

The Principle of Distinction in an International Armed Conflict: Organized Armed Groups Not Belonging to a State Party to the Conflict

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Abstract: The classification of Non-State Organized Armed Groups participating in a mere International Armed Conflict (IAC) could be troublesome, especially in the absence of a co-existing Non-International Armed Conflict (NIAC). Since this situation is not simply covered by the Geneva Conventions. Under the current legal framework of IHL, an Organized Armed Group classifies as armed forces in an IAC if it belongs to a State Party to the conflict. If not, the Organized Armed Group cannot be considered as armed forces as specified in Article 43 of Additional Protocol I to the Geneva Conventions and may as a result be classified as civilians. This differs from NIACs in which Non-State Organized Armed Groups are considered as armed forces as specified in Common Article 3. In the absence of a co-existent NIAC, the classification is contingent on how the Non-State Organized Armed Group fits in the IAC. This article argues that on the basis of international bodies of law such as the Geneva Conventions, Non-State Organized Armed Groups taking part in a mere IAC should not be considered as taking part in a NIAC, nor should they be classified as civilians taking continuously direct part in hostilities, and lastly nor should they be treated as armed forces as defined in Article 43 (1) of Additional Protocol I to the Geneva Conventions. Rather, the article concludes that Organized Armed Groups taking place in an IAC are classified as armed forces as provided in Common Article 3 and is therefore, also governed by what is known as the ‘mini-convention’ provided in Common Article 3 under customary international law.

Keywords: International Armed Conflict, Non-state Organized Armed Groups, Common Article 3, Principle of Distinction

1. Introduction

International humanitarian law (IHL) makes a distinction between combatants and civilians to primarily protect civilians against attacks. During international and non-international armed conflicts, attacks may only be directed against combatants and not against mere civilians. Members of Organized Armed Groups not belonging to a State Party to the conflict, are however not in and of itself considered combatants in an International Armed Conflict (IAC), according to the rules of IHL. As a general principle, for an Organized Armed Group to be identified as armed forces in an IAC under the legal framework of IHL, the Organized Armed Groups must belong to a State Party to the conflict. If not, the Organized Armed Groups cannot be considered as armed forces and its members therefore, not as combatants. This differs from a non-international armed conflict (NIAC), in

which Organized Armed Groups are considered to be armed forces as specified in Common Article 3 to the Geneva Conventions (Common Article 3). In NIACs, however, armed forces do not have the same legal status as in IACs, its status is defined by Common Article 3.

An IAC can co-exist with a non-international one [1] in which the legal framework of both conflicts can apply parallel. However, the classification of (members of) Organized Armed Groups not belonging to a State Party to the conflict (hereafter: Non-State Organized Armed Groups) could be troublesome in situations where the Non-State Organized Armed Group is not directing its attacks against its own government, but instead to another State Party in an IAC. In the absence of a co-existent NIAC, the classification is contingent on how the Non-State Organized Armed Group fits in the IAC. As it is not a situation that is traditionally covered by the binary form of armed conflicts defined in the

Geneva Conventions [2].

Non-State Organized Armed Groups cannot be considered as members of armed forces of a State Party to the conflict for the purposes of the IHL, according to article 43 (1) of Additional Protocol I to the Geneva Conventions. The groups may as a result be classified as civilians. This classification may, however, in certain circumstances be troublesome given that a member of a Non-State Organized Armed Group will receive the same amount of protection as mere civilians. To overcome this classification issue, the International Committee of the Red Cross (ICRC)'s Interpretative Guidance on Direct Participation in Hostilities states that the Non-State Organized Armed Group must be considered as taking part in a NIAC, while there is none [3]. This approach is limited as it causes unnecessary fragmentation within the international humanitarian legal framework governing IACs. Other possible classifications could be to consider the members of Non-Organized Armed Groups as civilians taking continuously direct part in or as armed forces (as defined in Article 43 (1) of Additional Protocol I [4]) despite of their belligerent ties [5].

