

VI

The Status of Opposition Fighters in a Non- International Armed Conflict

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The treaty law applicable to the classification of participants in a non-international conflict is limited to Common Article 3 to the 1949 Geneva Conventions¹ and the 1977 Additional Protocol II.² The former is generally deemed reflective of customary international law, whereas the latter is not (although certain individual provisions thereof certainly are).³ Other treaties apply during non-international armed conflicts, but do not bear on the issue of classifying those involved in the conflict.⁴

Common Article 3, which appears in each of the four Geneva Conventions, provides no specific guidance as to who qualifies as a “Party to the conflict,” although subsequent case law has clarified that the article encompasses conflict at a certain level of intensity that occurs between a State’s armed forces and organized armed groups, or between such groups.⁵ Textually, the article merely refers to “persons taking no active part in hostilities,” including “members of the armed forces” who are *hors de combat*.⁶ The reference is somewhat useful in that it suggests a normative distinction between those who actively participate in a non-international armed conflict and those who do not. Yet, the failure to address party status

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The Status of Opposition Fighters in a Non-International Armed Conflict

directly is unfortunate, for it begs the question of when non-State individuals or groups qualify as a party. Complicating the issue of participant classification is the fact that Common Article 3 makes no mention of the category “civilians.”

Additional Protocol II contains slightly more granularity in its provision on the instrument’s material field of application. Article 1 extends coverage to “all armed conflicts” between the armed forces of a State party to the Protocol and “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁷ This is a higher threshold of applicability than that of Common Article 3 in two regards.⁸ First, it does not include conflicts that are solely between organized armed groups; a State must be involved.⁹ Second, the group in opposition to the government must exercise a certain degree of control over territory. The higher thresholds are not dealt with in this chapter, as they bear on the law that applies to a conflict, not on the status of its participants. What is significant with regard to classification of participants, though, are the references to dissident armed forces and organized armed groups.

Additional Protocol II also adopts the notion of “civilian,” most notably in Article 13 on the “protection of the civilian population.” That article extends “general protection against the dangers arising from military operations” to civilians, and specifically prohibits both attacks against them and any actions intended to terrorize the civilian population, but withdraws said protection “for such time as they take a direct part in hostilities.”¹⁰ Unfortunately, Additional Protocol II, in contrast to its international armed conflict counterpart, offers no definition of the term “civilian.”¹¹

Taking the two treaties together, and in light of Common Article 3’s customary status, it can be concluded that two broad categories of non-international armed conflict participants lie in juxtaposition: civilians and organized armed groups. The former can be subdivided into those who directly participate in hostilities and those who do not. Organized armed groups consist of a State’s armed forces, dissident armed forces or “other” organized armed groups.

This chapter examines the three types of “opposition fighters”—dissident armed forces, other organized armed groups and civilians directly participating in hostilities. A companion contribution to the volume deals with the status of government fighters. The chapter does not address the criteria for the existence of a non-international armed conflict, the subject of other contributions, except as that topic bears on classification of participants.¹² Accordingly, it does not explore such contentious topics as whether a non-international armed conflict can exist during a belligerent occupation, the legal status of a conflict with

transnational terrorists, internationalization of a conflict through intervention of another State or external State control of insurgent groups. Rather, assuming a non-international armed conflict (whatever form it takes), it asks how opposition force participants in the conflict are to be classified.¹³

The significance of classification is limited. For instance, the international armed conflict concept of combatancy and the related notion of belligerent immunity do not exist in non-international armed conflicts.¹⁴ Members of the opposition forces may be prosecuted for any acts that violate domestic law, even if they are not violations of the law of armed conflict (LOAC), as is the case with attacking members of the armed forces.¹⁵ In light of the absence of combatancy in a non-international armed conflict, this chapter has adopted the term “fighters” in lieu of “combatants” to refer to those who participate in the conflict.¹⁶ Similarly, there is no prisoner of war regime in the context of a non-international armed conflict, although, as explained in the chapters on detention, certain basic protections do inure to the benefit of detainees in these conflicts.

The key consequences of classification lie in the law of targeting, for classification determines whether LOAC prohibits an attack on an individual during a non-international armed conflict.¹⁷ To the extent no prohibition exists on attacking persons with a particular classification, harm to an individual within that group plays no role in proportionality calculations (except as military advantage) and need not be considered when determining the precautions that attackers are required to take during attacks to avoid harming civilians.¹⁸ As will become apparent, the targetability of the various categories of opposition fighters is a matter of some contention in LOAC circles.

Before turning to an examination of the various categories of opposition fighters, it should be briefly noted that if the forces of another State intervene on behalf of the opposition, an international armed conflict ensues between that State and the State against whom the pre-existing rebellion is under way; the conflict has been internationalized.¹⁹ Unless the external State exercises a sufficiently high level of control over the opposition forces, a non-international armed conflict continues between those forces and their government.²⁰ Because the external State’s forces are involved in an international armed conflict, their status, which would be that of combatants, is not examined below.²¹

Individuals Who Are Not Members of a “Traditional” Opposition Force

As a general rule, individual criminals and purely criminal groups do not constitute “parties” to a non-international armed conflict, regardless of whether they engage alone in acts of violence against the government (or non-government

The Status of Opposition Fighters in a Non-International Armed Conflict

organized armed groups) or operate in the midst of an ongoing non-international armed conflict. Since they neither are a party nor operate on behalf of one, domestic law and international human rights norms will usually govern actions taken against them.

The official International Committee of the Red Cross (ICRC) commentary on Common Article 3 suggests that the drafters intended to preclude its applicability to common criminality. Early in the drafting process, a proposal to extend the 1949 Geneva Conventions to “all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties”²² was met with objection on the basis that it might be interpreted as applying to situations involving “no more than a handful of rebels or common brigands.”²³ Further concern was expressed about the “risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as ‘acts of war’ in order to escape punishment for them.”²⁴ According to the commentary, numerous delegations concluded that “[t]he expression [not of an international character] was so general, so vague, that . . . it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry.”²⁵

Proponents of the text in question were sensitive to these concerns, responding that “insurgents . . . are not all brigands” and “the behaviour of the insurgents in the field would show whether they were in fact mere felons, or, on the contrary, real combatants who deserved to receive protection under the Conventions.”²⁶ The ICRC’s non-binding and non-exclusive list of sample criteria for non-international armed conflicts, by making reference to “the Party in revolt against the *de jure* Government” and “insurgents,” adopts the same position,²⁷ one likewise strengthened by the ICRC *Commentary*’s use elsewhere of the term “rebel Party.”²⁸

As these examples illustrate, the law of armed conflict traditionally envisioned non-international armed conflict as consisting of only those activities evidencing some sort of politically motivated challenge to State authorities in order to attain political control and authority or displace those of the government. However, the evolving nature of criminality has brought this traditional understanding into question.

