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INTERNATIONAL HUMANITARIAN LAW AND THE TARGETING OF NON-STATE INTELLIGENCE PERSONNEL AND OBJECTS

MICHAEL N. SCHMITT*

This Article examines the targetability of individuals and organizations performing intelligence functions for a non-State group involved in an armed conflict. Specifically, it considers the circumstances under which they lose the international humanitarian law (IHL) protections from, and during, attacks that they would otherwise enjoy as civilians. To do so, the piece deconstructs IHL's "organized armed group" construct to determine when an intelligence organization can be characterized as a component thereof. Noting that some non-State groups consist of both entities involved in the hostilities and organizations having no relationship to them, the Article introduces the concept of a non-State group's "overall OAG," a notion that parallel's the characterization of a State's various military units as its "armed forces." Additionally, the Article assesses the circumstances under which individuals engaged in activities intelligence who are not members of an OAG may be targeted on the basis of their "direct participation in the hostilities."

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I. INTRODUCTION

The essence of warfare is the "attack," defined in international humanitarian law (IHL) as an "act[] of violence against the adversary, whether in offence or in defence."[1] Civilians and specially-protected military personnel enjoy key legal protections from attack.[2] However, as will be explained, civilians who are members of an "organized armed group" (OAG)[3] or otherwise "directly participate in hostilities"[4] forfeit that protection and therefore are not only subject to lawful attack, but need not be considered when assessing the proportionality of an attack[5] and the requirement to take precautions during the attack to avoid harm to civilians and civilian objects.[6]

These textually straightforward rules have proven difficult to interpret and apply in practice. Indeed, a five-year project of the International Committee of the Red Cross (ICRC) to examine these rules ended in failure

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 49(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Acts of violence against civilians self-evidently also qualify as attacks since treaty and customary law prohibit "attacking" civilians, except in the circumstances set forth in this article. *Id*. art. 51(2) (in international armed conflict); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (in non-international armed conflict); INT'L COMM. OF THE RED CROSS [ICRC], 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW STUDY r.1 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CIHL]. Some States, including the United States and Israel, are not Parties to the Additional Protocols and accordingly not bound by their provisions. However, in most cases, the provisions cited in this article reflect customary international law and as such bind non-Parties. For an unofficial, but generally reliable, catalogue of those provisions the United States considers as reflecting customary law, see Matthew J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions,* 2 AM. UNIV. J. INT'L L. & POL'Y 419 (1987). See also the ICRC's comprehensive study on the topic, CIHL, *supra*, which lays out the basis for concluding certain IHL rules are customary.

2. Specially protected military personnel include, inter alia, medical and religious personnel and those who are *hors de combat*. *See* CIHL, *supra* note 2, rr. 25, 27, 47, and treaty provisions cited in the commentary thereto. *See also* OFFICE OF THE GENERAL COUNSEL, U.S. DEP'T DEF., LAW OF WAR MANUAL §§ 5.9, 7.8.2 (2015, updated 2016) [hereinafter DOD MANUAL].

3. INT'L COMM. OF THE RED CROSS [ICRC], INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 31-31 (May 2009) [hereinafter INTERPRETIVE GUIDANCE].

4. On "direct participation," see Additional Protocol I, *supra* note 2, art. 51(3); Additional Protocol II, *supra* note 2, art. 13(2); DOD MANUAL, *supra* note 3, §§ 5.8.2.1, 5.8.3; CIHL, *supra* note 2, r. 6.

5. Additional Protocol I, *supra* note 2, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); CIHL, *supra* note 2, r. 14; DOD MANUAL, *supra* 3, § 5.10.

6. Additional Protocol I, *supra* note 2, art. 57(2)(a) & (3); CIHL, *supra* note 2, r5. 15-17, 20-21; DOD MANUAL, *supra* 3, § 5.11.

when the distinguished group of experts could not agree on key issues. Accordingly, the organization published the resulting *Interpretive Guidance on the Notion of Direct Participation* as its in-house position, rather than a consensus view of the experts, which was the original objective.[7]

This Article examines one critical facet of the matter: the targetability of individuals and groups performing intelligence functions for a non-State group involved in an armed conflict. It does not address other matters that are determined by the legal status of individuals under IHL, such as detention and combatant immunity.[8] Rather, analysis is limited to the question of when individuals who are members of organizations involved in intelligence activities that benefit a non-State group, or who engage in such activities on their own, lose the protection from attack they would otherwise be entitled to under IHL.[9] While that question surfaces primarily in the context of non-international armed conflicts to which non-State groups are party, which is the focus of the following discussion, non-State groups and individuals are also sometimes active during international armed conflicts, thereby raising identical questions that are usually addressed in the same manner.[10]

Since a common legal analysis applies to OAGs in both forms of conflict, the term "non-State party to the conflict" is employed broadly in this Article to denote any non-State group that is active in an international armed conflict or party to a non-international armed conflict. As will be explained, a non-State group may either itself be an OAG or be part of an OAG within a "mixed group." The term "overall OAG" is used herein as encompassing all the fighting wings and supporting organizations of a mixed

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7. INTERPRETIVE GUIDANCE, *supra* note 4. On the Interpretive Guidance, see generally Dapo Akande, *Clearing the Fog of War - The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 INT'L & COMP. L.Q. 180 (2010).

8. INTERPRETIVE GUIDANCE, *supra* note 4, at 11; DOD MANUAL, *supra* note 3, §§ 9.3.2, 3.4.1.2.

9. "Conduct of hostilities" is an IHL term referring to fighting and other military activities associated with combat operations.

10. International armed conflicts are between States (or a State and an organized armed group under the overall control of a State), whereas non-international armed conflicts are between a State and an organized armed group or between organized armed groups. Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). On "overall control," see Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, ¶¶ 120, 131 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). *See also* Common Articles 2 and 3 to the 1949 Geneva Conventions, which govern the material field of application of international and non-international armed conflict respectively. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 3; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3217 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

non-State group.

For the purposes of this article, the term "intelligence" refers to "[t]he product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations, hostile or potentially hostile forces or elements, or areas of actual or potential operations."[11] It also encompasses "counterintelligence," except where a distinction between intelligence and counterintelligence is necessary for analytical purposes.[12] Counterintelligence is designed to foil and impede the enemy's intelligence operations. It involves both counterespionage activities, including countersurveillance, and security functions. The former are "designed to detect, destroy, neutralize, exploit, or prevent espionage activities through identification, penetration, manipulation, deception, and repression of individuals, groups, or organizations conducting or suspected of conducting espionage activities."[13] "Security" functions by contrast, consist of "[m]easures taken by a military unit, activity, or installation to protect itself against all acts designed to, or which may, impair its effectiveness," such as "prevent[ing] unauthorized persons from having access to official information."[14]

Although the focus is on non-State "intelligence organizations" and "intelligence personnel," terms that respectively denote groups and individuals with regular duties involving intelligence, other groups or individuals sometimes collect and disseminate operationally useful information. For example, a non-State fighter who engages in tactical questioning of a just-captured enemy soldier is not necessarily an intelligence operative as such but might nevertheless uncover information of intelligence value.[15] Similarly, a sympathetic social or religious group that passes information to a non-State group's OAG on a periodic basis is not an intelligence organization per se but, again, can prove a valuable intelligence asset for the armed group.[16] Under certain circumstances, the individuals

11. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 107 (amended through Jan. 2020), https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf [hereinafter DOD DICTIONARY].

12. See, e.g., definition of "intelligence operations" in *id.* at 108.

13. *Id.* at 51.

14. *Id.* at 191.

15. "Tactical questioning is expedient initial questioning for information of immediate tactical value. Tactical questioning is generally performed by members of patrols . . . ." DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FIELD MANUAL 2-22.33, paras. 1–17 (Sept. 2006) [hereinafter FIELD MANUAL].

16. For instance, ISIS set up Da'wah Offices that performed missionary type and social service function in areas in which the group wanted to operate. Those who attended the religious and social events were often persuaded to serve as informants "under the guise of promoting the righteousness of providing information that fosters the religion." Carl Anthony Wege, *The Changing Islamic State Intelligence*

involved may be lawfully attacked by virtue of such activities even though they are not formally integrated into the OAG. Therefore, the scope of examination extends beyond intelligence organizations and personnel that are assigned intelligence duties as their core responsibility for an OAG.

Part II begins with a brief survey of both the significance intelligence holds for non-State groups and the variety of organizational approaches they take to intelligence activities. Part III turns to the normative framework governing status issues that are relevant to non-State organizations and personnel and the consequences of status vis-à-vis targeting. In particular, it examines the legal framework for targeting individuals under IHL.

With the groundwork established, Part IV focuses on OAGs in the intelligence context. It commences with an examination of the OAG construct to determine when an intelligence organization can be characterized as a component thereof. Sometimes a non-State group is composed of both an OAG and separate organizations having no relationship to the hostilities. This raises the question of where intelligence organizations fit within such "mixed groups," the answer to which determines the circumstances allowing for attack on its personnel. The Article introduces an approach by which various entities of a non-State group, including intelligence organizations, comprise the group's "overall OAG," much as a State's disparate military units make up the armed forces. Such entities may be considered ensemble as the OAG by virtue of common control over them and the function they perform. Complicating matters is the fact that some intelligence organizations are themselves comprised of military and non-military departments; therefore, the discussion includes consideration of the circumstances in which the latter may be characterized as lying outside the non-State group's OAG.

Drilling further down into OAGs, it is necessary to determine when an individual is a member of an OAG and therefore subject to OAG targeting rules. The issue arises because membership is not always clear, since not all non-State OAGs have formal recruiting mechanisms or indicia signaling membership. The analysis of an individual's status as a member of an OAG concludes by taking on the debate over whether all OAG members are targetable or only those who have a so-called "continuous combat function."

Part V deals with the targetability of individuals engaging in intelligence activities who are not OAG members. Such activities sometimes result in their loss of protected status "for so long" as they "directly participate in hostilities." Direct participation in hostilities is a status

Apparatus, 31 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 271, 274–75 (2018).

measured against three constitutive elements set forth by the ICRC[17] that are generally accepted by the international law community, albeit with open disagreement on their application in specific circumstances.[18] Discussion focuses on when an intelligence activity rises to the level of direct participation such that attacking the individual concerned is permissible.