This article identifies that the aforementioned classifications are not supported by the rules governed by IHL. Instead the rules governed by IHL supports that Non-State Organized Armed Groups in an IAC should be classified as armed forces under customary international law principles defined in the 'mini convention' provided in Common Article 3.

2. The Principle of Distinction in IACs

2.1. An IAC and Its Parties

An IAC is defined in Common Article 2 (1) of the Geneva Conventions as '*all cases of declared war of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*'. There must thus be an armed conflict between State Parties. In addition, the notion of 'armed conflict' under customary international humanitarian law is defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber as '*whenever there is a resort to armed force between States or protracted arm violence between governmental organized armed groups or between such groups within a State*' [6]. From those definitions, it is clear that Parties to an IAC can only be States. Organized Armed Groups are therefore, only considered to be a Party to an IAC when it belongs to a State party to that conflict.

2.2. The Principle of Distinction

The existence of an IAC triggers the application of the Geneva Conventions pursuant to Common Article 2, the Additional Protocol I to the Geneva Convention and customary international humanitarian law. One of the cornerstone principles that applies to armed conflicts is the principle of distinction. States may in an IAC only direct their

attacks against combatants and civilians taking direct part in hostilities [7]. Other civilians must be protected from such attacks. This flows from the customary international rule of the principle of distinction [8], which provides for a balance between humanitarian concerns and military necessity. The importance of this rule was noted by the ICJ in its *Legality of the Threat or Use of Nuclear Weapons Advisory opinion*, as it held that the principle of distinction is a fundamental rule and constitutes an intransgressible principle of international customary international law [9].

The principle of distinction in IACs is codified in article 48 of the Additional Protocol I to the Geneva Conventions. Article 48 constitutes that '*in order to ensure respect for an protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operation only against military objectives*'. To make the distinction between combatants and civilians, the definitions of both combatants and civilians must be clear. A 'civilian' is defined in article 50 of Additional Protocol I to the Geneva Conventions.

According to Article 50 of Additional Protocol I to the Geneva Conventions, a civilian is any person who does not belong to:

1. 'Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.' [10]
2. 'Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.' [11]
3. 'Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.' [12]
4. Members of organized armed groups under a command responsible to a Party for the conduct of its subordinates [13].

If a person does not fall within any of the aforementioned categories, the person is a civilian for the purposes of an IAC. But members of Non-State Organized Armed Groups do not fall within any of the aforementioned categories. This is due to the fact that the armed forces must belong to a Party to an IAC, which can only be States [14]. Members of Non-State Organized Armed Groups seems therefore to fall within the definition of a 'civilian'. It seems thus that the letter of the Geneva Conventions and its Additional Protocols indicate that Non-State Organized Armed Groups are afforded the same protective regime as the civilian population in an IAC. This contradicts with the purpose behind the principle of distinction [15].

Consequently, the question arises whether members of Non-State Organized Armed Groups can be qualified differently. Schmitt, for example, argues that Organized Armed Groups not belonging to a State participating in an IAC should be treated as (i) armed forces for targeting purposes regardless of their ties to a belligerent party or (ii) as civilians who directly participates in the hostilities throughout the duration of their membership in the Non-State Organized Armed Group [16].

This article discusses further whether such members may be civilians continuously taking direct part of hostilities or as members of armed forces on another ground.

3. A Member of a Non-State Organized Armed Group: Civilians Continuously Taking Direct Part of Hostilities

Civilians taking direct part in hostilities do not enjoy immunity from direct attacks (Article 51 (3) of Additional Protocol I) [17]. A civilian is taking direct part in hostilities if the act of the civilian (a) reaches a certain threshold of harm, that adversely affects the military operation or capacity of a party to an armed conflict, or inflicts injury, death or destruction on certain objects or persons, (b) directly caused the harm concerned and (c) closely relates to the hostilities occurring between parties to an armed conflict [18].