Consider the criminal gangs active in Colombia and Mexico.²⁹ They field forces today that often outgun the regular armed forces. Unlike brigands, bandits and other criminals who merely take advantage of the instability characterizing armed conflict, these gangs directly challenge State authorities in order to create zones in which they can with impunity pursue their criminal activities. The respective governments must resort to military force to counter the organizations, civilians are

placed at great risk from the ensuing hostilities and criminal gangs often control wide swaths of territory.

In other words, these are situations in which criminal gangs are highly organized and conduct hostilities with the government at a level of intensity consistent with the existence of a non-international armed conflict. There is little to distinguish them from the *Commentary's* description of Common Article 3 non-international armed conflicts as “armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.”³⁰ To the extent that the law of non-international armed conflict frees States to deal militarily with high-order political violence through application of LOAC conduct of hostilities rules, the same rationale would justify application to sufficiently organized and intense criminal activity directed against the State. Such an interpretation would be consistent with the assertion in the commentary on Common Article 3 that “the scope of application of the Article must be as wide as possible.”³¹ Accordingly, it is at least arguable that in light of the context and nature of the criminal armed activities States face today, imposing a political motivation requirement, in addition to organization and intensity, for qualification as a non-international armed conflict makes little normative or practical sense.

Should members of a criminal group or individual criminals become involved in a non-international armed conflict *on behalf of* one of the parties, they would qualify as members of an organized armed group or direct participants in hostilities, respectively, as those appellations are described below. With regard to groups, their activity in support of the party, considered as a whole, would have to constitute what is in a sense “group participation in hostilities” before qualifying as an organized armed group involved in a non-international armed conflict. Key factors in such an assessment include the nature of the group’s activity and its nexus to the conflict. For instance, if a dissident armed force that controls territory allows a criminal group to engage in criminal activities in exchange for conducting attacks on the State’s armed forces, guarding its military facilities or providing logistics for its combat operations, the criminal group would be operating on the dissident group’s behalf and therefore qualify. By way of contrast, merely paying a “tax” on production or transshipment of drugs to an organized armed group in control of an area, as is the case in Afghanistan with certain narcotics organizations, would not render the criminal group an organized armed group.³²

The Status of Opposition Fighters in a Non-International Armed Conflict

Dissident Armed Forces

The most straightforward category of opposition forces is dissident armed forces. As noted, Common Article 3 and Additional Protocol II both utilize the term “armed forces,” the former with regard to protections that attach once members thereof are *hors de combat*, the latter in its provision on material field of application. The context of the Common Article 3 reference clearly implies the possibility of “armed forces” on both sides of a non-international armed conflict, since the relevant provision applies to “each Party to the conflict.”³³ This interpretation becomes express with Additional Protocol II’s reference to “dissident” armed forces.

In the latter instrument, the phrase “dissident armed forces” is used in contradistinction to “other organized armed groups.” On this basis, it might be argued that “other organized armed groups” constitutes a separate category from dissident armed forces, a point with which the author disagrees since there is no meaningful difference in the legal regimes governing the detention or targeting of the two categories. However, acknowledging that some commentators distinguish among various members of an “other organized group” with regard to targeting, a point to be discussed, this chapter treats dissident armed forces and other organized armed groups separately for the sake of analysis.

What is clear is that dissident armed forces do not attain civilian status by virtue of their break from the State’s regular military. According to the ICRC’s 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities*,

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.³⁴

While other aspects of the *Interpretive Guidance* proved controversial, this text elicited no serious objection from the international experts participating in the drafting process.³⁵

Yet, merely having been members of the armed forces of a State does not suffice to qualify individuals as members of a dissident armed force. Only breakaway units that retain some degree of their original organizational structure qualify.³⁶ Fighters who are former members of the armed forces but have not remained with their units (such as deserters) are either members of other organized armed groups or civilians directly participating in hostilities.

Near-universal consensus exists that dissident armed forces, like members of the State's armed forces, are targetable at all times under the law of armed conflict. Stated with greater precision, it is not a violation of the law of armed conflict to "attack" them.³⁷ This is evident from the plain text of Common Article 3(1), which protects persons who are taking no active part in hostilities from acts of violence, including members of the armed forces who have laid down their arms or are *hors de combat*. The only reasonable interpretation of the provision is that those members of the armed forces who are still "in the fight" lack protection from attack under LOAC during a non-international armed conflict. This position comports with the common understanding of the principle of distinction, which requires an attacker to distinguish between combatants and civilians and direct attacks only against the former. The principle is universally accepted as customary law in both international armed conflicts and non-international armed conflicts.³⁸

Although the notion of "armed forces" transcends the boundary between international and non-international armed conflict, its precise parameters do not. Plainly, members of the regular armed forces qualify as "armed forces" in a non-international armed conflict, as do members of the regular armed forces in rebellion against the State.³⁹ The concept of armed forces in international armed conflict includes "militia and volunteer corps forming part of such armed forces."⁴⁰ It is reasonable to extend this inclusion into non-international armed conflict such that they would also qualify as part of the State's armed forces, or, if in rebellion, a component of the dissident armed forces.

The case of paramilitary or armed law enforcement agencies involved in a non-international armed conflict is more complicated. As a matter of customary international law in international armed conflict, they may be incorporated into the armed forces, and thereby lose any claim to civilian status.⁴¹ Additional Protocol I adds a further requirement, that incorporation be notified to the other party to the conflict,⁴² although by customary law incorporation is solely a factual matter and failure to so notify the enemy does not preclude such groups' treatment as members of the armed forces for purposes of targeting and detention.⁴³

The situation in non-international armed conflict differs markedly. In that opposition fighters are in violation of domestic law by virtue of their armed activities, law enforcement agencies necessarily engage in operations against them. Accordingly, in non-international armed conflict there is no logic for incorporation; fighting lawlessness is the very *raison d'être* of law enforcement entities, a task undiminished by the existence of a non-international armed conflict. Thus, even if wholly separate from the military, perhaps even conducting autonomous operations that are not coordinated with those of the armed forces, law enforcement and similar agencies qualify as the armed forces for the purposes of non-international

The Status of Opposition Fighters in a Non-International Armed Conflict

armed conflict classification. The *Commentary* to Additional Protocol II explicitly embraces this interpretation:

The term “armed forces” of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, “regular armed forces”, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force).⁴⁴

To the extent any such groups—or units thereof—act in opposition to the government, they will be considered and treated as “dissident armed forces.”