For the sake of completeness, the substantive discussion concludes in Part VI with a brief foray into the targetability of objects. Like civilians, civilian objects used for intelligence purposes sometimes lose their protected status. This may occur through use of the object for military purposes, probable future use for military purposes, or by virtue of the object's location. *De jure*, targetability of an object does not depend on who uses it. However, as will be explained, objects used for military intelligence purposes, regardless of the status of the user, are likely to qualify as targetable military objectives.

II. NON-STATE INTELLIGENCE FUNCTIONS AND ORGANIZATION

Intelligence operations have been a feature of organized warfare throughout history, for knowing the enemy's capabilities, weaknesses, and intentions, while masking one's own, affords a significant advantage on the battlefield. In particular, the party to a conflict that enjoys an advantage in this regard can often "operate inside" its opponent's "OODA loop" by "observing, orienting, directing, and acting" more quickly.[19] Thus, intelligence affords the operational initiative to the advantaged party, while rendering the other side largely reactive.

This dynamic is pronounced with respect to non-State groups, for effective intelligence can offset operational and tactical disadvantages

17. INTERPRETIVE GUIDANCE, *supra* note 3, at 46.

18. For instance, the International Group of Experts that prepared the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* "generally agreed with the three cumulative criteria." TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 429 (Michael N. Schmitt ed., 2017). On the disagreement, see the articles compiled in the special edition of the New York University Journal of International Law and Politics: Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741 (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 N.Y.U. J. INT'L L. & POL. 831 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

19. On the OODA loop, see Michael T. Plehn, Control Warfare: Inside the OODA Loop (June 2000) (unpublished MPhil thesis, School of Advanced Airpower Studies, Air University), https://apps.dtic.mil/sti/pdfs/ADA391774.pdf.

resulting from disparities in forces, weapons, technology, and funding. Indeed, non-State groups often have demonstrated an ability to mount complex operations against otherwise superior forces by relying on robust intelligence. In one well-known example, Lashkar-e-Taiba (LeT) in Pakistan used the American David Headley to collect intelligence over a three-year period to enable the 2008 attacks against targets in Mumbai, India.[20] Nearly 170 persons died.[21] In another the following year, al-Qaeda used a Jordanian triple agent to gather intelligence on, and gain access to, a Central Intelligence Agency (CIA) outpost at the organization's forward operating base in Khost, Afghanistan. The ensuing attack killed seven CIA personnel.[22] Mission success against far stronger adversaries in these examples hinged on the related intelligence operations, as well as the OAGs' ability to shield their intelligence activities from their opponents' own collection efforts.

Technology is enhancing the effectiveness of non-State intelligence organizations and personnel by allowing OAGs to leverage this dynamic. Advanced intelligence capabilities are increasingly accessible to such groups and can serve as powerful force multipliers. Examples include commercially available advanced space capabilities[23]; the growing affordability and increased portability of off-the-shelf remotely piloted aerial vehicles[24]; cyber means of gathering intelligence[25]; and enhanced communications capabilities using, for instance, e-mail, mobile phones, and social media platforms that are often encrypted.[26] Openly available tools like Google

20. Press Release, Dep't of Justice, Chicago Resident David Coleman Headley Pleads Guilty to Role in India and Denmark Terrorism Conspiracies (Mar. 18, 2010), http://www.justice.gov/opa/pr/2010/March/10-ag-277.html.

21. Sebastian Rotella, *U.S. Prosecutors Indict 4 Pakistanis in Mumbai Attacks*, WASH POST (Apr. 26, 2011), https://www.washingtonpost.com/politics/us_prosecutors_indict_4_pakistanis_in_mumbai_attacks/2011/04/26/AFaDLhsE_story.html; JEROME P. BJELOPERA, CONG. RESEARCH SERV., AMERICAN JIHADIST TERRORISM: COMBATING A COMPLEX THREAT 10, 37, 89–91 (2013).

22. Richard A. Oppel Jr., Mark Mazzetti and Souad Mekhennet, *Attacker in Afghanistan Was a Double Agent*, N.Y. TIMES (Jan. 4, 2009), https://www.nytimes.com/2010/01/05/world/asia/05cia.html.

23. Gregory D. Miller, *Space Pirates, Geosynchronous Guerrillas, and Nonterrestrial Terrorists*, 33 AIR & SPACE POWER J. 33 (2019).

24. Robbie Gramer, *Afghan Insurgents Use Drones in Fight Against U.S.*, FOREIGN POLICY (Jan. 31, 2017), https://foreignpolicy.com/2017/01/31/afghanistan-insurgents-use-drones-in-fight-against-u-s-nato-coalition-forces-unmanned-aerial-vehicles-future-warfare/; Michael Horton, *Inside the Chilling World of Artificially Intelligent Drones*, AM. CONSERVATIVE (Feb. 12, 2018), https://www.theamericanconservative.com/articles/inside-the-chilling-proliferation-of-artificially-intelligent-drones/.

25. Aron Heller, *Israel: Hamas Tried to Spy on Soldiers with Fake Dating Apps*, BLOOMBERG (Jul. 3, 2018), https://www.bloomberg.com/news/articles/2018-07-03/israel-hamas-tried-to-spy-on-soldiers-with-fake-dating-apps; Ben Schaefer, *The Cyber Party of God: How Hezbollah Could Transform Cyberterrorism*, GEO. SEC. STU. REV. (Mar. 11, 2018), https://georgetownsecuritystudiesreview.org/2018/03/11/the-cyber-party-of-god-how-hezbollah-could-transform-cyberterrorism/.

26. Robert Graham, *How Terrorists Use Encryption*, CTC SENTINEL, June 2016, at 20.

Earth further enhance non-State intelligence capabilities.[27] Combined with traditional advantages in human intelligence (HUMINT)[28] and an operating environment frequently containing sympathizers, these and other accessible technologies are eroding the technical advantage that States have traditionally enjoyed.

Counterintelligence operations are of particular consequence for non-State parties in State versus non-State party conflicts, for non-State operations are often more fragile than those mounted by a State's armed forces.[29] To illustrate, if the target of a planned terrorist strike learns the attack's location and timing, it can usually be thwarted. Even very general information suggesting an impending attack can result in the target State implementing security measures that diminish the likelihood of success, especially with respect to "soft" targets, such as poorly-defended civilian gathering places. Intelligence on planned attacks also enables traps to be set for the non-State attackers, while State forces can leverage their capabilities advantage to exploit weak points in an OAG's planning, positioning, and capabilities once those weaknesses become known. Denying their State adversary these advantages depends on the effectiveness of the non-State group's counterintelligence activities.

Of course, non-State intelligence capabilities and organization vary widely. The intelligence function in some groups is highly systematized and productive, providing both robust information at the strategic, operational, and tactical levels of conflict,[30] as well as counterintelligence that can frustrate, and exploit, their enemy's intelligence-gathering efforts. Hezbollah, with its "well-structured and increasingly formalised intelligence wings" exemplifies such groups.[31] The organization's intelligence gathering proficiency is on par with its organizational maturity, as demonstrated, for example, by Hezbollah's extensive use of drones in Syria[32] and its tapping

27. John Ribeiro, *Google Earth Used by Terrorists in India Attack*, PC WORLD (Nov. 30, 2008), https://www.pcworld.com/article/154684/article.html.

28. "HUMINT is a category of intelligence derived from information collected and provided by human sources." JOINT CHIEFS OF STAFF, JOINT PUBLICATION 2-01, JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS at III-39 (2017); s*ee also generally* FIELD MANUAL 2-22.3, *supra* note 15.

29. Bruce Riedel, *Terrorist Intelligence Capabilities: Lessons from the Battlefield*, 12 GEO. J. INT'L AFF. 26, 27 (2011).

30. *See supra* text accompanying notes 87–89 (discussing the levels of war).

31. Michael Horton, *Insurgent Groups Seek to Improve Intelligence Capabilities*, JANE'S ONLINE 1–2 (Oct. 12, 2017).

32. Nadav Pollak, *The Transformation of Hezbollah by its Involvement in Syria*, WASH. INST. FOR NEAR E. POL'Y, Aug. 2016, at 1, 8, https://www.washingtoninstitute.org/uploads/Documents/pubs/ResearchNote35-Pollak-2.pdf.

of fiber optic cables to intercept data.[33]

Yet, not all non-State groups have the means to set up well-developed hierarchical intelligence apparatuses.[34] These groups tend to establish flatter networks that rely heavily on HUMINT to accord them an understanding of the military, cultural, political, and economic terrain in which they operate. Indeed, in some cases, a State's technological superiority can be offset by an OAG's "more capable and deeply sourced HUMINT."[35] Examples of effective OAGs without advanced war-fighting technology at their disposal include Harakat al-Shabaab al Mujahideen in Somalia and Al-Qaeda in the Arabian Peninsula (AQAP) in Yemen.[36]

The internal structure of non-State intelligence organizations also differs from group to group. In some cases, a single organization supplies the full range of intelligence and counterintelligence functions. This was the case with the Islamic State of Iraq and Syria's (ISIS) Emni, the terrorist organization's intelligence apparatus. The Emni was responsible for tasks that included collecting intelligence for ISIS' operational use, monitoring individuals living in ISIS controlled territory, performing background checks on new recruits, recruiting foreign fighters for particular missions, and providing information to ISIS's propaganda organs.[37]

By contrast, intelligence functions may be divided between a non-State group's various organizations, as is the case of Hamas, which has distinct agencies responsible for counterintelligence, VIP protection, border guarding, and law enforcement.[38] When distinct, the respective agencies can fall under one roof and report through a common chain of command. Alternatively, agencies are sometimes organizationally stove-piped.

As to individual personnel in non-State intelligence organizations, some work exclusively for a single intelligence organization, others perform functions for multiple such organizations, and still others engage in intelligence functions on an *ad hoc* basis. At times, they move between

33. *Lebanon: Hezbollah's Communication Network*, STRATFOR (May 9, 2008), https://worldview.stratfor.com/article/lebanon-hezbollahs-communication-network.

34. A flatter structure of an intelligence organization can also frustrate enemy intelligence operations. For instance, "[o]wing largely to security concerns and fears about intercepted communications, [ISIS Emni] operatives in charge of planning and conducting attacks outside Islamic State-controlled areas have a high degree of operational freedom, and are supposedly independent and self-tasking." Horton, *supra* note 31, at 8–9.

