Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice

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I. Introduction and Overview

A quick glance at the Geneva Conventions and their Additional Protocols is sufficient to reveal that the treaty rules governing the conduct of parties to a non-international armed conflict (NIAC) are less developed than those governing parties engaged in international armed conflicts (IACs). The total number of treaty provisions governing the latter outstrips the number governing the former by many dozens. While there is a range of historical and political reasons for this, there is also a core practical question that appears to have hampered the development of the law of armed conflict (LOAC) with respect to NIACs: How do we identify the specific actors to whom the rules in this area would apply?

Finding a satisfying answer to this question—which in a variety of ways requires us to translate from familiar concepts and categories in the world of international

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
Toward a Limited Consensus on the Loss of Civilian Immunity in NIAC

armed conflict into the world of non-international armed conflict—is both very difficult and critically important. It is very difficult because in NIAC the amorphous, clandestine nature of the organizations with which we are dealing—and the often mercurial nature of the relationship between individuals and these organizations—challenges the instinctive desire that lawyers have to draw tight parallels between the clearly defined actors with which we are used to dealing in IAC (including uniformed soldiers fighting on behalf of often declared enemies with legal personality and right authority) and the muckier ones that we are required to deal with in NIAC. The parallels are there but frequently they are not as tidy as we want them to be, and operators will tell us that if we define categories too rigidly, we will impede their ability to meet the threat they are facing. Yet, if they are too loosely drawn, then there is a risk of sanctioning deprivations of life and liberty that will be criticized as illegitimate and arbitrary.

Unsurprisingly, efforts to develop a clearer answer to this question have been at the center of some very important legal conversations in recent years. In Guantanamo habeas litigation, the U.S. government has been required to articulate in numerous pleadings how to assess whether someone is “part of” al Qaeda, the Taliban or associated forces, and the U.S. federal courts (in particular the District of Columbia (D.C.) Circuit) have built up some jurisprudence in this area. There have also been efforts to synthesize expert opinion—notably, if not fully successfully, in the International Committee of the Red Cross’s (ICRC’s) Interpretive Guidance⁴ that was released in 2009. Finally, and most significantly for purposes of the emergence of shared international norms, States have been talking to each other about their experience, some of which is of course shared experience, in places like Afghanistan, Iraq and Libya.

This article will touch briefly on the ways in which the conversation about when an individual loses protection from attack through membership in an organized armed group (and related questions of what it means to take direct part in hostilities) have developed in the course of the last several years. In so doing, it will underscore that the development of the law in this area remains for the time being largely in the hands of States, and, in particular, their executive branches. It will also give a sense of where like-minded States with which the U.S. government works particularly closely have reached consensus in this area, as well as identify some areas where there remains a range of views. To keep the scope of this exercise manageable, the paper will keep a narrow focus on the threshold for membership in organized armed groups and direct participation in hostilities on the non-State side of a NIAC. It will not address a number of important related questions that also have a bearing on the question of when individuals lose immunity from being made the object of attack in non-international armed conflict, including questions about the
point at which armed violence can be deemed an armed conflict, the level of cohesion that is required in order to deem an organization an “organized armed group,” the circumstances under which an organized armed group can be said to be engaged in armed conflict, the geographic scope of armed conflict and the circumstances in which legal rules outside the law of armed conflict may be relevant.

II. Guantanamo Litigation

When in June 2008 the Supreme Court decided in the Boumediene case\(^2\) that Guantanamo detainees would have an opportunity to challenge the legality of their detention in U.S. federal court, without addressing the standard for who could be detained, it left the lower courts poised to engage in a sustained lawmaking exercise with potentially significant implications for the question of who forms part of a non-State organized armed group (like al Qaeda, the Taliban or their associated forces) that is engaged in an armed conflict against a State.