The question whether a member of a Non-State Organized Armed Group can be classified as a civilian taking direct part in hostilities was addressed by The Israeli Supreme Court in its Targeted Killings case. The Israeli Supreme Court ruled that individuals who cannot be considered as a combatant, could be participating in hostilities in an IAC [19]. In that regard, it further held that *'in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack for such time as he is committing the chain of acts. Indeed, regarding such civilian, the rest between hostilities is nothing other than preparation for the next hostility'* [20].

The ruling of the Israeli Supreme Court is not supported in international law because most States are still evaluating whether members of such an Organized Armed Group should be considered as a combatant or a civilian [21]. In addition, the approach by the Israeli Supreme Court leads to the non-distinction of members of Non-State Organized Armed Groups and civilians in IACs. While considering the organizational structure of such a group, the members of Non-State Organized Armed Groups cannot logically be classified as civilians taking direct participation in hostilities. The classification of civilians taking direct part of hostilities is designed for evaluating the conduct of civilians on a case by case basis and is outside the scope of classifications being extended to members of an Non-State Organized Armed Group solely on the basis of membership. For instance, a classic example of a civilian that is taking direct part in hostilities is a civilian truck driver that delivers ammunition to an active firing position. In that instance, if the civilian stops with the delivery of the ammunition, the person is again

protected against direct attacks. The protection is thus, only lost when specific acts are conducted. Considering the nature of the legal concept, if being a member of a Non-State Organized Armed Group constitutes as continuously taking direct participation just by mere membership, then the scope of the legal concept stretches further than the drafters likely intended.

4. A Member of a Non-State Organized Armed Group: Not a Civilian

4.1. The View of the ICRC's Interpretative Guide on Direct Participation in Hostilities

The ICRC's Interpretative Guide on Direct Participation in Hostilities provides for a solution to the undesirable effect of the definition of a civilian in IACs, that includes members of Non-State Organized Armed Groups. The solution that the ICRC's Interpretative Guide on Direct Participation in Hostilities provides is 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 provided that the violence reaches the required threshold. Whether the individuals are civilians or members of the armed forces of a party to a conflict would then have to be determined under IHL governing non-international armed conflicts' [3].

In other words, a fictional NIAC must be created to provide for a legal framework for the qualification of Organized Armed Groups in an IAC. This approach provides that members of Non-State Organized Groups may not be attacked because of their membership in the group in accordance with the law of IACs, but they may be attacked pursuant to that of NIACs.

This approach is inconsistent with Article 50 of the Additional Protocol I to the Geneva Conventions. Since the rules governing NIACs would override that article in a mere IAC if a Non-State Organized Armed Group participates as well. This thus cannot be regarded as consistent with the objectives and purpose of the Geneva Conventions and its Additional Protocols.

4.2. Armed Forces in an IAC Despite Their Ties to a State Party

Another approach is to treat Organized Armed Groups not belonging to a State participating in an IAC as armed forces for targeting purposes regardless of their ties to a belligerent party [16]. The treatment of a Non-State Organized Armed Group as armed forces for targeting purposes could in certain circumstances be more of a practical solution to the possible undesirable effects of categorizing members of Non-State Organized Armed Groups as 'civilians'. But the legal framework that applies to IACs does not provide any room for such a solution.

Article 43 (1) of Additional Protocol I defines 'armed

forces' in an IAC as the 'armed forces of a Party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party' [22]. A Non-State Organized Armed Group does not fall within that definition, as it is not under a command responsible to a State that participates in an IAC. Its members are therefore, also not combatants as provided in Article 43 (2) of the Additional Protocol I.

The letter of the rules nor its object and purpose provide room for considering Non-State Organized Armed Groups as armed forces despite their ties to State Parties [23]. Except for the consideration that Non-State Organized Armed Groups are armed forces solely in light of Common Article 3.