35. *Id.* at 1.

36. *Id*.

37. Anne Speckhard & Ahmet Yayla, *The ISIS Emni: Origins and Inner Workings of ISIS's Intelligence Apparatus*, 11 PERSP. ON TERRORISM 2, 3 (2017).

38. JIM ZANNOTTI, CONG. RESEARCH SERV., HAMAS: BACKGROUND AND ISSUES FOR CONGRESS 20 (2010).

organizations, or tasks an organization cannot perform itself are outsourced to other organizations, even ones outside the group.[39] As an example, David Headley, the LeT American mentioned above, was at one point outsourced to al Qaeda by LeT for a collection mission against Morgenavisen Jyllands-Posten, a Danish newspaper that had published cartoons depicting the prophet Mohammed.[40]

With respect to the question of IHL targetability status, non-State intelligence organizations perform a variety of functions and are structured in diverse ways. These functions and structures will determine whether their personnel are subject to the OAG targeting rules, those for direct participation in hostilities, or not at all.

III. THE LEGAL FRAMEWORK

The legal question at hand is the status under IHL's targeting rules of non-State individuals who are engaged in intelligence activities during armed conflicts. Individuals falling into three categories may be attacked: members of a State's armed forces, members of organized armed groups, and civilians who are directly participating in the hostilities.[41]

In an international armed conflict, armed forces personnel are combatants subject to attack, while most civilians are generally immune from attack, a rule imbedded in the principle of distinction.[42] Members of OAGs involved in the fighting on behalf of a State that is party to the conflict usually fail to qualify as combatants,[43] but are treated analogously with

39. Interview by author with government official.

40. Dep't of Justice, *supra* note 20; JEROME P. BJELOPERA, CONG. RESEARCH SERV., AMERICAN JIHADISTS TERRORISM: COMBATING A COMPLEX THREAT 89–91 (2013).

41. Outside an armed conflict, a State may act in so-called "naked self-defense." For instance, assume a terrorist attack not rising to the level of intensity that qualifies the violence as a non-international armed conflict. The State may nevertheless use force in self-defense pursuant to Article 51 of the U.N. Charter and customary international law. However, that use of force will be subject to international human rights law limitations on targeting. *See generally* Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line Between the* Jus ad Bellum *and the* Jus in Bello, 88 INT'L L. STUD. SER. US NAVAL WAR COL. 57 (2012).

42. "In order to ensure respect for and 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 operations only against military objectives." Additional Protocol I, *supra* note 1, art. 48. *See also* CIHLS, *supra* note 2, r.1 ("The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."); DOD MANUAL, *supra* note 2, § 4.2 (explaining that the law of war has recognized that the population of an enemy State should be divided between "combatants" and "civilians" to reflect the principle of distinction).

43. Pursuant to Additional Protocol I, "Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities." Additional Protocol I, *supra* note 2, art. 43(2). The ICRC Commentary to the provision explains, "All members of the armed forces are combatants, and only members of the armed forces are combatants. This should therefore

respect to IHL's conduct of hostilities rules. As a result, they are targetable at any time, a position widely accepted as customary law.[44]

With respect to individuals who are not OAG members, Article 51(3) of Additional Protocol I to the 1949 Geneva Conventions provides, for Parties to the instrument, that "[c]ivilians shall enjoy the protection afforded by [the Section on the conduct of hostilities], unless and for such time as they take a direct part in hostilities."[45] Note that in contrast to members of an OAG, direct participants may only be attacked when they are so participating. States that are not Party to the treaty, notably the United States and Israel, are bound by the article's customary law counterpart, which is generally set forth in the same terms.[46]

During non-international armed conflicts, the genre of armed conflict

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dispense with the concept of 'quasi-combatants', which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-military status, a soldier by night and peaceful citizen by day, also disappears." INTL. COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 1677 (Yves Sandoz et al. eds., 1987) (footnotes omitted). [hereinafter ADDITIONAL PROTOCOL COMMENTARIES]. Combatants are generally understood as those individuals who satisfy the criteria of Geneva Convention III for prisoners of war during an international armed conflict. *See* Geneva Convention III, *supra* note 10, arts. 4A(1)–(2) (setting out the conduct and level of participation that qualifies persons for prison of war status); *see also* Regulations Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, Convention No. IV Respecting the Laws and Customs of War on Land, Annex, 36 Stat. 2227, T.S. No. 539 [hereinafter Hague IV Regulations] (defining what conduct and level of participations makes the laws of war applicable to persons not in armies).

44. For instance, the U.S. Department of Defense's Law of War Manual provides, "Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent." DOD MANUAL, *supra* note 2, § 5.7.3. *See also* CIHL, *supra* note 1, at 21 (defining "armed forces" as consisting of "all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates."). For an interesting discussion juxtaposing the DoD manual approach to direct participation (totality of the circumstances) with that of the ICRC, see Ryan T. Krebsbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT'L SEC. L. & POL'Y 125 (2017).

45. Additional Protocol I, *supra* note 1, art. 51(3). No State has made any reservation to the provision.

46. In a textually uncontroversial restatement thereof, Rule 6 of the ICRC's *Customary International Humanitarian Law* study accurately sets forth the customary rule: "Civilians are protected against attack unless and for such time as they take a direct part in hostilities." CIHLS, *supra* note 2, r.6. State *opinio juris* is in accord. *See, e.g.*, FED. POLITICAL DEP'T, 16 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 164, § 119 (1977) (the UK statement at the CDDH describing the "valuable reaffirmation of existing customary rules of international law designed to protect civilians"). The United Kingdom reaffirmed this position when ratifying the Convention of Certain Conventional Weapons. Declaration upon Ratification of the CCW, Feb. 13 1995, § a(iii) (UK) ("The terms 'civilian' and 'civilian population' have the same meaning as in article 50 of the 1st Additional Protocol of 1977 to the 1949 Geneva Conventions. Civilians shall enjoy the protection afforded by this Convention unless and for such time as they take a direct part in hostilities.").

in which the issues raised in this article are most likely to present themselves, Common Article 3 of the four 1949 Geneva Conventions similarly limits protection from "violence to life and person" to "persons taking no active part in hostilities."[47] This provision, which is recognized as articulating customary international law,[48] does not relate to OAGs, for such groups are by definition involved in violence. Moreover, Article 1 of Additional Protocol II to the 1949 Geneva Conventions provides that the instrument's material field of application includes conflicts between a State's armed forces and "dissident armed forces or other organized armed groups,"[49] thereby clearly envisaging the targeting of OAG members according to the same methodology as applies to combatants during international armed conflicts.

Individuals who are not OAG members during a non-international armed conflict are subject to a direct participation rule. Article 13(3) of Additional Protocol II contains text mirroring its Article 53(1), Additional Protocol I, counterpart.[50] Although the provision applies only to the limited category of non-international armed conflicts governed by the instrument,[51] and only for Parties to the instrument, the customary law rule it restates extends to all States during all non-international armed conflicts.[52]

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47. Geneva Convention I, II, III, IV, *supra* note 10, art. 3(1). *See also* Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.LN/II.95, doc. 7 rev. §§ 177–78, 189, 328 (1997) (applying customary international law regarding protection for civilians and how participation in hostilities can forfeit that protection); Memorandum of Understanding on the Application of IHL Between Croatia and the Socialist Federal Republic of Yugoslavia, Nov. 27, 1991, ¶ 6, *reprinted in* MARCO SASSÓLI ET AL., HOW DOES LAW PROTECT IN WAR?, https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts (binding parties to the guidance on this subject in Additional Protocol I); Agreement No. 1 on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, Croat.-Yugoslavia, ¶ 2.5, May 22, 1992, *reprinted in* MARCO SASSÓLI ET AL., HOW DOES LAW PROTECT IN WAR?, https://casebook.icrc.org/case-study/former-yugoslavia-special-agreements-between-parties-conflicts) (same); U.N. Secretary-General, Observance by United Nations Forces of International Humanitarian Law, § 5.2, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999) (preserving protections for civilians unless they directly participate in hostilities). The phrase "active participation in hostilities" is generally understood as the equivalent of "direct participation in hostilities." Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 629 (Sept. 2, 1998) (clarifying that "active" and "direct" are synonymous for the Chamber's purpose); DOD MANUAL, *supra* note 2, § 5.8.1.1 (explaining why "direct" and "active" should be treated the same in this context).

48. *See generally* CIHL, *supra* note 1, commentary accompanying r.6 and sources cited therein (providing examples of applications).

49. Additional Protocol II, *supra* note 1, art. 1(1).

50. *Id.* art. 13(3).

51. Those in which the organized armed group "exercise[s] such control over a part of the territory as to enable [it] to carry out sustained and concerted military operations and to implement" the treaty. *Id.* art. 1(1).

52. CIHL, *supra* note 1, r.6 and accompanying commentary; DEP'T OF THE ARMY, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE, FM 6-27/MCTP 11-10C ¶1-56 (2019)

OAGs are sometimes active during an international armed conflict without acting on behalf of a State that is party to the conflict. These situations raise complex issues as to whether their operations, and those against them, are subject to the IHL rules applicable in international or non-international armed conflict. The resolution of that issue has no practical bearing on the discussion that follows because, as noted, targeting rules in both types of conflict regarding OAG members and civilians who are directly participating are in operational terms indistinguishable.

Ascertaining status is a *sine qua non* inquiry during targeting assessments, for individuals who are neither members of an OAG nor otherwise participating directly in the hostilities are not only immune from attack, but any incidental harm caused to them must be factored into the proportionality calculation that is required before and during an attack on a military objective. Pursuant to that rule, "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated,"[53] is unlawful.

Consider a planned operation against an OAG facility that qualifies as a lawful military objective (see below) because it is a military intelligence fusion center.[54] The prospective attacker would be obligated to assess reasonably foreseeable incidental harm to any individuals who are not members of the OAG or otherwise directly participating in the hostilities. Doing so is required to ensure that harm to them will not be excessive relative to the anticipated military value of neutralizing the facility's intelligence contribution. If it is excessive, attacking the facility will be unlawful even though it amounts to a valid, indeed critical, military objective. By contrast, the attacking force could ignore the presence of any OAG members and direct participants when making the proportionality assessment.