The issue came pointedly to a head when, shortly after the present administration came into office, Judge Bates asked the government to file a brief in the Hamilby case\(^3\) describing its detention authority under the 2001 Authorization for the Use of Military Force (AUMF).\(^4\)

The U.S. government complied by filing its brief of March 13, 2009, which argued that (i) when giving content to the broad language of the AUMF the U.S. government, consistent with the Supreme Court’s 2004 Hamdi decision,\(^5\) would look to the principles of the law of armed conflict, and (ii) because of the lack of codification in the law of armed conflict relating to non-State actors it would sometimes be necessary to draw analogies to the international laws of war applicable to international armed conflicts between States. The brief then asserted (in relevant part) that when viewed through this lens the U.S. government had the authority in the present conflict to hold individuals who were “part of” or “substantially supported” al Qaeda, the Taliban or associated forces, but left to be explored in future cases what the precise contours of those terms would be.

As of mid-2011, two years (and roughly fifty trial court and appellate decisions) later, what do we see? As concerns the topic of this article, one thing that appears to have emerged is an increasingly clear picture that the courts are unlikely to become the laboratory in which the metes and bounds of armed group membership are worked out. Initially, the district courts sought to draw parallels between armed groups and traditional armed forces in wrestling with the question of how LOAC ought to apply. Notably, the 2009 Hamilby (Judge Bates)\(^6\) and Gherebi (Judge Walton)\(^7\) opinions took the view that although it was possible to reach the conclusion that LOAC permitted the detention of certain individuals working...
Toward a Limited Consensus on the Loss of Civilian Immunity in NIAC

within the al Qaeda structure based on status, it was necessary that they be part of the command structure in order for this to be the case. There was arguably some distance between these two opinions on the question of whether the command structure must be within the military wing of the armed group, and how the issue of “support” should be addressed for purposes of determining status (either treating it as contributing to membership analysis or treating it as irrelevant), but they were operating very much within the LOAC framework, as were later trial court opinions that may have varied in their interpretation of LOAC but essentially accepted it as the analytic framework.

This has decidedly not, however, been the case at the appellate court level, where relevant decisions are marked in part by the following characteristics: First, while the law has not been entirely settled yet, at least one panel has, in the Bihani case, overtly dismissed the importance of international law in interpretation of the AUMF in an opinion that, although effectively overruled by an en banc decision that described this feature of the panel decision as dictum, marks a disinclination to use the international law of armed conflict as a tool with which to excavate the meaning of the AUMF. Second, although the appellate court continues to offer its views about what sorts of fact patterns would suffice in its views to establish detention authority for purposes of the AUMF, commentators have noted (correctly in my view) that the Circuit Court’s approach to the definition of who may be detained has been far less important to the outcome of cases than its focus on evidentiary issues. Professor Stephen Vladeck noted in May 2010 that although he found the D.C. Circuit caselaw governing the scope of the government’s detention power to be troubling, in his view “[i]t has not yet had a meaningful impact on any individual cases. In marked contrast is the D.C. Circuit’s jurisprudence concerning the government’s burden of proof in post-Boumediene habeas cases, and how that burden should affect district court assessments of the facts of individual detainees’ claims.” Third, as the D.C. Circuit has increasingly focused on what is required for the government to meet its evidentiary burden, its rulings in this area have had the effect of creating a substantial zone of deference for executive branch judgment. In the al-Adahi decision, the Circuit Court rejected trial court views that items of evidence must rise or fall on their own, instead requiring that they be looked at as a mosaic in which suspicious data points are taken as corroborating each other even if not fully proven on their independent merits. And although “preponderance of the evidence” continues to be the governing standard, some Circuit judges have suggested that a lower standard might be appropriate.