4.3. Armed Forces in Light of Common Article 3

Common Article 3 is the core provision governing NIACs in the Geneva Conventions. This article, as mentioned before, also covers Non-State Organized Armed Groups in NIACs, as it applies to each party to the conflict and not only to 'the High Contracting Parties' to the Geneva Conventions, which is the case in IACs.

Not just any group qualifies as a Party, however, it should encompass an Organized Armed Group. The group must, therefore, possess a degree of organization [24]. For instance, there must be a certain command structure and the group must have the capacity to sustain military operations [25]. It must possess a 'certain level of hierarchy and discipline in the ability to implement the basic obligations of IHL' [26]. In practice, certain indicative factors have been taken into account to determine the existence of a Non-State Organized Armed Group, such as (i) the presence of a command structure, disciplinary rules, mechanisms within the group, headquarters, de facto territorial control, (ii) the ability of the group to gain access to military equipment, recruits and military training, (iii) its ability to plan, coordinate and carry out military operations, (iv) its ability to define a unified military strategy and use military tactics and (v) its ability to represent itself and negotiate and conclude agreements [27]. It depends thus on multiple factors whether a group qualifies as an Organized Armed Group.

Common Article 3's fundamental character is further not limited to NIACs. It applies in all armed conflicts and therefore, Non-State Organized Armed Groups in IACs can be covered by Common Article 3 without creating a legal fictional NIAC. This was also suggested during the ICRC's Fourth Expert Meeting on the Notion of Direct Participation in Hostilities of 27 and 28 November 2006. One of the participating experts noted that the decision of categorization of Non-State Organized Armed Groups in IACs must be read in conjunction with the judgment of the International Court of Justice in the Nicaragua case concerning Common Article 3 [28]. Since the ICJ ruled in that case that:

'Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international

character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts.'

The ICJ held further that minimum rules applicable to international and non-international conflicts are identical [29].

Non-State Organized Armed Groups are recognized in Common Article 3 as a Party that can participate in a conflict. This recognition is therefore, also applicable in IACs given that Common Article 3 constitutes as a 'minimum yardstick' to IACs. The other provisions applicable to IACs will, however, not be applicable to Non-State Organized Armed Groups.

This approach differs from the approach of the ICRC's Guidance, since it does not consider that a Non-State Organized Armed Group in a mere IAC as a Party to a non-existing NIAC, but it recognizes the Non-State Organized Armed Group as a Party to the IAC in light of Common Article 3. It follows from the rules of IHL that Common Article 3 serves solely as the legal framework for the Non-State Organized Armed Group which are participating in a mere IAC.

5. Conclusion

Including Non-State Organized Armed Groups in the international humanitarian legal concept of 'civilians' compromises the principle of distinction in IACs. While regarding Non-State Organized Armed Groups as armed forces (as defined in Article 43 (1) of Additional Protocol I) in IACs solely for targeting purposes is not supported by the rules of IHL. In addition, classifying members of Non-State Organized Groups as civilians taking direct part in hostilities goes beyond the legal concept of 'civilians taking direct part in hostilities' that the drafters envisioned, as this sort of classification would no longer depend on the specific acts taken by civilians and instead would result in distinction based solely on group membership.

To consider that Non-State Armed Groups in a mere IAC are participating in a fictional NIAC is additionally not a solution that is supported by the rules of IHL. However, the rules of IHL support that Non-State Organized Armed Groups participating in a mere IAC are considered to be armed forces as stipulated in Common Article 3 according to the rules of customary international law, and are therefore, also governed by the rules provided by Common Article 3.

References

- [1] Cf. *Prosecutor v Lubanga Dyilo* (Judgment) ICC-01/04-01/06 (14 March 2012), para. 540; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. I. C. J. Reports 1986, p. 114, para. 219.
- [2] See e.g. M. Milanovic, 'Chapter 2: The Applicability of the Conventions to 'Transnational' and 'Mixed' Conflicts' in: A. Claphan, P. Gaeta, M. Sassoli, et al (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, Oxford, 2015).