Similarly, such individuals would have to be considered with respect to the IHL requirement to take feasible precautions in attack to minimize harm to civilians, for instance by selecting a weapon or tactic less likely to cause them harm, choosing a different target to achieve the intended effect, or warning of the attack, at least so long as said measures would not lessen the likelihood of achieving the attack's desired military effect.[55] In the previous scenario, for example, intelligence personnel who are either members of an

[hereinafter ARMY MANUAL].

53. Additional Protocol I, *supra* note 1, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b); CIHL, *supra* note 2, r.14; DOD MANUAL, *supra* note 2, § 5.10.

54. *See infra* notes 123–28 and accompanying text.

55. Additional Protocol I, *supra* note 1, art. 57(2)(a), (3); CIHL, *supra* note 1, at rr. 5.15–17, 20–21; DOD MANUAL, *supra* note 2, § 5.11.

OAG or are directly participating may be disregarded when deciding how to conduct an attack; this would be so even if the attacker's sole objective was physical damage of the intelligence facility.

Finally, by the rule of equal application of IHL,[56] the analysis set forth below applies *mutatis mutandis* to a State's intelligence organizations and personnel.[57] In this regard, and in anticipation of the discussion that follows, personnel of civilian intelligence organizations are not targetable as members of the armed forces, but they may qualify as OAG members if the organization performs functions that would render it part of an "overall" OAG in the context of a "mixed" non-State group, a situation examined below. The complexity of this and related issues demands a case-by-case analysis that is subject to numerous factual differences between State and non-State intelligence agencies, such as organizational maturity. State intelligence organizations are not the subject of this article and will not be discussed further. That said, as States consider how to classify intelligence personnel and organizations for IHL purposes, they should be cautiously attentive to the implications for their own personnel and services.

IV. STATUS OF OAG INTELLIGENCE ORGANIZATIONS AND THEIR PERSONNEL

The concept of organized armed group exists in contradistinction to that of the regularly constituted armed forces during both international and non-international armed conflicts. In the specific context of targeting (as distinct from detention) during the former, and even though they are primarily State-on-State conflicts, international armed conflicts can involve OAGs on one or both (state) sides. All groups engaged in the hostilities[58] during these conflicts qualify as "organized armed groups" unless their members meet the demanding criteria for "combatant" status.[59] Examples of such OAGs

56. *See generally* Adam Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 872 INT'L REV. RED CROSS 931 (2008) (explaining the principle of equal application of law and describing criticisms of it in the context of modern conflicts).

57. There may be domestic law implications based on the difference between State intelligence organizations and their non-State counterparts, as when the State criminalizes the provision of support to a non-State group during a non-international armed conflict. *See, e.g.*, 18 U.S.C. §§ 2339A, 2339B (2012) (regarding material support to terrorism under US federal law). Further, status as members of a State's armed forces affects whether intelligence personnel enjoy combatant immunity from prosecution and prisoner of war status as lawful combatants during an international armed conflict. ICRC, *Unprivileged Belligerent*, HOW DOES LAW PROTECT IN WAR? (Apr. 4, 2020, 12:30 PM), https://casebook.icrc.org/glossary/unprivileged-belligerent.

58. The term hostilities refers to the "[collective] resort by the parties to the conflict to means and methods of injuring the enemy." INTERPRETIVE GUIDANCE, *supra* note 3, at 43.

59. *Id.* at 27–28; DOD MANUAL, *supra* note 2, § 5.8.2.1. The combatant status criteria for individuals who are not members of the armed forces but instead of organized armed groups belonging

include contractors engaging in combat operations for a party, volunteer groups that fail to comply with IHL as required by Article 4A(2) of Geneva Convention III, and law enforcement agencies that are conducting operations in support of a party without being incorporated into the armed forces.[60] Insurgent groups engaged in hostilities against a State party to the conflict are also OAGs.

In non-international armed conflict, by contrast, the legal status of the combatant does not exist and therefore cannot serve as a reference point from which to identify OAGs. Rather, with respect to such conflicts, the term "organized armed group" usually denotes the armed forces of the non-State party to the conflict and includes both dissident armed forces that have rebelled against the government and other armed groups that draw their membership from the civilian population, including terrorist groups.[61] It can also encompass non-State groups operating on behalf of the government, as in the case of organized vigilantes.[62]

Three determinative questions animate the OAG targeting analysis in all armed conflicts. First, when does a group qualify as an OAG such that it becomes subject to OAG-specific targeting rules? Second, some non-State groups involved in an armed conflict engage in both military and non-military activities. As a matter of law, they are sometimes properly considered as comprised of both an OAG and civilian organizations. This necessitates determining when intelligence organizations and personnel therein are part of the group's OAG and targetable as such. Third, under what circumstances do individuals qualify as members of an OAG who are subject to lawful attack on that basis? This is, as discussed below, a complex issue, one compounded by an on-going dispute over whether all members of an OAG are targetable or only those with a "continuous combat function."

A. Definition of Organized Armed Group

"Organized armed group" is an IHL term of art that refers to the "armed or military wing of a non-State party [to the conflict]; its armed forces in a functional sense."[63] The conditions precedent to qualification of a group as

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to a party to the conflict are set forth in Geneva Convention III, *supra* note 11, art. 4A(2). They include being commanded by a person responsible for his or her subordinates, wearing a fixed distinctive sign recognizable at a distance that denotes status; carrying arms openly, and conducting operations in accordance with IHL. *Id.*

60. *See* Additional Protocol I, *supra* note 1, art. 43(3).

61. INTERPRETIVE GUIDANCE, *supra* note 3, at 35.

62. *See generally AUC*, COLOMBIA REPORTS (Dec. 5, 2016), https://colombiareports.com/auc/ (discussing a non-state group such as the paramilitary forces in Colombia, especially the United Self Defense Forces of Colombia).

63. INTERPRETIVE GUIDANCE, *supra* note 3, at 32.

an OAG, and consequent application of OAG-specific targeting rules to its members, are 1) that it be "organized," 2) that it be "armed," and 3) that its operations have a nexus to the conflict.[64] Although little definitive guidance on the three criteria exists in the targeting context,[65] the concept of "organized armed group" occupies a place of prominence in the law on classification of an armed conflict as non-international. Therefore, it is to discussion of the term in that regard that IHL experts look to animate its meaning vis-à-vis the law of targeting.[66]

Common Article 3 of the 1949 Geneva Conventions references "parties to a conflict."[67] This notion of "parties" is the basis for the International Criminal Tribunal for the former Yugoslavia's (ICTY) conclusion, which is widely accepted as reflecting customary law, that only when a group is sufficiently organized can it qualify as a party to a non-international armed conflict.[68] The logic is straightforward. If a group is not organized, it cannot logically be characterized as the "enemy" and therefore identifiable as a "party" to the conflict by other participants. Moreover, only groups that are organized are capable of enforcing IHL, a further requirement for characterization as a party to a conflict.[69] It must be cautioned in the latter regard that the fact that an organization fails to enforce IHL in practice does

64. Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARVARD NATIONAL SECURITY JOURNAL 5, 16–18 (2010).

65. For a robust critical analysis of the concept of organized armed group, see Watkin, *supra* note 18. *See also* Gloria Gaggioli, *Targeting Individuals Belonging to an Armed Group*, 51 VAND. J. TRANSNAT'L L. 901 (2018) (discussing the challenges associated with the notions of "organized armed group" and "membership" therein).

66. Interestingly, most IHL experts and States have embraced the term "organized armed group" without a robust discussion of its appropriateness vis-à-vis targeting. This was despite the fact that it derives from a separate issue of law, classification of conflict, that is animated by a different object and purpose.

67. Common Article 3, *supra* note 10.

68. Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). The tribunal described such conflicts as "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Id.* Other international tribunals have adopted the same definition of non-international armed conflict. *See generally* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 619 (Sept. 2, 1998); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment, ¶ 92 (Dec. 6, 1999); Prosecutor v. Fofana, Case No. SCSL-2004-14-AR73, Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," ¶ 32 (May 16, 2005) (Robertson, J., separate opinion); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 233 (Jan. 29, 2007); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶ 229 (June 15, 2006); Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute reflects its status as customary international law.

69. Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 205 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008). *See also* Michael N. Schmitt, *Classification of Cyber Conflict*, 89 INT'L L. STUD. 233, 247–48 (2013).

not preclude it from being a party to the conflict so long as it has the capacity to do so.

In *Prosecutor v. Limaj*, the ICTY highlighted a range of relevant factors when assessing whether a group is organized enough to be deemed an OAG. They include the existence of a formal command structure, the creation of unit zones of operation, the issuance of orders, the establishment of a headquarters, and the existence of disciplinary measures.[70] Such factors are not necessary, but, along with others, are pertinent in determining whether an armed group is sufficiently structured to qualify as "organized."

Other decisions are in accord. For instance, the International Criminal Court stated in *Prosecutor v. Lubanga* that the condition of organization "focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time."[71] Later, in *Prosecutor v. Bemba*, the same court noted that OAGs "must be under responsible command. In this regard, responsible command entails some degree of organization of those armed groups, including the possibility to impose discipline and the ability to plan and carry out military operations."[72]

The ICRC's *Commentary* on the term "organized armed group" in Article 1(1) of Additional Protocol II sheds further light on the meaning of "organized." That provision extends the material field of application for Parties to the instrument beyond Common Article 3 to certain armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups."[73] According to the *Commentary*, the term organized armed groups

> 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.[74]

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70. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 94–129 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005). *See also* Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Boskoski, Case No. IT-04-82-T at ¶¶ 197–203.

71. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Confirmation of Charges, ¶ 234 (Jan. 29, 2007).

72. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on Confirmation of Charges, ¶¶ 233–34 (June 15, 2006).

73. Additional Protocol II, *supra* note 1, art. 1(1).

74. COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 3, ¶ 4463. Although OAGs must be capable of enforcing IHL, the fact that a group does not do so does not disqualify it from OAG status.