If the D.C. Circuit’s caselaw indicates a disinclination on its part to decide detention decisions based on a fine parsing of LOAC, and therefore to become a significant engine driving refinements to the U.S. perspective on that body of law,
then it is hardly clear that the Supreme Court will be any more eager to wander into these thickets. To be sure, in the past, the Supreme Court has very much been the final word on the extension of key rights and privileges to Guantanamo (as was the case in Rasul (2004),12 Hamdan (2006)13 and Boumediene (2008)). There is reason, however, to believe that the Court may not wade in so dramatically on the issues being addressed in the present litigation. The composition of the Court has changed since the pathbreaking decisions of 2004–8 (including through the addition of Justice Kagan, who, because of her involvement as Solicitor General, may be recused from a number of cases that would present the Court with core detainee status questions) and so have the atmospherics. Criticism of review procedures and treatment issues—issues that may have helped draw the Court’s attention in the past—have largely been addressed over the past few years through a combination of judicial decisions (in particular the confirmation that Common Article 3 applies to al Qaeda detainees in the Hamdan decision, and the extension of habeas to Guantanamo in the Boumediene decision) and executive acts (including the treatment guarantees offered under Executive Order 13,491).14 Whether a set of facts or an issue of law might arise that the Court considers in need of its review remains to be seen, but it would not be surprising if in light of the above the Court were to continue to maintain its posture of reserve.

It bears mention that the judicial review of Guantanamo detainees has occurred in the detention context, and that there are questions about whether issues relating to targeting in the context of an armed conflict would even be justiciable. Even if they were, however, the courts seem to have placed their decisions in a framework where it appears that they are essentially creating a broad zone of deference for the exercise of reasonable military judgment. In its current form, it is somewhat difficult to draw from the caselaw more than broad guidance about the boundaries of that zone, and there is a great deal that is left unsaid about the specific factors that a specific decision maker in a specific set of circumstances should weigh in taking a targeting decision. For at least the time being, then, the core issues remain very much for the executive branch to work through.

III. Experts’ Processes (the ICRC Report)

If the D.C. Circuit has created a de facto zone of deference around military decision making, the same cannot so readily be said of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities. Because the report has been much discussed, it will be addressed here only briefly with the following few observations.
Toward a Limited Consensus on the Loss of Civilian Immunity in NIAC

By way of background, in 2003, the ICRC (together with the Asser Institute) mounted an effort to provide guidance on the question of when civilians lose their immunity from attack in both international and non-international armed conflict. They convened an experts group to study the question and produce a report. The process was guided by, among others, Nils Melzer, who has done his own scholarly work on the issue of targeted killings. Among the main findings in the report were that individuals who perform a “continuous combat function”—i.e., a role that involves direct participation in hostilities on a persistent, non-sporadic and non-spontaneous basis—on behalf of the military wing of an organized armed group that is party to a conflict become targetable on the basis of their status as “members” of the organized armed group until their status changes. With regard to direct participation in hostilities, the report also found that three components must be present in order for an action to constitute direct participation in hostilities: a threshold of harm must be met; there must be causation; and there must be a “belligerent nexus”—i.e., a sufficient connection between the action and the armed conflict. Each one of these criteria was explored at some length, and the report set forth lists of activities that would, or would not, satisfy the criteria as conceived by the report.15

The ICRC effort produced a report that, although a contribution to the literature in this area, has generated a fair amount of criticism, and has not become the gold standard that might originally have been hoped for. There were some major issues over content. As has been much discussed, the report included a section arguing that there was a legal foundation for the principle that militaries must use the least harmful means in addressing legal targets, which generated great concern among certain prominent experts who participated in the process, who believed that it lacked a basis in law or practice, and was not consistent with what had been discussed in the drafting process. From the operational perspective, the feedback was that the report was too rigid and complex, and did not give an accurate picture of State practice or (in some respects) of a practice to which States could realistically aspire. Many of the experts who had participated in the ICRC process declined to be named in the report, and the U.S. government in its habeas filings made clear that it did not regard the study as an authoritative statement of the law.

In the final analysis, it appeared that the “experts’ process” through which the product developed could not substitute for the difficult, painstaking and necessary process of allowing States to develop the law in areas such as this.

Nevertheless, notwithstanding the issues that have been raised with respect to the ICRC report, we should not lose sight of two very important contributions that it made—one substantive and one procedural. Substantively, it is critical to recognize that the study is in some ways pathbreaking in the level of recognition that it
gives to the concept that individuals who become members of organized armed
groups lose their civilian status and, while members, can be targeted on the basis of
their status alone for the duration of a NIAC. Moreover, procedurally, the report
has helped to catalyze important discussion among the U.S. government and its
partners about the topics that are addressed in the report. The emerging spectrum
of views on this subject is addressed in the following section.

