#), p. 117.

<sup>10</sup> U.S. Executive Order 12333 on the prohibition of assassination (*ibid.*) stipulates that “*one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military.*” This last criterion is clearly broader than the one proposed by the Commentary since civilians working in the military industry (e.g. civilian scientists occupying key positions in a weapons program that is regarded vital to a nation’s national security) could be considered to be directly participating in hostilities.

<sup>11</sup> [Commentary on AP I](#), *ibid.*, p. 603 (§ 1880).

<sup>12</sup> “*During the course of the discussions several delegations indicated that the expression ‘hostilities’ used in this article [Art. 51] § 3 included preparation for combat and the return from combat. Similar problems arose in Article 44 (Combatants and Prisoners of War) with regard to the expression ‘military deployment preceding the launching of an attack’.*”

provide a precise definition of preparatory operations but simply refers to [Article 44 § 3 AP I](#). Although this provision pertains to a different matter,<sup>13</sup> reference to it may be of interest for this analysis as this provision clearly limits the scope of the terms ‘preparatory to an attack’ or ‘deployment preceding the launching of an attack’ by explicitly mentioning their ‘military’ nature. In this context some authors, while recognizing that “*a combatant commits no offence [ . . . ] if he does not distinguish himself when engaged in such military operations as recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda*”, nevertheless hold that the term military operations ‘preparatory’ to an attack should be construed broadly enough to include “*direct logistical support for units engaged directly in battle such as the delivery of ammunition to a firing position.*”<sup>14</sup> As regards return from combat, [Article 44 § 3 AP I](#), interestingly enough, does not mention the period after an attack. Although this fact indicates that the importance of distinction might be differently evaluated in periods before, during and after an attack,<sup>15</sup> it should not result in hasty conclusions. According to the Commentary to AP I, it seems that civilians returning from combat operations are still considered to be directly participating in hostilities, although there is no indication as to when such participation (i.e. return) ends.

Hostile acts generally involve the use of a weapon but that does not necessarily imply that direct participation in hostilities is limited to such use. The Commentary to AP I holds, for example, that the mere fact of bearing arms is direct participation. It is self-evident that civilians carrying a weapon and clearly indicating their readiness to use it cannot claim immunity from attack. In certain situations, however, the simple fact of carrying a weapon does not necessarily imply a willingness to attack armed forces; carrying a weapon in self-defense is an example.<sup>16</sup> The context in which a person bears arms should therefore be taken into account in determining whether he or she may be directly participating in hostilities. In the same vein, according to the Commentary on AP I, logistical support activities such as “*transportation of arms and munitions, provision of supplies*” should only be considered

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<sup>13</sup> [Article 44 § 3 AP I](#) provides that combatants must distinguish themselves from the civilian population at least while “*they are engaged in an attack or in a military operation preparatory to an attack.*” In situations where such distinction is not possible, combatants nevertheless have an absolute obligation to distinguish themselves by carrying arms openly “*during each military engagement*” and “*during such time as he [a combatant] is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.*” [Article 44 § 3 AP I](#) has give rise to strong objection and is not believed to represent customary international law. However, the controversy is mainly linked to the fact that it grants legitimate combatant status to irregular fighters who follow at least these minimum standards of distinction.

<sup>14</sup> BOTHE, M. PARTSCH, K.J., and SOLF, A., [New Rules for Victims of Armed Conflict](#), Martinus Nijhoff Publishers, The Hague, 1982, p. 252.

<sup>15</sup> If distinction is considered absolutely necessary for the period during which a person's immediate potential to cause harm and damage to the adversary can still be prevented or limited, once an attack ends and no further immediate harm is to be expected, the importance of distinction is apparently not considered absolutely imperative anymore or can at least be balanced against other factors.