In a general sense, an organized group is one that often acts in a coordinated and collaborative manner. OAGs plan their missions collectively and exercise a degree of command and control over them. Such groups usually have an internal disciplinary system or other means of ensuring that members or components of the group act in accordance with the group's general aims and specific objectives. They also often share logistics and communications assets and systems. There is no minimum size requirement for an OAG, but the group should be large enough to have a defined leadership, exhibit organizational structure, and operate collaboratively. An OAG also cannot simply be a small number of individuals who share a common objective and engage in similar activities, such as attacking a common enemy in an uncoordinated fashion. This is so even if there are informal relationships, as with an individual who simply urges friends and work colleagues to engage in violence; rather, acts carried out by the individuals must be capable of being characterized as the actions of a group of individuals acting as a group.

Each case must be appraised on its own merits because there is no bright-line IHL test for determining whether an armed group is "organized." For instance, some groups are compartmentalized because they realize their enemy's intelligence assets can exploit coordination among a group's components; the more coordination there is within a group, the greater the possible points of exploitation. As a result, collaboration and coordination in such groups may occur at a high level, with lower level entities exercising a fair degree of autonomy in acting pursuant to an overall "commander's intent" by the operational leadership of the group.[75]

Of particular relevance in assessing an OAG's level of organization is whether the group has the ability to gather, analyze, and share intelligence among its members and organizational elements to support the group's operations. After all, the purpose of intelligence is generally to foster accomplishment of the group's objectives, whether that be through enabling the OAG's conduct of hostilities, precluding an opponent from interfering with such operations, or affording the group situational awareness of, and sensitivity to, the operational environment. Thus, the fact that a group has a dedicated organization or other entity responsible for intelligence, or personnel specifically tasked with intelligence duties, is a strong indicator of adequate organization.

If a group lacks the degree of organization necessary to qualify as an

75. Commander's intent is a "clear and concise expression of the purpose of the operation and the desired military end state that supports mission command, provides focus to the staff, and helps subordinate and supporting commanders act to achieve the commander's desired results without further orders, even when the operation does not unfold as planned." DOD DICTIONARY, *supra* note 11, at 41.

OAG, but nevertheless engages in the conduct of hostilities, its members may be direct participants in hostilities for targeting purposes. An example would be a flash mob that comes together to engage in violence against a State's forces during an armed conflict. Participants thereof need information on where to assemble and to find the targeted forces. This requires collecting and disseminating that information, often through social media. Yet, an individual who is doing so is only targetable as a direct participant, for flash mobs and similarly unstructured gatherings, lack the degree of organization required to qualify as an OAG.[76]

In addition to the organization requirement, groups must be "armed" for its members to qualify as targetable under the IHL rules applicable to OAGs. Armed denotes a group capable of conducting hostilities, especially "attacks," as IHL defines that term.[77] Importantly, the focus is on the group, not the individuals comprising it. Thus, the fact that a member of a group independently engages in hostile actions does not satisfy the armed requirement; the group must act in a concerted manner to engage in the hostile actions. In other words, an OAG must have the function of engaging in hostilities.

Given the "armed" requirement, it is unlikely that an intelligence organization will qualify as an OAG on its own terms, for gathering, analyzing, and disseminating intelligence or engaging in most counterintelligence functions, do not suffice to reach this threshold of conducting hostilities. However, an intelligence organization occasionally includes paramilitary forces that engage in combat operations. Except in the unlikely case that it is the only organization conducting hostilities on the part of, and at the direction of, the non-State group, the best approach is to consider such groups a component of a broader OAG (the overall OAG) serving the non-State group. This perspective tracks State military organizations, where individual units and services field combat capability but comprise a single armed force for the State.

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76. The only exception is that of the *levée en masse*. The term refers to "[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units." Hague IV Regulations, *supra* note 44, art. 2; *see also* Geneva Convention III, *supra* note 10, art. 4A(6) (defining prisoners of war); Additional Protocol I, *supra* note 1, art. 50(1) (defining civilian). Of course, the spontaneity of *levée en masse* means that they are highly unlikely to have dedicated intelligence organizations. Nevertheless, any person who supplies information that enables the fighting (tactical intelligence in traditional combat) is a member of the *levée en masse* and targetable as such. If resistance to the invaders becomes continuous and the fighters organize themselves, the *levée en masse* becomes an OAG, at which point OAG targeting rules attach.

77. Attacks are "acts of violence against the adversary, whether in offence or in defence." Additional Protocol I, *supra* note 1, art. 49. Attacks need not be kinetic in nature. See discussion of this point in TALLINN MANUAL 2.0, *supra* note 18, r.92 and accompanying commentary.

Finally, the activities of a group must have a nexus to the armed conflict in question to constitute an OAG under IHL. In other words, their purpose must be to advance the position of the group vis-à-vis its involvement in the conflict. This requirement is fundamental because some armed groups that are present in the battlespace do not intend to engage in conflict-related hostilities. A paradigmatic example is a group that performs only law enforcement functions. Another is a well-organized group that takes advantage of the disarray caused by the conflict to engage in violence for purely criminal purposes. However, since, by definition, terrorist organizations, rebellious forces, and insurgent groups are armed for reasons related to the armed conflict (usually to engage in violence against the government or civilian population), this requirement for qualification as an OAG seldom poses an obstacle.

It is sometimes the case, as in Iraq and Syria through the present, that multiple OAGs are involved in the same conflict. In this situation, it can be difficult to differentiate OAGs from each other when doing targeting analysis. The key to deconstructing status in these complex scenarios is to determine whether the groups are separate in the sense that they 1) are not under the control of a common leadership and 2) engage in operations autonomously, even if sometimes cooperatively with other fighting forces.

This is not a purely academic issue, since separateness can determine the applicable law. For instance, recall the requirement that violence reach a certain level of intensity before qualifying as a non-international armed conflict. If organized groups are separate, satisfaction of that requirement is necessary as to each group. It might be that one OAG is involved in a non-international armed conflict with the State because of the intensity of ongoing operations in which it is involved, while another is not. In the latter case, international human rights law and domestic law govern the use of force against the group, including any members engaged in intelligence activities, rather than the targeting rules of IHL.

To take but one example, Palestinian Islamic Jihad (PIJ) has cooperated with Hezbollah and Hamas. In 2017, it even formed a joint command with the latter to coordinate activities in Gaza. Yet PIJ has its own leadership, makes decisions independently, and at times has differed over policy and operations with its partners, as well as its primary State sponsor, Iran.[78] The targetability of PIJ members engaged in intelligence activities would thus be based on the organization's status as an OAG in its own right, as well as the intensity of the hostilities with Israel in which it is engaged, not on its

78. Daniel Levin, *Iran, Hamas and Palestinian Islamic Jihad*, WILSON CTR. (July 9, 2018), https://www.wilsoncenter.org/article/iran-hamas-and-palestinian-islamic-jihad.

relationship with the other groups.

B. Mixed Groups

Many non-State groups that engage in hostilities, such as Hamas, Hezbollah, ISIS, and the Taliban, consist of distinct elements, some of which perform functions unrelated to the hostilities. For instance, a group might include organizations that perform political, judicial, law enforcement, social, educational, humanitarian, or other roles that have little to do with the hostilities, in addition to fielding fighting forces making up its OAG. Often this is the case when a non-State group controls territory, as it must govern and provide the basic needs of the civilian population therein. A recent example was ISIS, which controlled wide swaths of territory in Iraq and Syria.[79] The question is which intelligence organizations comprising such a group qualify as a component of its OAG for the purposes of targeting law, even if they do not independently satisfy the organization and armed requirements discussed above.

Only when a group consists of distinct organizations does the issue of mixed groups arise; otherwise, the entire group constitutes the OAG. Distinctness denotes organizations that are unequivocally identifiable as discrete entities. For instance, they might be included on the non-State group's organizational chart as discrete entities and have separate budgets, personnel assignments might be characterized as being transferred into and out of them, and, most importantly, the organizations might have their own leadership that exercises dominant control over their activities. Some cases are clearer than others, thereby necessitating a case-by-case analysis.

If a group consists of distinct organizations, it is next necessary to determine whether any of them are part of the non-State group's overall OAG. As noted earlier, the term "overall OAG" is used here to denote all components of a non-State group's OAG.

In its *Interpretive Guidance*, the ICRC stated that "[t]he term organized armed group . . . refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense."[80] In fact, a non-State group may have multiple fighting wings, much as the armed forces of a State party are comprised of multiple combat units. In such cases, if the members report to common leadership, the fighting wings make up the non-State group's overall OAG. Intelligence personnel assigned to any of the wings are unquestionably members of the OAG on the basis that their wing is part

79. Rukmini Callimachi, *The ISIS Files*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html.

80. INTERPRETIVE GUIDANCE, *supra* note 3, at 32.

thereof.

Although intelligence organizations are sometimes organizationally distinct from the fighting wings, they may nevertheless amount to part of a mixed group's overall OAG based on their function. This is so even when they neither engage in combat nor share a common operational chain of command with any of the fighting wings. An intelligence organization that provides operationally useful intelligence to one or more of the non-State Group's fighting wings is part of the non-State group's overall OAG by virtue of that function. Stated differently, to avoid characterization as part of a mixed group's overall OAG, organizationally distinct entities must refrain from activities, such as "combat support" functions, that contribute meaningfully to an OAG's conduct of hostilities. [81]

This begs the question of what sorts of activities by an intelligence (including counterintelligence) organization of a mixed non-State group facilitate the conduct of hostilities to such an extent that the intelligence organization is a component of the OAG and targetable as a result. Self-evidently, if the activities of the intelligence organization are essential to a fighting wing's conflict-related undertakings, as in providing targeting intelligence, preparing order of battle estimates, or tracking enemy force maneuver, the group's OAG includes the intelligence organization. Even if the intelligence organization operates with a high degree of independence, it is fairly characterized as part of the group's overall OAG when it plays a role that is integral to the OAG's conduct of hostilities.

However, because an intelligence organization's activities might not unequivocally render it part of the non-State group's OAG, it is helpful to set forth criteria for assessing when the organization's activities merit characterization as such. A useful approach is to apply, albeit solely by analogy, the criteria that the ICRC has proposed for judging whether an individual who is not a member of an OAG is directly participating in hostilities. After all, if a certain activity engaged in by a civilian renders him or her targetable, why should that activity by the group not yield the same result?

The ICRC's *Interpretive Guidance* sets forth the criteria as the "constitutive elements of direct participation" in hostilities.[82] Although their precise application in specific circumstances is highly controversial,[83] the

81. Combat support is "[f]ire support and operational assistance provided to combat elements," whereas combat service support is comprised of "[t]he essential capabilities, functions, activities, and tasks necessary to sustain all elements of all operating forces in theater at all levels of warfare." DOD DICTIONARY, *supra* note 11, at 40.