IV. State Practice

When the ICRC report emerged, one reaction that at least some of its readership
offered was that it would take some time for States to digest its contents and pro­
vide some feedback on where it tracked—and did not track—State practice. As
noted above, this process has in fact been under way and, based on conversations
with interlocutors in a number of partner governments, it is possible to offer a gen­
eral assessment of the spectrum within which the views of the United States and a
number of its closest partners fall. These observations draw from personal and pro­
fessional exchanges over the past several years, but are relayed in the author’s per­
sonal capacity.16

A. Overarching Considerations

There is a strong consensus that the point of departure for any analysis of when
civilians become liable to attack under LOAC is the customary principle of distinc­
tion. Consistent with this principle, both Additional Protocol I17 (in Article 51(3))
and Additional Protocol II18 (in Article 13(3)) provide that in armed conflict civil­
ian s enjoy protections from being made the object of attack “unless and for such
time as they take a direct part in hostilities.”19 Moreover, with respect to NIAC, the
commentary on Article 13(3) additionally explains that “[i]f those who belong to
armed forces or to organized armed groups may be attacked at any time. If a civilian
participates directly in hostilities, it is clear that he will not enjoy any protection
against attacks for as long as his participation lasts.”20

Taken together, the Additional Protocols and the quoted passage from their
commentary suggest that in armed conflict the following individuals (in addition
to the members of regular armed forces who are liable to attack) relinquish their
protection under international humanitarian law from being made the object of
attack: (i) individuals who become members of organized armed groups (i.e., those
referred to in the first sentence of the above-quoted passage from the Article 13(3)
commentary) and (ii) civilians who are taking direct part in hostilities without be­
longing to an armed force or organized armed group (i.e., those referred to in the
second sentence of the above-quoted passage).21 Taking into account that current
toward a limited consensus on the loss of civilian immunity in NIAC

treaty law does not provide specific guidance on what it means to be a member of an organized armed group, or to take direct part in hostilities, the following principles emerge from Article 51(3) of Additional Protocol I and Article 13(3) of Additional Protocol II, and are supported by their Commentaries:

- A critical difference between individuals who lose their protection from attack because of their membership in an organized armed group and individuals who lose such protection as a result of direct participation in hostilities without belonging to an organized armed group is that an individual who loses protection because of membership in an organized armed group may be attacked "at any time." Because his or her membership deprives him or her of protection, such an individual does not then need to be actually involved in particular hostilities to be lawfully attacked at any point in time.22 By contrast, a civilian who is not a member of an organized armed group and is taking direct part in hostilities loses protection from attack only "for as long as his participation lasts."

- The determination whether an individual is a member (or ceases to be a member) of an organized armed group or is taking direct part in hostilities should be taken by the decisionmaker based on information reasonably available to him or her at the time and taking into account the considerations set forth below.

- Individuals making targeting decisions based on a determination that an individual is a member in an organized armed group, or is taking direct part in hostilities, may not act in the absence of sufficient confidence in the information establishing the factual basis for the determination.23 When there is insufficient confidence in the information, the determination should not be made unless and until such time as sufficient information to make a reasonable determination has been identified. Depending on the facts, deferral of one determination (e.g., that an individual is a member of an organized armed group) need not foreclose the other (e.g., that an individual is directly participating in hostilities).