Finally, it is possible for State armed forces to be transformed into opposition organized armed groups once they lose power. This was the situation in Afghanistan upon either adoption of United Nations Security Council Resolution 1386 in December 2001 or the installation of Hamid Karzai as interim president during the June 2002 *loya jirga*.⁴⁵ Arguably, it is also the situation of Qaddafi’s forces, at least from the perspective of those States, such as the United States, which have recognized the Transitional National Council as the legitimate government of Libya. Whether former military forces qualify as a dissident armed force or “other organized armed group” is unresolved as a matter of law, but this is of little practical significance in light of the position taken in this chapter that dissident armed forces are but a category of organized armed forces.⁴⁶

Other Organized Armed Groups

A second category of opposition forces consists, for the sake of analysis, of “other organized armed groups,” an expression drawn from the text of Additional Protocol II. It is well established that the existence of an armed conflict requires the participation of an armed force of some sort. In the context of international armed conflict, this requirement poses little difficulty. Armed forces of one State, which are organized by definition, face those of another. By contrast, the situation is more complex in non-international armed conflict, for armed conflict must be distinguished from “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”⁴⁷ In *Tadić*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) made such a distinction by defining non-international armed conflict as situations of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,”⁴⁸ a

test combining intensity and organization which has been adopted in the Rome Statute of the International Criminal Court.⁴⁹

Until recently, it was unclear whether organized armed groups other than the dissident armed forces comprise groups who are directly participating in hostilities or constitute a separate category of “non-civilians.”⁵⁰ Neither Common Article 3 nor Additional Protocol II directly addresses the scope of the concept of civilian. As noted, the former avoids the term altogether, instead simply extending protection to those taking no active part in hostilities, while the latter employs the term without defining it.⁵¹

The issue of whether members of organized armed groups are civilians or a separate category bears on the conduct of hostilities. In particular, Article 13 of Additional Protocol I, which is generally accepted as reflective of customary international law,⁵² provides:

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.⁵³

So, if the members are civilians, they are only targetable while participating in the hostilities. If not, they may be treated as analogous to members of the armed forces, and thereby remain targetable even when not participating.

The ICRC acknowledged this normative dilemma in its 2005 *Customary International Humanitarian Law* study:

It can be argued that the terms “dissident armed forces or other organized armed groups . . . under responsible command” in Article 1 of Additional Protocol II inferentially recognise the essential conditions of armed forces, as they apply in international armed conflict . . . , and that it follows that civilians are all persons who are not members of such forces or groups. Subsequent treaties, applicable to non-international armed conflicts, have similarly used the terms civilians and civilian population without defining them.

While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6 [which deals with the issue of direct participation in hostilities].⁵⁴

The Status of Opposition Fighters in a Non-International Armed Conflict

This very issue occupied the attention of a group of international experts convened by the ICRC from 2003 to 2008 to consider the notion of direct participation by civilians. Various suggestions were offered, including an approach by which members of an organized armed group might be treated as civilians who were continuously participating in hostilities, and therefore continuously legitimate targets. However, the ICRC worried that the 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,”⁵⁵ a point later acknowledged by the District Court for the District of Columbia in *Gherebi*.⁵⁶

Accordingly, the *Interpretive Guidance* took the reasonable position that “as the wording and logic of Article 3 GC I–IV and Additional Protocol 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.”⁵⁷ Individuals who are members of organized armed groups are accordingly not civilians.⁵⁸ The ICTY embraced this stance in *Galic*.⁵⁹ This is an important point, for if members of an organized armed group are not civilians, the LOAC extending protection to civilians is inapplicable to them. For instance, they may be attacked regardless of whether they are directly participating; their vulnerability to attack is status, not activity, based.

Not all groups in a battlespace are “organized armed groups.” To qualify, the group in question must be both “organized” and “armed.” With regard to the organized criterion, Article 1 of Additional Protocol I refers to a group that is “under responsible command.” This phrase is explicatory of the notion of organization. The ICRC commentary to the article explains that

[t]he existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.⁶⁰

The ICTY dealt with the issue of the threshold level of organization in the case of *Limaj*. In assessing the Kosovo Liberation Army (KLA), the Trial Chamber held that

some degree of organisation by the parties will suffice to establish the existence of an armed conflict. This degree need not be the same as that required for establishing the responsibility of superiors for the acts of their subordinates within the organisation, as

no determination of individual criminal responsibility is intended under this provision of the Statute.⁶¹

It went on to cite an ICRC document submitted to the Preparatory Commission for the Rome Statute's elements of crimes, which stated that armed conflict "presupposes the existence of hostilities between armed forces organised *to a greater or lesser extent*."⁶² Looking to factors like the existence of a general staff and headquarters, designated military zones, adoption of internal regulations, the appointment of a spokesperson, coordinated military actions, recruitment activities, the wear of uniforms and negotiations with the other side,⁶³ the Chamber concluded that the KLA was an organized armed group,⁶⁴ a determination consistent with those in other cases examining the same issue.⁶⁵

Similarly, in the *Haradinaj* case the ICTY surveyed all previous judgments relevant to the issue of organization before concluding that no single factor was necessarily determinative. Rather, the Trial Chamber suggested a holistic approach. Illustrative factors that bore on organization included

existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.⁶⁶

These cases suggest two indispensable elements of the "organized" criterion. To begin with, the group in question must exhibit a degree of structure. The structure need not be strictly hierarchical or implemented in any formalistic manner, although such factors are highly indicative of the required organizational robustness. For instance, many non-military organized armed groups have flat and decentralized structures. Yet, as has been noted elsewhere, while such organizational models may complicate identification of a group's members, "operations in Afghanistan and Iraq demonstrate that these challenges are not insurmountable."⁶⁷ Nor need an organized armed group have explicit ranks, wear distinctive emblems, operate from established bases or recruit in a particular fashion.

That said, a group that is transitory or ad hoc in nature does not qualify; in other words, an organized armed group can never simply consist of those who are engaging in hostilities against the State, *sans plus*. It must be a distinct entity that the other side can label the "enemy" for reasons ranging from the development of field strategy and tactics to the conduct of negotiations. A qualifying group must also be capable of exercising some degree of control over the activities of its members. In

The Status of Opposition Fighters in a Non-International Armed Conflict

particular, it must be sufficiently organized to enforce compliance with LOAC, although failure to actually do so does not bar qualification as an organized armed group.⁶⁸

Additionally, to be “organized,” a group must be able to act in a coordinated fashion, albeit not to the extent of the regular armed forces. This requirement implies an ability to plan and execute group activities, collect and share intelligence, communicate among members, deconflict operations and provide logistic support to combat operations. Collective action alone, in the sense of multiple autonomous actions against the State (or another organized armed group), does not suffice; the actions engaged in must evidence a group character.