82. INTERPRETIVE GUIDANCE, *supra* note 3, at 46.

83. *See, e.g.*, *supra* note 18 and accompanying text; *see also* Michael N. Schmitt, *The Interpretive*

three elements generally capture the nature of acts that would render an individual a direct participant in hostilities (discussed below),[84] and, by analogy, an organization as part of a group's OAG.

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);
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
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).[85]

The first constitutive element requires that the act in question make a material contribution to the weakening of the enemy's military capacity.[86] Counterintelligence operations intended to deprive the enemy of operationally relevant information qualify. So too do activities that enhance the OAG's ability to mount combat operations, for they adversely affect the enemy's relative position in the conflict. For example, surveying terrain and patterns of life to identify potential ambush points, gathering information to evaluate the willingness of members of the civilian population to provide sanctuary, or identifying civilians who might be willing to provide information on the enemy fulfil this "threshold of harm" criterion.

With respect to the second constitutive element, the requirement of "direct causation," a practical approach from a military perspective, and one that aligns with the law, is to look at whether the intelligence is of value at the tactical, operational, or strategic level of war. The tactical level of warfare is where "battles and engagements are planned and executed to achieve military objectives assigned to tactical units."[87] It includes the collection, analysis, preparation, and dissemination of intelligence that bears

Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, 1 HARV. NAT'L SEC. J. 5 (2010); Yoram Dinstein, '*Direct Participation in Hostilities'*, 18 TILBURG L. REV. 3 (2013).

84. For instance, note that US military's IHL manuals have discussed the notion in a manner that is broadly consistent the approach. DOD MANUAL, *supra* note 2, § 5.8.3; ARMY MANUAL, *supra* note 52, ¶ 2–14 (incorporating the DoD Manual's considerations by reference).

85. INTERPRETIVE GUIDANCE, *supra* note 3, at 46.

86. In this regard, the ICRC defines hostile acts as those that "by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces." ADDITIONAL PROTOCOL COMMENTARIES, *supra* note 43, ¶ 1942. The term "participation" refers to the involvement of the individual in such acts. INTERPRETIVE GUIDANCE, *supra* note 3, at 43. It does not necessarily denote conducting hostile acts oneself.

87. DOD DICTIONARY, *supra* note 11, at 210.

on preparing or conducting individual attacks and defending against those of the enemy. For instance, gathering information regarding an enemy unit or its disposition in anticipation of an attack against that unit occurs at the tactical level, as does conducting reconnaissance of a location at which the OAG will carry out an attack.

Warfare at the operational level denotes that at which "campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas."[88] Such intelligence, for example, would enable the OAG to coordinate and synchronize the actions of numerous tactical units or defend against a wide-ranging enemy campaign involving multiple operations. Intelligence activity at this level typically encompasses a broader area and longer period than that produced and consumed at the tactical level of war.

Lastly, in the State context, the strategic level of warfare is that at which "a nation, often as a member of a group of nations, determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives."[89] Translated into non-State party context, assessments as to the likelihood that the State against which the party is fighting will receive foreign support and intelligence about domestic political affairs in that State are examples of strategic level intelligence.

The activities of a non-State group's intelligence organization(s) in support of its OAG's ability to conduct hostilities at the first two levels are direct enough in terms of the relationship between the act and the harm befalling the enemy to satisfy this criterion, while those at the strategic level usually lack the requisite directness. This is because it is at the tactical and operational levels of war that the conduct of hostilities occurs, and at which the effect of intelligence on enemy military operations is at its most direct. By contrast, intelligence at the strategic level might indirectly enhance the ability of the group's OAG to conduct hostilities, but the causal nexus to military operations is too attenuated to have sufficiently direct impact on enemy military operations. If the organization performs some operational or tactical level intelligence functions, it is a part of the non-State group's OAG irrespective of whether it also shoulders any strategic level intelligence responsibilities.

In addition to considering the level of war served by an intelligence function when assessing the direct causation criterion, the nature of the linkage between the function and enhancement of the group's overall OAG's

88. *Id.* at 161.

89. *Id.* at 204.

combat wherewithal—or the diminishment of the enemy's—further bears on whether inclusion of the organization in the OAG is appropriate. Counterintelligence, which, as noted, can take the form of counterespionage and security activities looms large in this regard. Since counterespionage diminishes the capacity of the enemy to conduct intelligence operations against the OAG, the causal nexus between avoiding potential harm to the OAG's military operations and counterintelligence is usually quite direct.[90] Counterespionage operations, for example, can uncover specific attacks for which the enemy is laying the intelligence foundation or deny the enemy access to the OAG's own operational plans. Although some counterespionage activities involve issues at the strategic level of war, as in the case of foiling efforts by the enemy to gather information as to the OAG's international support or its internal political dynamics, most seek to thwart enemy intelligence operations designed to affect OAG activities at the operational or tactical level of war.

By contrast, consider an organization that performs personnel or operational security (OPSEC) functions, like doing background checks before allowing access to sensitive material or establishing and monitoring procedures for ensuring the security of such material. These and similar security activities may have effects at the tactical and operational levels of war, for instance by ensuring that OAG members who operate at those levels are trustworthy and that sensitive material related to ongoing operations is secured. Although they constitute a form of counterintelligence, the *causal* connection between such activities and any harm caused if they fail is too attenuated to justify inclusion of the organizations performing them in a mixed non-State group's OAG.

The third constitutive element, that of belligerent nexus, would act—if applied in the context of OAGs—to exclude intelligence organizations of a non-State group that have functions entirely unrelated to the armed conflict. As noted above, an organized armed group's activities must be related to the conflict before the IHL rules relating to such groups attach.

Any intelligence organization fulfilling all three elements would, by the

90. As was the case, for instance, with ISIS's espionage activities and the significance of effectively countering them. According to Speckhard and Yayla, "ISIS intelligence agents very cleverly embedded their own cadres into groups that opposed them but also 'turned' or recruited selected individuals from rival groups into assets to serve ISIS. ISIS leaders could thereby obtain key information about opposing groups, such as their fortifications and weak spots prior to attacking them. Likewise, these embedded spies or ISIS 'assets' also murdered important leaders in any opposing group, set off explosions, and even ran suicide operations to spread unease and terror throughout a rival group, all with the intent to weaken it prior to facing an attack from ISIS." Speckhard & Yayla, *supra* note 37, at 6. Obviously, the counterespionage activities of groups against which ISIS engaged in such tactics could at times prove of existential importance.

direct participation in hostilities analogy, constitute part of the non-State group's OAG. To illustrate, Hamas' Internal Security Service not only has counterintelligence responsibilities regarding its Palestinian rivals, but also engages in external intelligence activities.[91] The former activity does not satisfy the criteria (unless Hamas was in a non-international armed conflict with its rivals), but the latter do if they facilitate operations against external opponents like Israel. Similarly, the Hamas-commanded National Security Force provides border guard services, a civilian function, but also has an early warning role, a traditional military task.[92] Resultantly, either group may be classified as part of the Hamas overall OAG. Their personnel accordingly qualify as members of Hamas' OAGs alongside those of its fighting wing, the al-Qassam Brigades.

Finally, an intelligence organization itself might have responsibilities that are both military and non-military in nature. When this is so, characterization of the entire organization as part of the OAG will depend on how it is structured. Distinct departments that are clearly identifiable as such and that perform only functions that do not contribute to the OAG's fighting capacity would not be considered part of the non-State group's OAG. As an example, an intelligence organization might have an element responsible for military intelligence and another that generates only law enforcement-related intelligence. So long as it is organizationally distinct and identifiable to enemy forces as such (perhaps by being based in a separate location and wearing different uniforms), the latter is not part of the OAG, and its members may only be attacked pursuant to the rules governing direct participation in the hostilities by civilians that are described below. It must be emphasized that if the intelligence organization lacks clearly distinct sub-elements that exclusively perform tasks unrelated to the conflict, the entire organization would be part of the non-State group's OAG.

C. Qualification as a Member of an Organized Armed Group

Intelligence organizations usually serve as part of a broader non-State OAG by providing critical combat support to facilitate the planning and execution of hostilities; in other words, they operate in a manner that resembles intelligence units in a State's armed forces. When this is so, the members of the intelligence organization are members of the OAG for targeting purposes, although, as will be discussed, a degree of controversy exists over whether all are targetable (except for medical and religious personnel and those who are *hors de combat*).

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91. Zinnotti, *supra* note 38, at 20.

92. *Id.*

This begs the question of qualification as a member of the OAG, for individuals with very different relationships to an OAG can provide it information of intelligence value.[93] It is accordingly necessary to distinguish OAG members performing intelligence related activities from other individuals who, while not members, engage in activities that can be characterized as "intelligence" in nature. The former are targetable as members of an OAG, whereas the latter may only be attacked, as explained below, for such time as they directly participate in the hostilities.

Members of a State's armed forces usually become part of those forces through an official recruitment process or conscription regulated by the State's domestic law, although they may also be impressed into service. Once in the armed forces, there are ranks, uniforms and other indicia that signal membership. Organized armed groups, including their intelligence organizations such as ISIS's Emni,[94] likewise may have procedures for joining, even if those procedures tend to be less formal and unregulated by law. If an established process exists for becoming a member of an OAG, those who complete it qualify. Similarly, rank, uniforms, identity cards and other clear-cut indicators of OAG membership can serve to signal membership of intelligence personnel in an OAG, whether they are part of a distinct organization in the group performing intelligence functions or not.[95]

Yet, much of the time, recruitment procedures may be informal, as in simply taking an oath of allegiance or undergoing short political indoctrination training. They may even be lacking altogether, as when members of the local population are forced to join an OAG or when they simply begin to participate in the group's activities or otherwise accompany it. Complicating matters is the fact that members of an OAG often wear civilian clothing or otherwise conceal their affiliation with the group.

Absent clear indicia, the most significant indicator of membership will likely be the existence of a de facto superior–subordinate relationship between the OAG's leadership or other members with authority and the individual or intelligence organization of which he or she is part. Following their binding orders or other specific instructions, as distinct from mere

93. On membership in an OAG, see generally E. Corrie Westbrook Mack & Shane R. Reeves, *Tethering the Law of Armed Conflict to Operational Practice: Organized Armed Group Membership in the Age of ISIS*, 36 BERKELEY J. INT'L L. 334 (2018).