<sup>16</sup> In the context of an armed conflict, however, the line between legitimate self-defense and direct participation in hostilities may be extremely difficult to draw. The ICTY addressed this issue in the context of a crime against humanity. The Tribunal referred to the Commission of Experts Established Pursuant to Security Council Resolution 780 which observed, “*It seems obvious that article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms.*” The Commission then provided an example based on the situation in the former Yugoslavia and concluded that “*A head of a family who under such circumstances tries to protect his family gun-in-hand does not thereby lose his status as a civilian. Maybe the same is the case for the sole policeman or local defence guard doing the same, even if they joined hands to try to prevent the cataclysm.*” ICTY, Judgement, The Prosecutor v. Tadic, IT-94-I-T, 7 May 1997, §§ 640-643.

indirect participation in hostilities.<sup>17</sup> But in a statement relating to the use of children during hostilities, the Preparatory Committee for the Establishment of an International Criminal Court specified that the notion of direct participation “*would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.*”<sup>18</sup> According to this statement, logistical activities would not, by their very nature, be excluded from constituting direct participation in hostilities. The criteria would once again depend on the context, in particular on whether such acts are being conducted on the front line or behind it.<sup>19</sup> Finally, intelligence and guarding activities may be mentioned among the acts not involving the use of weapons but which may be - depending on the circumstances - assimilated to direct participation in hostilities.<sup>20</sup>

## **II. Direct participation in hostilities in contemporary conflicts: specific challenges**

Contemporary conflicts have given rise to further complications in regards to defining ‘direct participation in hostilities.’ While an exhaustive review of the issue would go beyond the scope of this short summary, a few examples, including computer network attack and exploitation (1), privatization of armed forces (2) and the so-called “war on terrorism” (3) serve to illustrate some of the major challenges posed. Each of these situations involves an increased intermingling of civilian and military activities making it difficult to determine who is taking a ‘direct part in hostilities’ and what measures should be taken to protect those who do not directly participate.

### **1) Computer Network Attack (CNA) and Computer Network Exploitation (CNE)**

Tentatively defined as “*operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computer and networks themselves,*”<sup>21</sup> CNAs are conducted from long-distance through radio waves or international communication networks.

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<sup>17</sup> [Commentary on the Additional Protocols](#), *ibid.*, p. 901 (§ 3187). This statement is made—it is true—in the specific context of children directly participating in hostilities.

<sup>18</sup> During the March-April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, a proposal was developed which aimed to prohibit “*recruiting children under the age of fifteen years into armed forces or using them to participate in hostilities.*” The words ‘using’ and ‘participate’ were explained in a footnote to provide guidance in interpreting of the scope of this provision. LEE, R. S. (ed.), [The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results](#), Kluwer Law International, The Hague, 1999, p. 118.

<sup>19</sup> A.P.V. ROGERS ([Law on the Battlefield](#), *ibid.*, p. 8) also mentions that a civilian driving an ammunition truck in a combat zone could legitimately be considered as taking a direct part in hostilities. One author has, however, contested this geographic limitation: “*Commentators who argue that otherwise noncombatant conduct, such as providing military transport or logistical support, becomes combatant activities if performed at the frontlines are mistaken in two areas. First, they are using the increased danger inherent with accompanying forces to graft a geographic element onto the law where none exists [ . . . ] Secondly, they fail to take into account the changing nature of technology and weapons delivery. A civilian need no longer be near the front lines to take a direct part in delivering destructive munitions or information*”; GUILLORY, M. E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, *ibid.*, pp. 133-134.

<sup>20</sup> Some military manuals including the [U.S. Naval Handbook](#) (1995, § 11.3) clearly include these activities in direct participation in hostilities. See also the statement by the Preparatory Committee for the Establishment of an International Criminal Court, already referred to in the context of logistical support activities. However, contrary practice was identified. One example is the [Commentary to Article 77](#) AP I (p. 901, § 3187) concerning children, providing that direct participation does not include acts such as “*gathering and transmission of military information.*”

<sup>21</sup> Joint Chiefs of Staff, Joint Doctrine for Information Operations, Joint Publication 3-13, 9 October 1998, p. 88.

While they may not involve direct physical damage, the resulting system malfunctions can be devastating. CNE, namely the ability to gain access to data hosted on information systems and to make use of the system itself, though not of a direct destructive nature, could have equally significant military implications.

Assuming a CNA or CNE falls under IHL, a question arises as to the status of the individuals engaging in such activities: clearly, if these persons are incorporated in the armed forces of a belligerent, their legal status, rights and liabilities are not distinct from combatants engaged in a traditional armed conflict.<sup>22</sup> If, on the contrary, the technicians conducting a CNA are not part of the armed forces, a strong argument could be made that such civilians are directly participating in hostilities. The challenge, however, is to distinguish acts linked to an armed conflict from purely criminal acts. The case of a CNE is even more complex due to the lack of clarity as regards the treatment of ‘classical’ intelligence gathering. A further issue is whether collecting information by computer should be treated differently from other forms of intelligence gathering.

