

Opposition Forces in Non-International Armed Conflict

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Opposition Parties to the Conflict

- Treaty law sparse on categories of persons in NIAC
- GC I-IV, CA 3: No guidance on Parties
 - Refers to persons taking ***no active part in hostilities***, including ***members of the armed forces*** who are *hors de combat*
- AP II:
 - Art. 1: Conflict between Party's "***armed forces*** 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*"
 - Art. 13.3: "***Civilians*** shall enjoy the protection afforded by this part, *unless and for such time as they take a direct part in hostilities.*"
 - **Distinguishes between civilians and organized armed groups**

Categories of Persons

Civilians

- Who do not participate
- Who participate

Organized Armed Groups (OAG)

- State's armed forces
- Dissident armed forces
- Other OAGs



Consequences of Categories

- **Principle of Distinction** (targeting): Anyone who oppose the government militarily
 - ✓ May be attacked
 - ✓ Do not count in the proportionality analysis
 - ✓ Are not a factor in precautions in attack rules
- **Rationale?**
 1. Attacking civilians, armed forces hors de combat and specially protected (religious/military) = LOAC violation
 - Attacking others is not
 - (But may violate domestic law)
 2. Civilians lose protection when they directly participate
- **Detention:** Subject of later presentations

Individuals who are not Members of the Opposition



Individual Criminals and Criminal Gangs

- Generally **cannot be Parties to conflict**, whether
 - Acting alone or
 - Operating in the midst of a NIAC
- **BASIS**: State concerns expressed during CA3 negotiations
 - Not meant to cover “**handful of rebels or common brigands**”
 - Not meant to cover “any form of **anarchy, rebellion or even plain banditry**”
 - “**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.”
- **Traditional Understanding**: *Purpose of violence must be to attain political control or authority*

Individual Criminals and Criminal Gangs

- Operations v. them governed by domestic and HR law
- **BUT**, if operate on **behalf of a Party: OAG** or **direct participant**
 - ❖ E.g., Party allows them to operate criminal enterprise in exchange for attacking opponent, providing key logistics, guarding OAG facilities
 - ❖ E.g., Paying taxes on criminal activities to OAG in control of territory not sufficient (Afghanistan)
- **Key** = are the **group** activities at the level of **direct participation in hostilities (DPH)**

Well-Organized Armed Criminal Gangs as OAGs?

- **Possible change in the wind?**
 - **Mexico:** Violence far exceeds required intensity for NIAC, thousands of civilian deaths, gangs often outgun State, State must resort to military
- **ICRC Commentary:** “scope of **application of CA 3** must be as **wide as possible**”
- **No express limitation** to “**political** motive” in treaty law
- Perhaps **distinguish** case where gang **takes advantage of instability** for criminal purposes from that where gang **fights State for control of territory** in order to create zone of unfettered criminal activity

Dissident Armed Forces



Dissident Armed Forces

- Clearest case
 - **CA 3** uses term “**armed forces**” and speaks of obligations imposed on “**each Party**”
 - Implies armed forces on both sides
 - **AP II** expressly **mentions & distinguishes from “other OAGs”**
- Clearly **targetable at all times**: **CA 3** provides protection to members of the armed forces **hors de combat**
 - Implies **all other members do not enjoy** protection

Who Qualifies?

- **Regular armed forces** in opposition
- **“Militia and volunteer corps** forming part of such armed forces” in opposition
 - GC III, art. 4, but **no reason to exclude in NIAC**
- **Paramilitary and armed law enforcement** in opposition?
 - In **IAC**, must be **incorporated** to have combatant status
 - **No such logic in NIAC** - regularly combat domestic lawlessness
 - **Commentary** to AP II: “armed forces” meant to cover **forces not included in definition of armed forces in domestic legislation** (“national guard, customs, police forces or any other similar force”)

Condition on Status

- **Interpretive Guidance:** “*Do not become civilians merely because have turned against their government*”
- BUT must “remain organized under the structures of the State armed forces to which they formerly belonged”
- **If not, qualify as...**
 - Members of other OAGs **or**
 - Civilians directly participating in hostilities

Other Organized Armed Groups



Other Organized Armed Groups

- Previously unclear whether **civilians** or a **category analogous to dissident armed forces**
 - E.g., ICRC *Customary IHL Study* queries whether subject to DPH
- **ICRC Interpretive Guidance Project**
 - Considered possibility of civilians who “**continuously participate**”
 - Rejected:** Creates Party consisting of entirely civilians
 - Adopted binary approach** – civilians and organized armed groups (includes dissident armed forces)
 - OAG: DPH Rule N/A → once qualify as members, targetable
- **Definition: Group which is not a dissident armed force, BUT is BOTH organized and armed**