- [3] N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva: International Committee of the Red Cross 2009, p. 24.
- [4] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.
- [5] See e.g. *The Public Committee Against Torture in Israel v. The Government of Israel* (2006) HCJ 769/02 (Targeted Killings case).
- [6] ICTY, *Prosecutor v. Dusko Tadic a/k/a "DULE"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.
- [7] See article 51 (3) of Additional Protocol I.
- [8] See e.g. ICRC 'Rule 1. The Principle of Distinction between Civilians and Combatants', <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule1>, accessed on 10 January 2021; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996, p. 226.
- [9] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I. C. J. Reports 1996, p. 226, at p. 257, para. 78-79.
- [10] Article 4 (A) (1) of International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135.
- [11] Article 4 (A) (2) of the Third Geneva Convention.
- [12] Article 4 (A) (3) of the Third Geneva Convention.
- [13] Article 43 of Additional Protocol I to the Geneva Conventions.
- [14] Ibid. See also Rule 4 in the ICRC IHL Database Customary IHL <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule4>, accessed 11 October 2021.
- [15] See also N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva: International Committee of the Red Cross 2009, p. 22.
- [16] M. N. Schmitt, 'The Interpretative Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis', *Harvard National Security Journal* 2010, vol. 1, 5., p. 20.
- [17] Art. 51 (3) Additional Protocol I and Art. 13 (3) of International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.
- [18] See N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva: International Committee of the Red Cross 2009.
- [19] *The Public Committee Against Torture in Israel v. The Government of Israel* (2006) HCJ 769/02 (Targeted Killings case), para. 25.
- [20] *The Public Committee Against Torture in Israel v. The Government of Israel* (2006) HCJ 769/02 (Targeted Killings case), para. 39.
- [21] ICRC, 'Practice relating to Rule 1. The Principle of Distinction between Civilians and Combatants', <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule1>, accessed 10 January 2021.
- [22] See also Rule 4 in the ICRC IHL Database Customary IHL <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule4>, accessed 11 October 2021.
- [23] See also N. Melzer, 'Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities', *N. Y. U. Journal of International Law & Politics* 2010, vol. 42, 831, p. 844.
- [24] The ICTY adopts that 'some degree of organization' is necessary (*Prosecutor v. Tadic*, Appeals Chamber, ICTY (Case No IT-94-1-A), para 120; *Prosecutor v Limaj*, Trial Chamber II, ICTY (Case No IT-03-66-T, para. 89; *Prosecutor v Boskoski*, Judgment, Trial Chamber, ICTY (Case No IT-04-82-T) 10 July 2008, para. 195), while the ICC ruled that under the ICC Statute there must be a sufficient degree of organization (*Lubanga Dyilo*, ICC-01/04-01/06, para 536; *Bemba Gombo*, ICC-01/05-01/08, para 134).
- [25] *Prosecutor v Ramush Haradinaj et al.*, Trial Chamber I, ICTY (Case No. IT-04-84-T), para. 60; *Boskoski* para 198. See also *Ntaganda*, *Decision on the Prosecutor's Application under Article 58*, 13 July 2012, *Pre-Trial Chamber II*, ICC-01/04-02/06, ICC, para 49.
- [26] See also, *Prosecutor v. Tadic*, Appeals Chamber, ICTY (Case No IT-94-1-A), para 120. See also *Prosecutor v Boskoski*, Judgment, Trial Chamber, ICTY (Case No IT-04-82-T) 10 July 2008, para 197.
- [27] *Prosecutor v Ramush Haradinaj et al.*, Trial Chamber I, ICTY (Case No. IT-04-84-T), para. 60.
- [28] ICRC, Fourth Expert Meeting on the Notion of Direct Participation in Hostilities Summary Report, November 2006, p. 18.
- [29] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment. I. C. J. Reports* 1986, p. 14, at p. 113-114, paras. 218-219.