The organization requirement is especially relevant in three regards. First, there is no non-international armed conflict equivalent of international armed conflict’s *levée en masse*.⁶⁹ An uprising against the government, no matter how intense, can only constitute a non-international armed conflict once the opposition begins to exhibit some degree of organization. Until then, it is an internal disturbance and thereby excluded from the ambit of non-international armed conflict.

Second, an organized armed group cannot consist solely of those who share the same basis for opposition to the government, for they lack the requisite degree of organization and coordination. As an example, whereas individual terrorist groups in a non-international armed conflict may qualify separately as organized armed groups, it is only once they begin to affiliate and to coordinate their activities that they become a single organized armed group. Consider al Qaeda, an organized armed group consisting of loosely related subgroups. The fact that others may share al Qaeda’s ideology or are inspired by the organization does not alone suffice to qualify them as al Qaeda members. Instead, they are either members of a separate organized armed group, civilians directly participating in hostilities or mere violent criminals. Thus, there can, legally, be no such thing as a “war on terrorism” as such, because the generic category of terrorists cannot constitute a single party to an armed conflict. It is only once particular groups are somehow affiliated and plan or coordinate activities in concert that they may be treated as a distinct organized armed group.

Third, cyber attacks have raised the possibility of virtual organization. Online organizations are commonplace in contemporary life. In many cases, the members thereof never physically meet. They may not even know the identities of other members. If a collection of online hackers conducts related operations against a government (assuming such operations rise to the level of armed actions as a matter of law), can it meet the organization criterion? Along similar lines, can persons who conduct kinetic actions as members of a group constituted and coordinating entirely online make up an organized armed group?

Individuals operating autonomously, even if targeting the same State entities, are not an organized armed group. There is no organizational element and their actions lack coordination. A similar conclusion would hold with regard to individuals who operate collectively, but not cooperatively. During the cyber attacks against Georgia in 2008, for example, a website appeared containing hacker tools and a list of Georgian government and civilian targets.⁷⁰ Using that site, hundreds of individuals began conducting individual attacks. Again, the absence of organization and of cooperative activities would preclude characterization of the attackers as members of an organized armed group.

On the other hand, a virtual group can have a specific leadership and organizational structure and conduct highly synchronized cyber operations. The only apparent obstacle to qualification as an organized armed group would appear to be the requirement that organizational structure allow for enforcement of LOAC. There is presently no consensus as to whether the difficulty a virtual group would have enforcing LOAC precludes qualification as an organized armed group, such that the virtual members would at most qualify as civilian direct participants.

The second criterion of an organized armed group is that it be “armed.” Logically, a group is armed when it has the capacity to carry out “attacks,” defined in LOAC as “acts of violence against the adversary, whether in offence or in defence.”⁷¹ Such acts must be based on the group’s intentions, not those of individual members. This conclusion derives from the fact that while many members of the armed forces have no violent function, the armed forces as a whole are nevertheless “armed” as a matter of LOAC.⁷² Conversely, the mere fact that certain members of a group participate in hostilities does not render the group “armed” absent a shared purpose of carrying out the qualifying attacks.

More problematic is a group that does not itself carry out attacks, but performs acts that amount to direct participation in hostilities, such as collecting tactical intelligence for use by other groups in specific attacks. To the extent that acts constituting direct participation render individual civilians subject to attack, it is a reasonable extrapolation to conclude that a group with a purpose of directly participating in the hostilities is “armed.” Of course, such groups could only exist in the context of a non-international armed conflict in which another group was conducting attacks, for without attacks there is no armed conflict in the first place.

The one area of potential difficulty with regard to the armed criterion involves groups that engage in cyber operations. By the approach taken above, a group of this kind would have to be mounting operations that rose to the level of a cyber “attack” as a matter of law or otherwise be engaging in cyber activities that amounted, as discussed, to direct participation in either cyber or kinetic attacks. While disagreement exists as to which cyber operations constitute attacks under LOAC,⁷³

The Status of Opposition Fighters in a Non-International Armed Conflict

there is consensus that any cyber operation resulting in injury to or death of individuals or damage to or destruction of objects qualifies. There is also agreement that cyber activities that merely cause inconvenience or irritation do not.

Certain organized groups consist of both armed and non-armed wings. This is the case, for instance, with Hamas and Hezbollah. It is generally accepted that when the group in question is composed of subgroups, only those that engage in hostilities qualify as organized armed groups. Individuals who straddle both wings, such as the overall leader, are members of the armed subgroup, notwithstanding their non-hostile roles.

Controversy surrounds one aspect of status as a member of an organized armed group. Specifically, the question is who among the members may be attacked when not directly engaged in hostilities. A restrictive view, represented by the *Interpretive Guidance*, adopts the notion of “continuous combat function” as the key to membership. The term is defined as a “continuous function for the group involving his or her direct participation in hostilities.”⁷⁴

Although the question of which acts qualify as “direct participation” is itself somewhat contentious,⁷⁵ the issue need not be explored here. Suffice it to say that by the *Guidance* standard only those with a continuous combat function may be treated as members of an organized armed group and therefore attackable at any time during the period of their membership. Absent such a function, individuals affiliated with the group are to be treated as civilians who can only be attacked for such time as they participate in the hostilities.⁷⁶

In justification, the *Interpretive Guidance* correctly notes the difficulty during a non-international armed conflict of distinguishing civilians from members of organized armed groups, and points to the fact that membership in an organized armed group is seldom formalized, “other than taking up a certain function for the group.”⁷⁷ Groups may not wear uniforms, operate from fixed bases or fight employing classic military tactics and they are often organized informally and operate clandestinely. Complicating matters is the reality that civilians in the battlespace may carry weapons for their own protection. Therefore the requirement of continuous combat function, by setting a high bar for membership, appears to afford the civilian population enhanced protection from mistaken attacks.

These concerns are valid, but, for both practical and normative reasons, overstated. In fact, organized armed groups often have a membership structure based on more than mere function. Members frequently wear uniforms or other distinguishing garb and may operate from fixed bases, especially when in control of territory or operating from remote locations.⁷⁸ For example, the Red Army, Hamas, Hezbollah, FARC, Tamil Tigers and KLA were often distinguishable from the civilian population and operated in a manner not unlike the regular armed forces.