## 2) The ‘privatization’ of armed forces

In an effort to reduce expenses, several armed forces have, since the end of the cold war, increasingly outsourced activities more or less directly linked with the conduct of hostilities. To a greater extent, Private Military Companies (PMCs)<sup>23</sup> therefore replace or support an army or an armed group. There is little doubt that the use of arms by employees of combat PMCs in the context of an armed conflict would be considered direct participation in hostilities. However, grey areas have emerged: for example a contracted job may be described as ‘police activities,’ thereby blurring the nexus between the contracted tasks and the armed conflict.<sup>24</sup> Even if private contractors conducting anti-drug or other anti-criminal activities were considered to be directly participating in hostilities, the level of involvement required for such qualification remains uncertain.

Non-combat PMCs generally perform traditional civilian support roles, including building infrastructure (roads, airfields), providing transportation, billeting and food services. It has been argued that though their placement may put them in danger, their activities should normally not be treated as a direct participation in hostilities.<sup>25</sup> One of the main problems posed with regards to non-combat PMCs concerns military dependence on sophisticated

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<sup>22</sup> The proposal to grant these individuals a status equivalent to persons who accompany the armed forces without being members thereof would probably be rejected on the basis that the type of person listed in [Article 4 § 4 G.C. III](#) are more analogous to computer technicians that keep the machine in order and not those that actually undertake the attack; DOSWALD-BECK, L., “Some Thoughts on Computer Network Attack and the International Law of Armed Conflict,” in: SCHMITT, M., O’DONNELL, B. (eds.), Computer Network Attack and International Law, *ibid.*, 2002, p. 172.

<sup>23</sup> The literature traditionally draws a distinction between so-called ‘Private Military Companies’ and ‘Private Security Companies’ whose tasks are limited to ensuring the protection of various sites and which normally provide services of a civilian nature without increasing the effectiveness of an army or armed group (let alone replacing them). However, the relevance of such distinction in terms of IHL is debatable.

<sup>24</sup> GUILLORY, M. E., “[Civilianizing the Force: Is the United States Crossing the Rubicon?](#)”, *ibid.*, p. 127.

<sup>25</sup> GUILLORY, M. E., “[Civilianizing the Force: Is the United States Crossing the Rubicon?](#)”, *ibid.*, p. 124. However, caution is required in the matter. The U.S. Department of the Air Force Pamphlet entitled Federal Civilian Deployment Guide notes, for example, that “*Civilians accompanying the armed forces and performing duties directly supporting military operations may be subject to direct, intentional attack.*” Although the document does not elaborate on what is included under ‘duties directly supporting military operations’, it could be assumed that - depending on various factors - some of the above listed activities (for example transportation or supply of munitions in or near the front line) would be classified as a direct participation in hostilities.

equipment that has *de facto* made the armed forces reliant on civilian specialists. Far from ignoring this problem, the Commentary on AP I states that “*The increasingly perfected character of modern weapons, which have spread throughout the world at an ever-increasing rate, requires the presence of such specialists (foreign adviser and military technicians), either for the selection of military personnel, their training or the correct maintenance of the weapons.*” The Commentary qualifies such experts as “*neither combatants nor mercenaries, but civilians who do not participate in combat*” unless they take a direct part in hostilities.<sup>26</sup> In accordance with the Commentary, it is therefore safe to say that the civilian status of private companies is not in question if they only provide training or assure the maintenance of the systems in a non-combat context. However, it leaves unanswered the eventual classification of other activities during combat and the degree of involvement necessary to be considered as participating in hostilities.<sup>27</sup> Assuming that by their very nature these systems are intended to harm the enemy either by destruction or through the acquisition of sensitive information, a part of the doctrine considers it self-evident that serving alongside combatants in “*correcting any deficiencies that may arise, and thereby enabling the system to function as intended, can be construed as ‘likely to cause actual harm to the personnel and equipment of the enemy’.*”<sup>28</sup>