B. Membership in Organized Armed Groups

As to whether an individual has become a member of an organized armed group and therefore is liable to attack at any time, there is a range of views among the United States and its partners on the precise "test" that should be applied to determine membership. Some partners appear to believe that the test for membership must be based fundamentally on the function performed by the individual in question. But there is also a view that, because of the clandestine and decentralized nature of certain organized armed groups, it may be difficult to discern a command structure that is clearly analogous to the structures that would be found in State military, and that it is accordingly important to be cautious about focusing too
Stephen Pomper

stringently on functions that can be analogized to those performed in a traditional command structure. Notwithstanding this spectrum of views about how to define the membership test, there is a shared sense that the following factors may bear on such a determination, with the precise weight given to any of these factors dependent on, among other things, the test that is applied:

- The extent to which an individual performs a function on behalf of an organized armed group that is both analogous to a function traditionally performed by a member of a State military who is liable to attack and that is performed within the command structure of the organization (i.e., the individual is either carrying out or giving orders to perform such a function). Examples of activities that would likely qualify include those that would constitute combat, combat support and combat service support functions if performed for a regularly constituted armed force and carrying arms openly, exercising command over the group or one of its units, or conducting planning related to the conduct of hostilities.

- The frequency of the individual’s preparation, command or execution of operations amounting to direct participation in hostilities and the intensity of the damage or harm likely to be inflicted by such participation.

- Other similar factors determined in the reasonable military judgment of the decisionmaker to demonstrate an individual’s integration into the organized armed group, such as the adoption of a rank, title or style of communication; the taking of an oath of loyalty; or the wearing of a uniform or other clothing, adornments or body markings that mark out members in the group—in each case in a context and manner indicating that these acts of identification reliably connote meaningful assimilation into the group.

Relevant factors in determining that an individual has ceased to be a member of an organized armed group include the amount of time that has passed since that individual has taken relevant action on behalf of the group in question, and whether he or she affirmatively has disassociated himself or herself from the organized armed group. Decisionmakers should base these determinations on the standard of reasonableness in the prevailing circumstances.

C. Direct Participation in Hostilities

With respect to determining what it means to take “direct part in hostilities,” as a threshold matter there seems to be a common view that direct participation in hostilities stands in contrast to support by a general population to a nation’s war effort. Civilians who are contributing to a nation’s war effort accordingly do not by dint of this alone lose their protection. Any determination that a civilian is taking part in hostilities (and thus loses immunity from being made the object of attack) will be
highly situational and needs to be made by a decisionmaker taking the following considerations into account:

- **Nature of the harm:** Is the individual’s activity directed at (i) adversely affecting one party’s military capacity or operations or enhancing the capacity/operations of the other, or (ii) killing, injuring or damaging civilian objects or persons?

- **Causation/integration between action and harm:** Is there a sufficiently direct causal link between the individual’s relevant act and the relevant harm, or does the act otherwise form an integral part of coordinated action resulting in that harm? (Although it is not enough that the act merely occurs during hostilities, there is no requirement that the act be only a single causal step removed from the harm.)

- **Nexus to hostilities:** Is the individual’s activity linked to an ongoing armed conflict and is it intended either to disadvantage one party, or advance the interests of an opposing party, in that conflict?

The period during which an individual can be deemed to be directly participating in hostilities is generally viewed to include the period during which that individual is deploying to and returning from the hostile act, but there is a range of views about whether the acquisition of specific materials necessary for an attack might under certain circumstances be considered part of the deployment period, and whether the period in which an individual goes into hiding following an attack might under certain circumstances be considered part of the return. There is also a range of views about whether each of the foregoing three factors must be present in order to make a determination that an individual is directly participating in hostilities (or whether a “totality of the circumstances” approach should govern), and about whether certain types of activities must be excluded from the definition of direct participation in hostilities (e.g., financial support). Moreover, there is a range of views concerning the relevance of geographic and temporal proximity of an individual’s actions to particular hostile acts in ongoing hostilities.

At some point, as noted above, the frequency or intensity of an individual’s direct participation may establish that the individual is a functional member of an organized armed group, and there is also a perspective that persistent direct participation in hostilities may establish the individual in question to be continuously liable to attack for the period of persistent activity even if it is insufficient to establish functional membership. Accordingly, where an individual takes direct part in hostilities, it is important to determine whether the nature and frequency of the direct participation is such that the loss of protection lasts only for the duration of specific acts, or is sufficiently persistent that the individual is liable for attack for a wider period, including the periods between the specific acts.
V. Conclusion

The above description of views suggests in some ways a clustering by the U.S. government and its partners around certain views that are put forward in the ICRC study on direct participation in hostilities. There is increasing convergence, for example, around the notion that there are two roads to loss of immunity—membership and direct participation in hostilities. Among the considerations that bear on membership, there is growing consensus that functional factors echoing some of the factors from the ICRC’s “continuous combat function test” are at least relevant. Moreover, the factors that a number of States look at in assessing whether an action constitutes direct participation in hostilities parallel, to some extent, the three factors that were captured in the ICRC study.