Membership may also be confirmed by intelligence ranging from human sources and communications intercepts to captured documents and interrogation of captured fighters. So, from a practical perspective, it is frequently a relatively simple matter to discriminate between civilians and members of organized armed groups. When it is not, the law itself takes account of the uncertainty. Article 50.1 of Additional Protocol I, a provision generally deemed reflective of customary international law in both international armed conflicts and non-international armed conflicts,⁷⁹ provides that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

The result of the continuous combat function criterion is therefore inequity in the law. By the proposed standard, direct attack on a member of an organized armed group without a continuous combat function is prohibited (indeed, such an attack would be a war crime since the individual qualifies as a civilian), but a member of the State’s armed forces who performs no combat-related duties may be attacked at any time. This is a rather curious result in light of the fact that the organized armed group lacks any domestic or international legal basis for participation in the conflict in the first place. The standard badly skews the balance between military necessity and humanitarian considerations that undergirds all of LOAC.⁸⁰

A more reasoned approach, and one that better comports with the underlying logic of the distinction between civilians and organized armed groups, is to simply treat insurgent fighters and members of the armed forces equally. By it, members of organized armed groups may be attacked so long as they remain active members of the group, regardless of their function. It makes no more sense to treat an individual who joins a group that has the express purpose of conducting hostilities as a civilian than it would to differentiate between the various members of the regular armed forces. After all, and as noted in the *Interpretive Guidance* itself (albeit in the context of international armed conflict),

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.⁸¹

A final issue with regard to organized armed groups in non-international armed conflicts involves mixed conflicts, that is, conflicts with both international and

The Status of Opposition Fighters in a Non-International Armed Conflict

non-international components. The *Interpretive Guidance* raises this prospect in its assertion that “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.”⁸² A group belongs to a party when at least a de facto relationship exists between the group and the party to the international armed conflict. Mere tacit agreement suffices so long as it is clear for which side the group is fighting.⁸³ The basis for the position is straightforward—since only States may be party to an international armed conflict, a non-State group would have to be affiliated with a State to qualify as a party. By contrast, non-international armed conflict necessarily involves at least one party that is not a State or otherwise an extension thereof.

The prospect of groups appearing in the battlespace that do not belong to any of the parties to an international armed conflict is far from hypothetical. For instance, during the international armed conflict phases in Afghanistan and Iraq, coalition troops regularly faced forces that were not allied with the Taliban or the Baathist regimes. In particular, certain Shia militia groups in Iraq opposed both the coalition forces and those of the Iraqi government in the hope of eventually seizing power themselves.

From a practical perspective, an approach that automatically renders hostilities with a non-affiliated organized armed group as a separate non-international armed conflict is problematic in that it requires application of separate bodies of law to colocated hostilities. Therefore, an argument can be made that it is preferable to ask whether there is an unambiguous nexus between the actions of the group in question and the international armed conflict.⁸⁴ If so, the law applicable in international armed conflict would continue to govern hostilities with the group. If not, the group would qualify as an organized armed group in a non-international armed conflict.

Regardless of one’s position on this specific issue, there are undoubtedly situations in which international and non-international conflicts coexist.⁸⁵ For instance, a non-international armed conflict may survive in a situation where an international armed conflict breaks out. In Afghanistan, non-international armed conflict between the Taliban-led Afghan government and the Northern Alliance was under way at the time coalition forces began operations in 2001. Until the coalition exercised “overall control” of Northern Alliance operations, that conflict continued alongside the international armed conflict between the coalition States and Afghanistan.⁸⁶

Despite the complexity of classifying conflict, it is important to emphasize the fact that classification of participants in such conflicts tracks the criteria normally applied in the two types of conflicts. The fact that an international armed conflict is

ongoing in the same battlespace and at the same time as a non-international armed conflict has no bearing on qualification of any groups involved in the latter as “organized armed groups.”

Civilians Who Directly Participate in Hostilities

The final category of fighters in armed opposition to the government comprises individuals who are members of neither dissident armed forces nor any other organized groups. Their activities alone cannot constitute a non-international armed conflict, for such a conflict cannot exist without an organized armed group on at least one side. Thus, the category of directly participating civilians only has meaning in the context of an ongoing non-international armed conflict.

Individuals “who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis” make up the category.⁸⁷ Examples include those who engage in individual acts for pay (e.g., a fee for emplacement of improvised explosive devices (IEDs)) or for other reasons unrelated to group affiliation, as well as groups of individuals who take part in the hostilities without prior organization and coordination (as in a mob that attacks a military facility). By the *Interpretive Guidance’s* approach, the category would extend to those members of an armed group who do not have a continuous combat function, but which at times take up arms or engage in other acts amounting to direct participation.

The topic of direct participation in hostilities has been the subject of extensive and lively discourse in the literature and need only be summarized here.⁸⁸ It is an important debate, for, unlike members of the dissident armed forces and other organized armed groups, direct participants may only be attacked while they engage in acts of participation. As noted in Additional Protocol II, Article 13.3, civilians enjoy protection from attack, “unless and *for such time as they take a direct part in hostilities*.” Resultantly, the options for targeting them are dramatically reduced.

With regard to the concept of direct participation, two questions are key: (1) what acts qualify a civilian as a direct participant in hostilities; and (2) when is he or she participating? The *Interpretive Guidance* proffers three cumulative “constitutive elements” of acts that constitute direct participation.

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

The Status of Opposition Fighters in a Non-International Armed Conflict

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).⁸⁹

These criteria generally capture the essence of direct participation, although there is some disagreement with the standards around the margins.⁹⁰ For instance, the first criterion could be expanded to encompass acts that enhance one's own military capacity, rather than merely negatively affecting the enemy. Further, the causal link as explained in the *Guidance* is overly restrictive.⁹¹ As an example, it excludes assembly of an improvised explosive device on the basis that such participation is *indirect*.⁹² This assertion flies in the face of common sense; no State that engages in combat could reasonably accept it. The *Guidance* also labels voluntary human shielding as indirect, a position that is likewise highly questionable.⁹³ Despite such concerns, the three elements fairly capture what is generally understood to be direct participation—acts that militarily affect the parties in a fairly direct manner and that are related to the ongoing armed conflict.

Much more problematic is the question of when may direct participation be said to be happening, for a civilian only loses immunity from attack during that period. At issue is the “for such time” verbiage in the direct participation norm, which is properly characterized as customary in nature.⁹⁴

The *Interpretive Guidance* asserts that “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 the act.”⁹⁵ However, many of the experts involved in the project of developing the *Guidance* argued for a broader interpretation of “preparatory,” such that the period of participation should extend as far before and after a hostile action as a causal connection existed.⁹⁶ As an example, the broader approach would include assembling an IED and perhaps even acquiring the necessary materials.