### 3) The ‘fight on terrorism’

Until the attacks of 11 September 2001, counter-terrorist operations - at least outside the actual battlefield - were exclusively treated as law-enforcement issues. States, therefore, had the duty to use all feasible measures to arrest and prosecute suspected terrorists rather than targeting them with lethal force. It has been argued, however, that the ‘war on terror’ could lead to a reinterpretation of the rules on targeting. It is clear that non-State actors directly participating in hostilities during an (international or non-international) armed conflict may, for such time as they participate, be lawfully killed or wounded. By analogy, terrorist organizations, though not operating in a traditional armed conflict context, have been assimilated to paramilitary groups whose members do not respect the laws and customs of warfare. In other words, they have been viewed as ‘unlawful combatants’ directly participating in hostilities, consequently subject to direct attack and, if captured, not entitled to POW status. This assimilation raises the practical question of how to distinguish between suspected terrorists and civilians. As one author put it, “*in a war against members of a terrorist organization who wear no uniform, are not obviously engaged in hostilities, and may be found anywhere in the world, the basic act of identifying the enemy is already controversial.*”<sup>29</sup>

Furthermore, the lawfulness of ‘targeted killings’ has been called into question even when they are conducted in the context of an armed conflict. This practice is even more controversial when taking place outside the scope of a traditional armed conflict, as confirmed by the strong diplomatic reactions engendered by the destruction of a car carrying six persons

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<sup>26</sup> [Commentary on AP I](#), *ibid.*, p. 579 (par. 1806).

<sup>27</sup> The Civilian Employee Deployment Guide of the U.S. Department of the Army adopts quite an extensive test: “*Taking part in hostilities has not been clearly defined in the law of war, but generally is not regarded as limited to civilians who engage in actual fighting. Since civilians augment the Army in areas in which technical expertise is not available or is in short supply, they, in effect, become substitutes for military personnel who would be combatants.*”

<sup>28</sup> GUILLORY, M. E., “[Civilianizing the Force: Is the United States Crossing the Rubicon?](#)”, *ibid.*, p. 128. According to the author “*to argue to the contrary would seem akin to suggesting that a shell loader is not a direct participant because someone else is firing the cannon.*”

<sup>29</sup> DWORKIN, A., “[The Yemen Strike: The War On Terrorism Goes Global](#),” in Crimes of War Project (November 14 2002).

- supposedly including a senior terrorist suspect - by a missile fired from an unmanned drone in a remote part of Yemen on 2 November 2002. This operation raised the issue of the line between lawful acts of war against civilians directly participating in hostilities and summary executions in violation of human rights law. It has been suggested that new rules of engagement be adopted for new forms of violence, taking into account intangible factors such as the degree of certainty with which suspects can be identified, their alleged seniority within the terrorist group, and the possibility of detaining them through law-enforcement means.<sup>30</sup>

Lastly, it should be noted that counter-terrorist operations are not necessarily carried out by the armed forces of a state but can also be conducted by special forces or intelligence agencies. The status of these agents may be an issue given that, if they were not lawful combatants, they would have no right to participate in hostilities and their actions could be considered unlawful.

### **III. The legal consequences of a direct participation in hostilities**

In international armed conflicts, combatants have the right to directly participate in hostilities. Unless they violate IHL, their participation must have no penal consequence and in case of capture they benefit from POW status. The situation is more complex concerning civilians taking a direct part in hostilities colloquially called ‘unlawful combatants’ or ‘unprivileged belligerents.’<sup>31</sup> The result of their direct participation in hostilities is loss of immunity from attack (1), however the legal regimes applicable to such civilians in case of capture or detention raises difficult questions (2).

#### **1) The consequence of ‘direct participation in hostilities’ within the rules on conduct of hostilities**

According to Articles [51](#) § 3 AP I and [13](#) § 3 AP II, direct participation in hostilities by civilians automatically entails loss of immunity from attack “*for such time as they take a direct part in hostilities.*”<sup>32</sup> The primary uncertainty in this regard is the duration of the direct participation (the ‘time element’). The Commentary on AP I confirms that direct participation in hostilities only leads to a temporary loss of immunity from attacks: “*It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection and he may no longer be attacked.*”<sup>33</sup> But criticism has been leveled at what some call the ‘revolving door’ interpretation, meaning that a civilian could reclaim the benefit of immunity from attack as soon as he or she has dropped his or her arms. Some have suggested that a solution could be a ‘membership approach,’ whereby the mere fact of being a member of a group directly

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<sup>30</sup> DWORIN, A., “[The Yemen Strike: The War On Terrorism Goes Global](#),” *ibid.*

<sup>31</sup> DÖRMANN, K., “The Legal Situation of Unlawful/Unprivileged Combatant,” *IRRC*, 2003 (849), pp. 46-47.