94. "[T]here were ten grueling levels of training one had to undergo to become an Emni operative, training that included running, jumping, push-ups, parallel bars, crawling, swimming, scuba diving, sleeping in holes in the ground, navigating by the stars, and surviving on limited food and water rations and under difficult conditions in the desert. Upon completion of all ten levels, recruits were blindfolded and driven to pledge their allegiance (still blindfolded) to then-Emni leader, Abu Muhammad al-Adnani." Speckhard & Yayla, *supra* note 37, at 13.

95. *See* DOD MANUAL, *supra* note 2, § 5.7.3.1; ARMY MANUAL, *supra* note 52, ¶ 2-61.

suggestions or encouragement, is compelling evidence of this relationship. For instance, the fact that an individual has observed and reported on enemy activity at a set time and place pursuant to an OAG's direction is strong support for characterizing the individual as a member of the group.

The related factors of regularity and nature of participation in the OAG's activities are also a compelling sign of membership.[96] They are particularly telling in the absence of evidence that orders to perform a particular action have been followed. Whereas *ad hoc* and infrequent participation may suggest mere support for the OAG's cause, regular and recurring involvement provides an objectively reasonable basis to imply membership. Consider individuals who periodically inform the OAG of the location and activities of enemy forces because the OAG pays for such information on a by-report basis.[97] Or take members of a civilian population in territory controlled by a non-State group who report persons engaging in suspicious behavior. Neither are members of the OAG—although they are likely to be targetable as direct participants in the hostilities, a topic discussed below. But once the service becomes regularized, as in receiving a recurring salary to provide information, it becomes reasonable to characterize them as members of the group. This is so irrespective of whether they are part of a dedicated intelligence organization within the OAG or are acting on an individual basis.

Regularity is especially convincing when the activities engaged in mirror those performed by combat support personnel of a State's armed forces. If regular activities are such that the OAG relies upon them to conduct hostilities, the individuals concerned are likely OAG members irrespective of whether they have joined it by any set formal procedure. For targeting purposes, this "functional" membership would generally suffice.[98]

Regularity must be distinguished from voluntariness (or lack thereof). The latter is not a reliable indicator of membership because compelled participation in the OAG's activities, even under threat of death, does not

96. The ICRC has opined that "[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict." INTERPRETIVE GUIDANCE, *supra* note 4, at 34. Although the author disagrees with the continuous combat function approach, the ICRC's insistence on integration supports regularity as an indicator of membership in an OAG.

97. ISIS had paid informants wherever they operated to create fear of defying the group. Speckhard & Yayla, *supra* note 37, at 7.

98. *See, e.g.*, ARMY MANUAL, *supra* note 52, ¶ 1-92 ("In addition, these armed groups may rely on individuals who are not formally members of the groups but are functionally part of those organizations. These individuals may be regarded as part of the group constructively, even if not members in fact."). *See also id.*, ¶¶ 2-63 to -64; DOD MANUAL, *supra* note 2, §§ 4.18.4, 5.7.3.2. For an argument focusing on the nature of conduct as the key factor in assessing membership, see David McBride, *Who is a Member: Targeted Killings against Members of Organized Armed Groups*, 30 AUST. Y.B. INT'L L. 47 (2012).

preclude membership.[99] This is so whether the individual is forced to fight for the group or simply perform intelligence-related activities like surveillance.

Mere sympathy for an OAG's cause, and even occasional intelligence activities in support of it, are insufficient standing alone to confirm membership. Indeed, even acting "for the cause" is insufficient. To illustrate, ISIS-inspired local jihadists unknown to ISIS have carried out attacks requiring extensive intelligence preparation. When the attacks occurred, ISIS Emni sometimes tried to contact those involved through video games or social media in order to acquire material that could be used to back up claims that the attack was mounted on behalf of ISIS and launch a propaganda effort to that effect.[100] This, however, did not render the individual or any group with which the attackers were affiliated a member of ISIS. It would only be once such contact bears fruit and results in the individual or group joining ISIS that membership for targeting purposes would attach.

Along these lines, individuals and groups often pledge allegiance to an OAG. Doing so does not *ipso facto* authenticate membership in the OAG. However, if the pledge or oath signals a meeting of the minds between the individual or group and the OAG, it may suffice to qualify the individual or group as part of the OAG.[101] Yet this would require that the OAG know of them, in some manner signal their acceptance into the group, and subsequently act as an integrated entity through coordination, collaboration, command, and control.

The phenomenon of terrorist groups around the world swearing "bay'at" (an oath of allegiance to a leader) to ISIS and thereby becoming affiliates, or "wiliats," is instructive.[102] Only in those cases in which a superior-subordinate organizational relationship emerged whereby ISIS directed and controlled the operations of the group swearing allegiance, did the latter become part of ISIS' OAG. Should this occur, support by the group of ISIS undertakings may take the form of intelligence activities, such as surveilling potential targets. But absent such a relationship, and even if the group periodically cooperates and collaborates with ISIS, the groups would not be part of ISIS's OAG.

Perhaps most telling is an OAG's treatment of an individual engaged in

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99. INTERPRETIVE GUIDANCE, *supra* note 3, at 59–60 (in the context of direct participation).

100. Speckhard & Yayla, *supra* note 37, at 9.

101. On the relationship between such groups, see Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining Organized Armed Group*, 89 INT'L L. STUD. 54 (2013).

102. Joel Day, *The ISIS Bandwagon: Under What Conditions Do Groups Pledge Support?*, B.U. INST. ON CULTURE, RELIGION & WORLD AFF. (Mar. 8, 2016), https://www.bu.edu/cura/files/2016/03/The-ISIS-Bandwagon-V3.pdf.

intelligence activities as a member and, correspondingly, the individual acting as one. For example, if the group has distinct billeting facilities, does the individual live in them? Does the individual attend group meetings and gatherings, recruit others to join the OAG, or receive a regular salary from the OAG? If the group maintains membership rolls, does the individual appear thereon?[103] When no established process for becoming a member exists, all the aforementioned factors, and numerous others, have to be considered ensemble in making case-by-case determinations of membership.

D. Targetable Members of an Organized Armed Group

In its *Interpretive Guidance*, the ICRC took an very narrow approach to OAG membership.[104] Emphasizing that it is often difficult to determine whether an individual is a member, the ICRC suggested that "the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereinafter 'continuous combat function')."[105] For the ICRC, the continuous combat function "distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis or who assume exclusively political, administrative, or other non-combat functions."[106] It defines the continuous combat function by reference to the constitutive elements of direct participation—i.e., threshold of harm, direct causation, and belligerent nexus—set forth earlier.

This approach confuses the question of who has OAG member status with that of whom within the group is targetable. By treating members of the OAG who do not satisfy the three criteria as non-members, the ICRC creates a legal fiction. The better approach is to acknowledge that there may be OAG members whose primary duties do not involve combat-related functions, as is the case with a State's armed forces. Indeed, sometimes those individuals might have joined the OAG through established procedures, wear its uniform or other indicia of membership, be carried on the OAG's membership rolls, or perform functions that, albeit not combat-related, are essential to the

103. For instance, ISIS's Emni "keeps detailed lists and personnel files on the foreign fighters that join them, including letters of application detailing their level of religious knowledge, former military training and terrorism credentials, as well as their telephone numbers, and even their hobbies." Speckhard & Yayla, *supra* note 37, at 7.

104. Some States have adopted the approach. *See, e.g.*, FED. PROSECUTOR GEN., FUEL TANKERS CASE 47–48 (2010) ("If they have functionally joined an organized armed group in a non-international armed conflict as fighters, they are retaining this status as armed fighters until they have recognizably and finally given up this function.").

105. INTERPRETIVE GUIDANCE, *supra* note 3, at 33.

106. *Id*. at 34.

functioning of the OAG, such as financial, administrative, and logistical duties. It is counterfactual to assert that they are not members of the group.

In part, the ICRC justifies its disjunctive approach on the basis that it can be difficult to distinguish members of an OAG from individuals who are not members.[107] Yet, this is not always the case. For example, members of some OAGs wear uniforms, while in others the organizational structure of the non-State group is very clear, with fighting wings designated as such. An example of the former is the Fuerzas Armadas Revolucionarias de Colombia (FARC),[108] whereas the al-Qassam Brigades of Hamas illustrate the later.[109] Moreover, the ICRC's approach can incentivize an OAG's failure to implement measures that provide objective indicia of membership, thereby exposing civilians in the conflict area to increased risk of reasonably mistaken identity.

The issue, though, is these individuals' targetability, regarding which there are two views. The ICRC takes the position that since those without a continuous combat function are civilians, they may not be directly attacked unless and while they directly participate in hostilities.[110] Yet, in some cases, an OAG's opponent can know that the individual concerned is a member of an OAG (e.g., because of the uniform worn), but not know whether the person's function involves intelligence activities qualifying as a continuous combat function. Further compounding matters, the prospective attacker may not know when that individual is engaged in activities that would open the door to attack consistent with the "for such time" aspect of the direct participation rule. Effectively, the member of the OAG will be immune from attack, even though he or she is without question a member of the enemy forces. This is an untenable situation from an operational perspective.

The ICRC's approach also generates incongruency between members of the OAG and the State's armed forces. While the latter may be attacked irrespective of their duties—with certain express exceptions for non-combatant members of the armed forces—the targetability of OAG members depends, by this approach, on the nature of their function as it relates to the conduct of hostilities. The result is a paradoxical situation in which members

107. *Id.* at 33.

108. Immigration and Refugee Board of Canada, *Colombia: Insignia or Armbands Worn by Members of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC), the National Liberation Army (Ejercito de Liberación Nacional, ELN) and the United Self-Defence Forces of Colombia (Autodefensas Unidas de Colombia, AUC); Whether Such Markings are Worn at All Times (2000 - May 2003)*, Doc COL40240.E (May 20, 2003), https://www.refworld.org/docid/3f7d4d7834.html.

109. Central Intelligence Agency, *Gaza*, WORLD FACTBOOK (2019), https://www.cia.gov/library/publications/the-world-factbook/geos/gz.html.