There was also significant objection to the *Interpretive Guidance*'s assertion that individuals who participate in hostilities on a recurrent basis regain protection from attack between their operations, losing it again only upon launching the next attack. This dynamic has become known as the “revolving door,” which the *Guidance* somewhat curiously suggests is an “integral part, not a malfunction of IHL.”⁹⁷

The approach flies in the face of military common sense and accordingly represents a distortion of LOAC's military advantage/humanitarian considerations balance. This is especially so in the context of irregular warfare, where clandestine activities by insurgent groups are common. Again, consider the case of an IED attack. If the insurgent is discovered deploying to the attack location, implanting the IED or returning from the operation, the attack will likely be foiled since IED attacks are

usually only successful when the devices can be laid secretly. As a result, the best option for countering future attacks is through heuristic intelligence analysis, which would reveal patterns of IED-implanting activities that allow for pinpointing those involved through human and technical intelligence. Yet by the *Interpretive Guidance* position, they could not be attacked until launching the next operation, an unacceptable result militarily.

The only viable approach is one in which a civilian who directly participates in hostilities on a recurring basis remains targetable until he or she opts out of the hostilities in an unambiguous manner. There is, of course, a risk that a direct participant might actually have decided to cease all hostile activities without the knowledge of the forces he or she has been attacking. But it is more sensible to have the participant, who enjoyed no right to participate in the first place, bear the risk of mistake rather than his or her former victims. The requirement to presume civilian status in the event of reasonable doubt further mitigates this risk.

Conclusions

In a non-international armed conflict, opposition fighters can be divided into two categories—members of an organized armed group and civilian direct participants in hostilities. The former category includes dissident armed forces and other groups that are both “organized” and “armed.” The argument that a member of an organized armed group must be treated as a civilian if he or she does not have a continuous combat function in the group was rejected as both impractical and contrary to the logic of the law.

The result of this binary classification is that there is no LOAC prohibition on attacking members of organized armed groups at any time, just as there is no international law prohibition on attacking members of the government’s forces.⁹⁸ Only when dealing with a fighter who is unaffiliated with a group, and who is therefore a civilian temporarily deprived of protection as such, does a temporal limitation arise. This approach accords neatly with the foundational premise of the law of armed conflict—that the law must balance military necessity and humanitarian considerations. Further parsing of the prevailing binary classification or otherwise complicating it will only serve to confuse matters in what is perhaps the most confusing genre of conflict—that which is non-international.

Notes

1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for

The Status of Opposition Fighters in a Non-International Armed Conflict

the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Common Article 3].

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

3. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79 & 82 (July 8); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 54, ¶ 218 (June 27) [hereinafter *Nicaragua*]. It is generally acknowledged that certain Additional Protocol II provisions, such as that prohibiting attacks on civilians (Article 13.2), are reflective of customary international law.

4. Examples include the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Convention on Certain Conventional Weapons as amended, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and the Convention on Cluster Munitions.

5. Prosecutor v. Tadić, Case No. IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadić*]; Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj*]; Prosecutor v. Milošević, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004) [hereinafter *Milošević*]. The test was adopted in the Statute of the International Criminal Court. Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

6. Common Article 3.1, *supra* note 1.

7. AP II, *supra* note 2, art. 1.1.

8. On the distinction between the thresholds, see Charles Lysaght, *The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AMERICAN UNIVERSITY LAW REVIEW 9 (1983); Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AMERICAN UNIVERSITY LAW REVIEW 29 (1983).

9. The drafters of the Protocol considered including the situation of a conflict between organized armed groups without the involvement of a State, but decided against doing so on the basis that the scenario was largely theoretical. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4461 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987) [hereinafter AP COMMENTARY].

10. AP II, *supra* note 2, art. 13.3.

11. The 1977 Additional Protocol I defines civilians in the negative, as those individuals who “do not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” The former sets forth categories of persons entitled to prisoner of war status, whereas the latter defines the term “armed forces.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 50.1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. The drafters of Additional Protocol II originally intended to include a definition of the term, but the proposals were dropped in order to shorten the text. See discussion in 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 19 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL]. One possible distinction would be the treatment of law enforcement personnel. In an international armed conflict, they are civilians

unless incorporated into the armed forces. In a non-international armed conflict, it is conceivable that they would assume the status of “fighters,” who do not enjoy the same protections under international humanitarian law as civilians.

12. For an excellent examination of the subject, see Jelena Pejic, *Status of Armed Conflicts, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL LAW* 77 (Elizabeth Wilmschurst & Susan Breau eds., 2007); see also GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* ch. 5 (2010).

13. On non-international armed conflicts generally, see ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW* (2010); LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* (2002); EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* (2008); Dieter Fleck, *The Law of Non-International Armed Conflict, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* (Dieter Fleck ed., 2d ed. 2008); MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY* ¶ 1.1.2 (2006) [hereinafter *NIAC Manual*]; A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* ch. 9 (2d ed. 2004); UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* ch. 15 (2004) [hereinafter *UK Manual*].

14. See, e.g., the discussion in *Al-Marri v. Pucciarelli*, 534 F.3d 213, 233 (4th Cir. S.C. 2008); INTERNATIONAL COMMITTEE OF THE RED CROSS, OFFICIAL STATEMENT: THE RELEVANCE OF IHL IN THE CONTEXT OF TERRORISM 1, 3 (Feb. 21, 2005), <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorismihl-210705>. For international armed conflict, Additional Protocol I provides that “[m]embers of the armed forces . . . are combatants, that is to say, they have the right to participate directly in hostilities.” AP I, *supra* note 11, art. 43.2.

15. Of course, they may also be prosecuted for any war crimes they commit. The point is that international law does not shield fighters from domestic prosecution for acts during a non-international armed conflict that are “immunized” in international armed conflict. For a discussion of the distinction and its rationale, see Waldemar Solf, *The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice*, 33 AMERICAN UNIVERSITY LAW REVIEW 53, 57–61 (1983).

16. Note that the term “combatant” is occasionally used in the context of non-international armed conflict. See, e.g., Respect for Human Rights in Armed Conflicts, G.A. Res. 2676 (XXV), pmbl. & ¶ 5, U.N. Doc. A/8052 (Dec. 9, 1970); Cairo Declaration, §§ 68–69, available at <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN002865.pdf>, and Cairo Plan of Action, § 82, available at http://www.iss.co.za/af/regorg/unity_to_union/pdfs/au/afreurplan00.pdf, both adopted at the Africa-Europe Summit held under the aegis of the Organization of African Unity and the European Union, April 3–4, 2000; Rome Statute, *supra* note 5, art. 8(2)(e)(ix). However, as noted in the *Customary International Humanitarian Law* study commentary, “this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but this does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts.” CIHL, *supra* note 11, at 12. To avoid confusion, the authors of the *NIAC Manual* adopted the term “fighters” to refer to those who engaged in hostilities during a non-international armed conflict. *NIAC Manual*, *supra* note 13, ¶ 1.1.2.