There are, of course, important differences between what is described in this article and what is described in the ICRC study. The tests and factors described here, reflecting States’ operational experience, are less rigidly constructed. They do not have the complexity of the tests and factors articulated in the ICRC document. And there is no reference to the ICRC’s suggested rule that parties must use the “least harmful means” for subduing opponents as described in Section IX of the Interpretive Guidance—a test for which it is difficult to detect much, if any, support among the United States and like-minded partners.

But, as noted above, it is increasingly clear that it will be State practice—rather than international expert groups or the courts of any one country—that will drive the development of a common view within the international community. We are already seeing the outline of a limited consensus emerging, and, as we move forward, we may well see an increasing level of accord among certain like-minded States on the question of how individuals lose immunity from being made the object of attack in the context of non-international armed conflicts.

Notes

Toward a Limited Consensus on the Loss of Civilian Immunity in NIAC

8. Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011). Notably, a different panel of the D.C. Circuit looking at the al Warafi case suggested somewhat greater receptivity to applying the law of armed conflict when, in remanding the case to the district court, it asked the lower court to “address whether Al Warafi was permanently and exclusively medical personnel within the meaning of Article 24 of the First Geneva Convention…, assuming arguendo [its] applicability.” Al Warafi v. Obama, 409 F. App’x 360, 361 (D.C. Cir. 2011).


10. Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010).

11. The panel in the Almerfedi decision (which reversed a district court’s decision to grant the habeas petition based on evidence that the detainee had spent a few months at the guesthouse of an al Qaeda-associated organization in Pakistan and had traveled in an eastward direction within Iran (i.e., toward Afghanistan and away from Europe) carrying several thousand dollars) appeared to suggest that a “minimum threshold of persuasiveness” or “credible evidence” standard for an initial showing, which could be rebutted by petitioner, might be sufficient under the Supreme Court’s Hamdi ruling. Almerfedi v. Obama, 654 F.3d 1, 9–10 (D.C. Cir. 2011).


15. INTERPRETIVE GUIDANCE, supra note 1, at 22–26, 48–64.

16. As indicated above, there are multiple issues not addressed here that may have a bearing on the lawfulness of targeting operations, including the threshold at which armed violence can be deemed an “armed conflict,” the level of cohesion that is required in order to deem an organization an “organized armed group,” the circumstances under which an organized armed group can be said to be engaged in armed conflict, the geographic scope of armed conflicts and the circumstances in which legal rules outside the law of armed conflict may be relevant.


21. The question of whether an individual is liable to attack for either reason is separate from the question of whether that individual should benefit from combatant immunity, and also the
question of whether an individual may be detained (as the scope of detention authorities in armed conflict is different from the scope of targeting authorities).

22. As discussed below, there is a range of views on whether individuals who pass the membership threshold lose their civilian status (and are therefore unprivileged belligerents) or remain civilians but are deemed to be continuously taking a direct part in hostilities and accordingly continuously lose their protections from being made the object of attack.

23. There is a range of views about the specific level of doubt that would preclude action from being taken.

24. There is a range of views with respect to the significance of combat support and combat service support in assessing membership.

25. There is a range of views with respect to the significance of combat support and combat service support in assessing membership.

26. There is a range of views about the extent to which indications of formal membership (such as swearing an oath of loyalty) may be considered.

27. Under this view, factors relevant to whether an individual ceases to be liable to attack because of direct participation in hostilities include (but are not limited to) the amount of time that has passed since the last relevant act, and whether there are concrete and verifiable facts or persuasive indicia that the individual has affirmatively foresworn taking a direct part in hostilities.