The “Organized” Criterion

- **AP I Commentary:** “...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.**”
- **Haradinaj** (ICTY 2008), **Indicative Factors:**
 - Headquarters
 - Control of territory
 - Access to weapons & equipment
 - Recruiting and training
 - Logistics capability
 - Unified strategy and tactics
 - Ability to speak with one voice in negotiations
 - See also, e.g., *Limaj, Milosevic*

The “Organized” Criterion

- **Case-by-case** determination
- Must have **some structure**, albeit not hierarchical
 - May be flat, decentralized; no req. for ranks, uniforms, bases, etc.
 - **A “group” the other side can label “the enemy”**
- Must act in a somewhat **coordinated fashion**
 - Ability to plan & execute group activities, collect & share intelligence, communicate, deconflict operations
- **No levee en masse** in a NIAC due to organization/coordination requirements
 - Remain civilians directly participating

Challenging Cases of OAG Organization

- **Transnational terrorist groups** (assuming a NIAC)
 - Shared ideology not enough to constitute single group
 - Acts inspired by group A executed by group B not enough
 - Al Qaeda example
- **Virtual groups** (organized on-line; may not know each other)
 - **Operate autonomously** not an OAG (ex: Estonia)
 - **Operate collectively**, not an OAG (ex: Georgia)
 - **BUT IF** on-line leadership, organizational structure, coordinated attacks...*perhaps*
- **Obstacle:** *Does organization allow for enforcement of LOAC?*
 - Cyber warfare group of experts split

The “Armed” Criterion

- **Group** that **carries out “attacks”**
 - Acts of violence (AP I, art. 49)
- **Group** that **otherwise directly participates** (e.g., gathering tactical intell for use by another OAG)
- **Potential issue:** Group engaging in ***cyber operations***
 - Operations must amount to **cyber “attacks” or direct participation in support of OAG mounting cyber or kinetic attacks**
 - **Attack = AT LEAST** injury to or death of persons; damage to or destruction of objects

Issues: OAGs

- Groups consisting of **armed & non-armed** (e.g., political or social) wings
 - If **distinct**, only armed wing = OAG
- The **Continuous Combat Function (CCF)** controversy
 - **IG: Only** those individuals in group with **CCF = “members”**
 - CCF = acts that would be DPH if by individual civilian
 - All **others** = civilians (if directly participate, targetable for such time)
 - **Justification = difficulty of distinguishing** members from civilian population **and** common **lack of formalized membership mechanism**

Continuous Combat Function

- **Criticism**
 1. **Counterfactual**
 - Often distinguishable (appearance, intelligence, bases, etc.)
 - Often have established membership
 2. **Counter-normative:** LOAC requires treating as civilian if doubt
- **Results in imbalance** between State's armed forces and opposition OAGs
- **Preferred approach:** Treat as armed forces (State & dissident)
 - *IF a member of group that engages in hostilities - targetable*

Civilians Who Directly Participate in Hostilities



Civilian Direct Participants

- **IG:** Individuals “who directly participate in hostilities on a merely **spontaneous, sporadic or unorganized basis**”
 - ✓ E.g., paid to implant IEDs
 - ✓ E.g., ad hoc collections of individuals
- **Key issues**
 1. **What** is direct participation?
 2. **When** is the direct participation underway?

What is Direct Participation?

Constitutive Elements

1. Act must be likely to adversely affect the military operations or military capacity of a party...or...inflict death, injury, or destruction on persons or objects protected against direct attack (**threshold of harm**), and
 2. Direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (**direct causation**), and
 3. 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**).
- **Requires clarification:** E.g., acts enhancing own force capabilities
 - **Differences in interpretation:** E.g., IED assembly & voluntary human shields

When Directly Participating?

- **IG:** “**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.”
- **Criticism**
 1. **Window too narrow:** Should include all acts “**upstream and downstream**”
 2. Creates a “**revolving door**”
 - IG: Not a malfunction of LOAC
 - Critics: Impractical. In insurgency secrecy is key. May only be able to target when NOT engaging in act.
- **Result?** *Imbalance between gov’t forces & insurgents not directly involved*
- ❖ **Better interpretation:** *If recurring acts, targetability extends throughout period of acts*

Key Conclusions

- ✓ **Dissident armed forces and organized armed groups**
 - **Treat similarly** vis-à-vis principle of distinction
 - **No CCF** criterion for OAGs

- ✓ **Civilians directly participating**
 - IG approach on **constitutive elements** generally sound, but **care in application**
 - **Revolving door** dynamic generally **unacceptable**

QUESTIONS?

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