17. For a study which deals extensively with the relationship between targeting and status, see NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2008).

18. AP I, *supra* note 11, arts. 51.5(b) & 57 (international armed conflict). The rule of proportionality and the requirement to take precautions in attack are generally deemed reflective

The Status of Opposition Fighters in a Non-International Armed Conflict

of customary law in non-international armed conflict. CIHL, *supra* note 11, chs. 4 & 5; NIAC Manual, *supra* note 13, ¶¶ 2.1.1.4 & 2.1.2.

19. The classic work on the subject is Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AMERICAN UNIVERSITY LAW REVIEW 145 (1983).

20. This was the situation in the *Nicaragua* case, where the International Court of Justice found U.S. activities against Nicaragua to be governed by the law of international armed conflict, but held that the hostilities between the Nicaraguan armed forces and the contra rebels remained a non-international armed conflict. *Nicaragua*, *supra* note 3, ¶ 219.

21. A separate issue is external control of guerrilla forces. At a certain point, sufficient control is exercised to render what would otherwise be a non-international armed conflict international in character. On this issue, see the *Tadić* Appeals Judgment, which sets forth the “overall control” test. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 137 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999). This test was adopted with approval by the International Criminal Court Pretrial Chamber in *Prosecutor v. Lubanga*, Case. No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 211 (Jan. 29, 2007) [hereinafter *Lubanga*].

22. COMMENTARY TO GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 30 (Jean S. Pictet ed., 1960) [hereinafter GC-III COMMENTARY]; COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 31 (Jean S. Pictet ed., 1958) [hereinafter GC-IV COMMENTARY].

23. GC-IV COMMENTARY, *supra* note 22, at 31

24. GC-III COMMENTARY, *supra* note 22, at 32.

25. GC-IV COMMENTARY, *supra* note 22, at 35. The *Commentary* to the Second Convention uses the term “brigandage.” COMMENTARY TO GENEVA CONVENTION II FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA 32 (Jean S. Pictet ed., 1960).

26. GC-III COMMENTARY, *supra* note 22, at 32.

27. See, e.g., GC-IV COMMENTARY, *supra* note 22, at 35, 36.

28. See, e.g., *id.* at 34.

29. On the Mexican case, see Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 1042 (2011), although the author does not fully address the points raised herein.

30. GC-IV COMMENTARY, *supra* note 22, at 36.

31. GC-III COMMENTARY, *supra* note 22, at 36.

32. See discussion in Michael N. Schmitt, *Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law*, 12 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 301 (2009).

33. Common Article 3, *supra* note 1.

34. NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 32 (2009) [hereinafter IG].

35. The project involved a group of international experts convened on multiple occasions between 2003 and 2008 to consider direct participation in hostilities by civilians; the ultimate product reflects the views of the ICRC informed by that process. The author was a member of the group.

36. IG, *supra* note 34, at 32.

37. Of course, as discussed above, in the absence of combatant immunity, attacks on members of the armed forces can be criminalized in domestic law.

38. AP I, *supra* note 11, arts. 48 & 51; CIHL, *supra* note 11, Rule 6; U.S. Navy, U.S. Marine Corps & U.S. Coast Guard, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, ¶ 8.1 (2007).

39. The Additional Protocol II *Commentary* specifically references situations “where there is a rebellion by part of the government army.” AP COMMENTARY, *supra* note 9, ¶ 4460.

40. GC III, *supra* note 1, art. 4A(1)

41. CIHL, *supra* note 11, at 16–17.

42. AP I, *supra* note 11, art. 43.3.

43. CIHL, *supra* note 11, at 17.

44. AP COMMENTARY, *supra* note 9, ¶ 4462.

45. Resolution 1386 authorized the International Security Assistance Force to aid the interim Afghan government in maintaining security. S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001). There is a degree of disagreement over precisely when to mark the establishment of the new Afghan government, such that the Taliban became an opposition force.

46. The legal issue is whether the (former) Libyan military can qualify as a dissident armed force given the fact that its units were never part of the opposition forces, which now constitute the State's armed forces.

47. AP II, *supra* note 2, art. 1.2; Rome Statute, *supra* note 5, arts. 8(2)(d) & 8(2)(f).

48. *Tadić*, *supra* note 5, ¶ 70.

49. Rome Statute, *supra* note 5, art. 8(2)(f).

50. The uncertainty was acknowledged by the ICRC in the CIHL study, *supra* note 11, at 19, and the IG, *supra* note 34, at 21.

51. AP II, *supra* note 2, art. 13.

52. On the customary law status, see, e.g., CIHL, *supra* note 11, Rule 6; NIAC Manual, *supra* note 13, ch. 2.

53. AP II, *supra* note 2, art. 13.2–3.

54. CIHL, *supra* note 11, at 19.

55. IG, *supra* note 34, at 28.

56. The court noted that “it would be odd for the drafters of Additional Protocol II to devote a portion of the convention to protecting a discrete group of individuals labeled ‘civilians’ if every member of the enemy in a non-international armed conflict is a civilian.” *Gherebi v. Obama*, 609 F. Supp. 2d 43, 66 (D.D.C. 2009).

57. IG, *supra* note 34, at 28. In this sentence, the expression “armed forces” applies to the State's armed forces. Dissident armed forces would be included in the category of organized armed groups.

58. This interpretation was adopted in *Gherebi*, *supra* note 56, at 65.

59. *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (“For the purpose of the protection of victims of armed conflict, the term ‘civilian’ is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict.”). See also *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 180 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (“Civilians within the meaning of Article 3 are persons who are not, or no longer, members of the armed forces.”); *Hamli v. Obama*, 616 F. Supp. 2d 63, 73–74 (D.D.C. 2009) (“The clear implication of Part IV, then, is that Additional Protocol II recognizes a class of individuals who are separate and apart from the ‘civilian population’—i.e., members of enemy armed groups.”).

60. AP COMMENTARY, *supra* note 9, ¶ 4663.

61. *Limaj*, *supra* note 5, ¶ 89 (emphasis added).

The Status of Opposition Fighters in a Non-International Armed Conflict

62. *Id.*, citing International Committee of the Red Cross, Working Paper, June 29, 1999, available at <http://www.iccnw.org/documents/ICRCWorkPaperArticle8Para2e.pdf> (submitted by the ICRC as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the International Criminal Court) (emphasis added).