<sup>32</sup> Although the rule is formulated in a similar manner in the two Protocols, in the absence of combatant status in non-international armed conflict there is a question as to whether the loss of immunity should be treated in the same manner in international or non-international armed conflict. “*This is a consequence of the fact that no one has the ‘right to participate in hostilities’ in a non-international armed conflict (a right which is an essential feature of combatant status) and is in line with the fact that the law of non-international armed conflict does not protect according to the status of a person but according to his or her actual activities*”; BOUVIER, A., SASSÒLI, M., *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 208.

<sup>33</sup> [Commentary on the Additional Protocols](#), *ibid.*, (par. 1944). Practice is quite unambiguous in this regard. See, *inter alia*, the ‘Abella’ Case, Inter-American Commission on Human Rights, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 177–178, 189 and 328.

participating in hostilities would be sufficient reason for loss of immunity.<sup>34</sup> Such a theory might be considered unnecessary in the context of an international armed conflict where precise definitions of combatant and civilian status are available. However, the question may be asked if it would be legally feasible and opportune to accept the membership approach in a non-international armed conflict and under what conditions.

2) Legal consequences of a direct participation in hostilities in case of capture by the enemy

a) Status issues

Under [Article 4](#) § 1 of Geneva Convention IV (GC IV), “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”<sup>35</sup> The scope of this provision is narrowed by specific exceptions provided for in the second paragraph of [Article 4](#) excluding nationals of a state not party to the Convention, nationals of neutral and co-belligerent states in enemy territory, and nationals of co-belligerent states in an occupied territory, assuming that normal diplomatic relations exist in each case. The fact that a civilian has directly participated in hostilities is not mentioned as a ground for exclusion from the protection of GC IV. In addition, [Article 5](#) of GC IV which allows (under strict conditions) for certain derogations from the rights provided by GC IV uses the term ‘protected person’ with regard to those detained as spies or saboteurs, as well as persons suspected of or engaged in activity hostile to the security of the State/occupying power. Therefore, under GC IV, all persons - including those who directly participate in hostilities - are entitled to the protection of its provisions provided they fulfill the nationality criteria and are not covered by GC I to III.

Furthermore, the text of [Article 45](#) § 3 AP I - at least implicitly - confirms that civilians directly participating in hostilities, if they fulfill the nationality criteria, are protected under GC IV. Support for this interpretation can also be found in the recent jurisprudence of the ICTY, military manuals, and legal doctrine.<sup>36</sup>

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<sup>34</sup> “[At the other end of the spectrum is] the view that there is a loss of privileged status as long as the person is a “member” of the group engaged in hostilities. To the extent that the opposing force involved may have been denied combatant status solely as a result of a group characteristic a strong argument may be made that a “combatant like” approach to whether they may be targeted would be appropriate. While criminal law generally does not embrace the notion of culpability on the basis of membership in a group alone combatancy is itself “membership” based. That does not mean in respect of non-state actors that all supporters or even members of such an entity may be involved in the planning for or application of violence as the entity may include military and political components depending on its level of sophistication and its governance structure”; WATKIN, Ken, “Combatants, Unprivileged Belligerents and Conflicts in the 21<sup>st</sup> Century”, HPCR Policy brief <<http://www.ihlresearch.org/portal/ihli/Session2.pdf>> p. 12.

<sup>35</sup> The Commentary on Geneva Convention IV (ICRC, 1958, p. 51) states, “Every persons in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”

<sup>36</sup> “If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV provided that its article 4 requirement are satisfied”; ICTY, Judgement, The Prosecutor v. Delalic et al., IT-96-21-T, 16 November 1998, § 271. For the legal literature, see *inter alia* IPSEN, K., in: FLECK, D. (ed.), The Handbook of Humanitarian Law in Armed Conflicts, Oxford University Press, 1995, p. 301; McCoubrey, H., International Humanitarian Law: Modern Developments in the Limitation of Warfare, Dartmouth, Aldershot, 2nd ed., 1998, p. 137; DAVID, E. Principes de droit des conflits armés, Bruylant, Brussels, 2nd ed., 1999, pp. 397 et ss. G. ALDRICH (“The

Divergent opinions have, nevertheless, been expressed in scholarly writing regarding the applicability of GC IV. Some legal commentators reject the applicability of IHL, including GC IV, to civilians who take a direct part in hostilities though fail to provide a detailed legal justification for their positions.<sup>37</sup> Still other scholars mention the scope of protection granted by IHL (i.e. [Article 75](#) AP I in particular), but nevertheless give the impression that so-called ‘unlawful combatants’ constitute a third category in between combatants and civilians.<sup>38</sup>

#### b) Loss of immunity against penal prosecution

The fundamental difference in terms of the legal consequences for combatants and civilians who directly participate in hostilities is that the latter may be criminally prosecuted for such participation under the domestic law of the detaining state. The question is sometimes asked as to whether domestic criminal prosecution could ensue for the mere fact of directly participating in hostilities or whether the direct participation must involve an act prohibited under domestic law (e.g. murder).

It has also been suggested that the competence of states to punish civilians for participation in hostilities should be limited to an “*act committed in the course of the same mission that ended up in his capture by the adversary [ . . . ] Hence, should the enemy capture [him] at a later stage, it may not prosecute him for the misdeeds of the past.*”<sup>39</sup> The question, therefore, is whether this rule, enshrined in the 1907 Hague Regulations concerning spies and reiterated in AP I for members of the armed forces who have not distinguished themselves from the civilian population as required by [Article 44](#) § 5 could, by analogy, be applied to civilians who directly participate in hostilities.

IHL does not criminalize direct participation in hostilities *per se*. However, using ‘war crime’ as a generic expression for any type of IHL violation, some military manuals list direct participation in hostilities by a non-combatant as an offense against the law of armed conflict.<sup>40</sup> Press accounts often refer to participation in hostilities by civilians as a ‘war

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Taliban, Al Qaeda, and the Determination of Illegal Combatants,” [AJIL](#), Vol. 96, 2002, p. 892) is however less assertive on the matter. For further and more precise references, cf. DÖRMANN, K., “The Legal Situation of Unlawful/Unprivileged Combatant,” *ibid.*, p. 59 (note 36).

<sup>37</sup> For example DETTER de LUPIS, I., [The Law of War](#), Cambridge University Press, 2000, p. 136; GREENWOOD, C., “International law and the “war against terrorism,” [International Affairs](#), 2002, p. 316; Report on Terrorism and Human Rights, Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 74.

<sup>38</sup> BAXTER, R. R., “So-called ‘Unprivileged Belligerency’: Spies, Guerillas and Saboteurs,” [B.Y.I.L.](#), 1951, pp. 328 and 336-338. ROBERTS, A., “The Laws of War in the War on Terror,” U.S. Naval War College, International Law studies, Newport, RI, 2003, p. 31 (to be published).

<sup>39</sup> DINSTEIN, Y., “The Distinction between Unlawful Combatants and War Criminals,” *in*: DINSTEIN, Y. (ed.), [International Law at a Time of Perplexity](#), 1989, p. 112.

<sup>40</sup> See for example Canada, [LOAC Manual](#) (1999), p. 16-4, § 21(g); New Zealand, [Military Manual](#) (1992), § 1704(5); Nigeria, [Manual on the Laws of War](#) (undated), § 6. UK, [Military Manual](#) (1958), § 626. Such an interpretation has also been suggested by the United States Military Tribunal at Nuremberg when it stated that “*the rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars (emphasis added). Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.*” Hostage Trial of 8 July 1947-19 Feb. 1948, [Law Reports of Trials of War Criminals](#), United Nations Wartime Commission, Vol. XV, 111 (London, 1947-49). In that respect, it should be mentioned that the Charter of the International Military Tribunal (London, 8 August 1945) define the notion of war crime as encompassing violation of the law or customs of war (Article 6 b). The United States Supreme Court also addressed this issue in [Ex Parte Quirin](#), (317 U.S. 1 (1942)).

crime.’ It is unclear, however, whether such statements use the term ‘war crime’ in the generic sense described above, or whether they reflect an understanding of the term as indicating a serious violation of IHL, leading to the possible application of the principle of universal jurisdiction. Any interpretation that would result in the conclusion that mere participation in hostilities by civilians could be subject to the principle of universal jurisdiction would be highly contested, as no provision of IHL treaty law enables such an interpretation.