63. *Id.*, ¶¶ 90–134.

64. *Id.*, ¶ 134.

65. See, e.g., *Milošević*, *supra* note 5, ¶¶ 16–25.

66. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), surveying Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Prosecutor v. Mucić et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998); *Milošević*, *supra* note 5; Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); *Limaj*, *supra* note 5; Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006); Prosecutor v. Mašić, Case No. IT-95-11-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v. Mrksić, Case No. IT-95-13/1-T, Judgment (Sept. 27, 2007).

67. Kenneth H. Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 641 (2010).

68. See AP II, *supra* note 2, art. 1.1; AP COMMENTARY, *supra* note 9, ¶ 4470. It is important to recognize that there is no requirement that the group actually enforce compliance, but only that it be sufficiently organized to be able to do so. Since organization is a requirement for Common Article 3 conflicts, it is reasonable to apply it to such conflicts in addition to those meeting the AP II thresholds.

69. A *levée en masse* consists of inhabitants of a non-occupied territory who rise up and spontaneously resist invading forces without having had time to organize themselves into regular armed units. GC III, *supra* note 1, art. 4A(6).

70. The conflict was an international armed conflict between Georgia and Russia, although the example is one that could apply equally in a non-international armed conflict. On the cyber aspects of this conflict, see ENEKEN TIKK, KADRI KASKA & LIIS VIHUL, INTERNATIONAL CYBER INCIDENTS: LEGAL CONSIDERATIONS (2010).

71. AP I, *supra* note 11, art. 49. On the notion of attack in the cyber context, contrast Knut Dörmann, *Applicability of Additional Protocols to Computer Network Attack*, paper delivered at the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, Stockholm, November 17–19, 2004, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/68lg92?opendocument>, with Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 365 (2002).

72. Analogously, Additional Protocol I (*supra* note 11), Article 43.2 categorizes “members of the armed forces” as “combatants . . . [who] have the right to participate directly in hostilities,” not as individuals who do so participate. The group’s activities matter, not those of select members.

73. Contrast Dörmann, *supra* note 71, with Schmitt, *supra* note 71. Note that the reference here is to an attack under the *jus in bello*, not an “armed attack” under the *jus ad bellum*.

74. IG, *supra* note 34, at 33.

75. See generally Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 697 (2010); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation*

in *Hostilities*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 831 (2010).

76. The *Interpretive Guidance* provides that

[i]ndividuals 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.

IG, *supra* note 34, at 34.

77. *Id.* at 32–33.

78. For a discussion of the extent to which organized armed groups take on such characteristics, see Watkin, *supra* note 67, at 674–82.

79. See CIHL, *supra* note 11, at 23–24. The application of the rule has been subject to important qualifications. See, e.g., UK Statement upon Ratification, ¶ (h), Jan. 28, 1998, available at <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (noting the obligation of a commander to protect his or her forces); UK Manual, *supra* note 13, ¶ 5.3.4. See also HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, commentary to Rule 12(a) (2010).

80. See Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010).

81. IG, *supra* note 34, at 22.

82. *Id.* at 24. The position was based on the ICRC's commentary to Article 4 of the Third Geneva Convention, which provides that "[r]esistance movements must be fighting on behalf of a 'Party to the conflict' in the sense of Article 2, otherwise the provisions of Article 3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a 'Party to the conflict.'" GC-III COMMENTARY, *supra* note 22, at 57. It should be noted, though, that the drafters of the Convention saw Article 3 conflicts exclusively in the guise of hostilities conducted against a force's own government. There is no hint that the ICRC envisaged hostilities against the military forces of States with which the force's own government was fighting as a non-international armed conflict. On the contrary, the commentary is crafted in terms of the "Party in revolt against the de jure Government," "rebellion" and "rebel Party." *Id.* at 36.

83. See IG, *supra* note 34, at 23, which defines "belongs" by reference to the GC-III COMMENTARY, *supra* note 22, at 57. This concept should not be confused with the notion of "belonging to" in the context of external involvement in a non-international armed conflict at a level which internationalizes the conflict. In such cases, the issue is "overall control" of the group (see *Tadić*, *supra* note 21), described by the International Criminal Court in *Lubanga* as "a role in organising, co-ordinating, or planning the military actions of the military group." *Lubanga*, *supra* note 21, ¶ 211.

84. An example might be armed opposition to an occupation, not in support of the government which has been occupied, but rather in order to expel the occupiers and assume control over the territory in question.

85. Yoram Dinstein labels these conflicts "horizontally mixed." YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 14–15 (2004). See also Christopher Greenwood, *International Law and the "War Against Terror,"* 78 INTERNATIONAL AFFAIRS 301, 309 (2002); *Lubanga*, *supra* note 21, ¶¶ 210–14.

86. On overall control, see *Tadić*, *supra* note 21.

The Status of Opposition Fighters in a Non-International Armed Conflict

87. IG, *supra* note 34, at 25.

88. The most significant debate was published in volume 42:3 (2010) of the *New York University Journal of International Law and Politics*.

89. IG, *supra* note 34, at 46.

90. See, e.g., Schmitt, *supra* note 75.

91. “[D]irect causation should be understood as meaning that the harm in question must be brought about in one causal step” and “it is not sufficient that the act and its consequences be connected through an uninterrupted causal chain of events.” IG, *supra* note 34, at 53–54.

92. *Id.* at 54.

93. *Id.* at 56. On human shields, see Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 292 (2009), reprinted in 38 ISRAEL YEARBOOK ON HUMAN RIGHTS 17 (2008).

94. This point was affirmed by the Israeli Supreme Court in *Public Committee against Torture in Israel v. Government of Israel* ¶ 38, HCJ 769/02, Judgment (Dec. 13, 2006), 46 INTERNATIONAL LEGAL MATERIALS 373 (2007), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

95. IG, *supra* note 34, at 65. The interpretation is based on AP COMMENTARY, *supra* note 9, ¶¶ 1943–44, 4789.

96. See, e.g., Yoram Dinstein, *Distinction and the Loss of Civilian Protection in International Armed Conflict*, in INTERNATIONAL LAW AND MILITARY OPERATIONS 183, 189–90 (Michael D. Carsten ed., 2008) (Vol. 84, U.S. Naval War College International Law Studies), reprinted in 38 ISRAEL YEARBOOK ON HUMAN RIGHTS 1 (2008). See also Kenneth H. Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 17 (2004).

97. IG, *supra* note 34, at 70.

98. With the obvious exception of those who are *hors de combat*.