110. INTERPRETIVE GUIDANCE, *supra* note 3, at 33.

of a State's military may be lawfully targeted, but OAG personnel performing precisely the same function may not.[111] For example, State military intelligence personnel who contribute solely to strategic intelligence may be attacked. By contrast, an OAG member involved in the production of the same type of intelligence would not qualify as having a continuous combat function and thus would be treated as a civilian immune from attack unless he or she engaged in some other activity that qualified as direct participation, and then only for such time as it took place.

This inconsistency is further exacerbated by the fact that members of a State's armed forces are combatants during an international armed conflict and represent the sovereign State during a non-international armed conflict. As such, they are permitted to engage in hostilities in the sense that they operate under the authority of the State.[112] By contrast, IHL does not countenance the involvement of non-State individuals or groups. An interpretation of targetability status that affords the latter greater protection from attack (and other conduct of hostilities protections) creates an ironic imbalance in the law.

The more operationally logical approach, and the one that reflects IHL's principle of equal application, is to treat all members of an OAG as targetable, with the same exceptions that apply to members of the State's armed forces.[113] By this approach, there are two steps in the targeting analysis. First, the contours of the OAG in question must be identified, with particular attention paid to the challenging case of mixed non-State parties. Second, the attacker must determine whether the individual in question is a member of that OAG.

These assessments can be difficult in any context, but especially in relation to intelligence organizations. This is because they tend to be compartmentalized internally and masked externally in order to maintain secrecy. After all, the more the enemy knows about the membership, structure, and functions of an intelligence organization, the greater the risk to its operations and operatives. But challenges in application do not negate the clarity of this basic rule: All members of an OAG, as delineated above, are targetable.

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111. On the issue of the need for equal treatment from a highly experienced senior military officer, see R. Patrick Huston, *A Practical Perspective on Attacking Armed Groups*, 51 VAND. J. TRANSNAT'L L. 919 (2018).

112. *See, e.g.*, Additional Protocol I, *supra* note 2, art. 43(2) ("Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.").

113. For instance, see the position taken by the United States in DOD MANUAL, *supra* note 12, § 5.7.3. *See also* ARMY MANUAL, *supra* note 52, ¶ 2-60.

V. DIRECT PARTICIPATION BY CIVILIANS IN HOSTILITIES

The targetability of individuals who are not members of an OAG but nevertheless engage in intelligence activities is determined based upon the three constitutive elements of direct participation in hostilities set forth above. Recall that they lose their protection from attack and are excluded from proportionality calculations and precautions in attack analyses 1) for such time as they 2) directly participate in hostilities.[114]

As to satisfaction of the three constitutive elements, the discussion above with respect to qualification of intelligence organizations as part of a mixed non-State group's OAG applies *mutatis mutandis* here. Accordingly, individuals who are not members of an OAG but who engage in intelligence activities related to the conflict that directly affect an OAG's military capability lose their conduct of hostilities protections for such time as they so participate.

What is unique with respect to individuals who are directly participating in hostilities is the temporal issue noted above. Whereas OAG members are always targetable, civilians who engage in intelligence activities amounting to direct participation are only targetable while so participating. The "for such time" text has focused attention on two issues, the duration of the targetability and how to treat individuals who directly participate in hostilities on a recurring basis.

The duration controversy concerns the window of targetability with respect to a single act of direct participation. There is general agreement that a civilian loses protection from the time he or she begins preparing to participate until returning from such participation;[115] the paradigmatic case is preparing go out on an ambush, ambushing the enemy, and returning from the attack. The disagreement surrounds precisely when preparation has begun and the operation ends.[116]

That debate has less traction in the intelligence context than with respect to attacks and other classic conduct of hostilities activities because the period of intelligence activities engaged in by individuals who are not members of an OAG is often clear. Consider a civilian who observes the OAG's

114. Additional Protocol I, *supra* note 2, art. 51(3); Additional Protocol II, *supra* note 2, art. 13(2); DOD MANUAL, *supra* note 2, §§ 5.8.2.1, 5.8.3; CIHL, *supra* note 2, r.6.

115. This is the position of the ICRC; no one disputes that a direct participant is at least targetable during this window. INTERPRETIVE GUIDANCE, *supra* note 3, at 65.

116. Yoram Dinstein has opined, correctly in the author's opinion, that "in demarcating the relevant time span in the course of which the person concerned is actually taking part in hostilities, it is permissible to go as far as reasonably possible both 'upstream' and 'downstream' from the actual engagement." Yoram Dinstein, *Distinction and Loss of Civilian Protection in International Armed Conflict*, 84 INT'L L. STUD. 183, 188–89 (2008).

adversary positioning itself. That civilian goes to the OAG and reports the activity. In such a case, the individual will be directly participating from the time he or she observed the enemy activity until returning home after making the report. Or consider a situation in which the OAG asks a civilian to be at a location to observe the adversary's activities. The period of direct participation begins once he or she sets out and ends upon returning home.

The second temporal controversy is more relevant in the intelligence context. Labeled the "revolving door" issue, it arises when an individual engages on a repeated basis in intelligence activities that qualify as direct participation. By the ICRC's interpretation, each act of direct participation must be considered separately, such that the individual undertaking them enjoys full civilian status between the acts of direct participation.[117] In a sense, the individual is going through a normative revolving door, thereby losing and regaining civilian protection over and over.

Yet, intelligence activities are seldom persistent in the sense of being relatively continuous, at least when humans, as distinct from technology, gather and disseminate the information. In many situations, the intelligence and counterintelligence assets function within what is best understood as an intelligence "cycle," in which information is constantly gathered, analyzed, disseminated, and then reassessed. The cycle continues throughout the duration of the armed conflict. In this cycle, individuals who are not OAG members might supply intelligence information or engage in related activities such as monitoring and reporting on enemy activities on an intermittent, albeit recurring, basis.

By the ICRC approach, they would be immune from attack between those periods. This poses a serious practical problem on the battlefield. The OAG's adversary will in most cases be unaware of when the individual is engaging in the intelligence activities but might have reliable intelligence confirming that he or she is repeatedly doing so. Applying the ICRC approach would prohibit an attack on the individual unless caught "in the act," an unlikely prospect given that intelligence activities are usually clandestine. Effectively, most civilians who directly participate in the hostilities by engaging in intelligence activities would *de facto* be immune from attack most of the time, either by operation of law or due to operational factors, as when gathering intelligence remotely by cyber means.

The ICRC's interpretation of the "for such time" component of the direct participation rule has been heavily criticized for turning a blind eye to the reality of the battlefield, as it skews the delicate balance between military

117. INTERPRETIVE GUIDANCE, *supra* note 3, at 70 ("The 'revolving door' of civilian protection is an integral part, not a malfunction, of IHL.").

necessity and humanitarian considerations that undergirds IHL.[118] To be valid, the interpretation of "for such time" must both account for humanitarian concerns and offer a militarily sensible means of application. This balance can only be achieved if an individual known to repeatedly engage in intelligence or counterintelligence activities that qualify as acts of direct participation is considered as engaging in a continuous course of conduct throughout which he or she loses the targeting protections non-participating civilians enjoy. Once the individual desists altogether from qualifying activities, protection would be regained.[119]

This is an approach that is not without its own challenges. First, it must be determined whether the gaps between intelligence activities qualifying as acts of direct participation are narrow enough to justify labeling them a single course of conduct. Unfortunately, there is no bright-line test for making this assessment, other than to suggest that a continuous course of conduct is never "spontaneous" or "sporadic."[120] Second, it may not be clear when an individual has decided to refrain from future qualifying activities. In such a case, a mistaken conclusion that the targeted individual will continue to conduct intelligence activities must be assessed against a standard of reasonableness in same or similar circumstances.[121] This is appropriate, since the risk of mistaken attack should fall on the civilian who decided to engage directly in the hostilities without any right to do so under IHL.

VI. STATUS OF OBJECTS INVOLVED IN NON-STATE INTELLIGENCE ACTIVITIES

In some situations, a party to the conflict might wish to conduct an attack against objects used by OAGs or individuals that are performing intelligence tasks. The determination of whether the object is lawfully subject to attack is not made by reference to the status issues discussed above. Rather, targetability depends on the object's qualification as a

118. Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 795–839 (2010).

119. *See* ARMY MANUAL, *supra* note 52, ¶¶ 2-17 to -18.

120. The *Interpretive Guidance* uses the terms sporadic and spontaneous to refer to conduct that does not qualify as a continuous combat function (an approach with which the author disagrees). *See* INTERPRETIVE GUIDANCE, *supra* note 2, at 32–35. Although used here in the context of direct participation rather than organized armed groups, the same logic supports exclusion of spontaneous and sporadic actions from the ambit of a course of conduct involving direct participation. During the discussions among the experts involved in the ICRC's Interpretive Guidance project, there was a robust discussion on the subject (the author was a participant). *See* INT'L COMM. OF THE RED CROSS [ICRC], FIFTH EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES 35–44 (2008).

121. For a discussion of a reasonable mistake of fact in the IHL context, see Marko Milanovic, *Mistakes of Fact When Using Lethal Force in International Law: Part II*, EJIL: TALK! (Jan. 15, 2020), https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-ii/.

military objective. To take a simple example, the home of an OAG's intelligence director is not targetable *per se*, but may be attacked if also used as a location for exercising command and control over the group's intelligence operations.[122]

Article 52(2) of Additional Protocol I sets forth the definition of military objective in what is a universally accepted formulation for both international and non-international armed conflicts: "[M]ilitary objectives are . . . those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage."[123] When objects related to intelligence activities satisfy this two-pronged test, they may be attacked. Further, any expected collateral damage caused to the objects during an attack on another military objective does not factor into the proportionality calculation, and there is no requirement to take precautions to avoid harming them during that attack.

As to the textual criteria yielding "definite military advantage," "nature" denotes an object that is military in character, as in an OAG's military-specifications reconnaissance drone.[124] A military objective by "use" is an otherwise civilian object that presently is being used for military purposes,[125] whereas "purpose" refers to one that will be so used in the future.[126] Accordingly, all objects used or intended to be used by an OAG or a direct participant in hostilities to engage in conflict-related intelligence activities are military objectives. These could range from a vehicle from which an OAG surreptitiously monitors enemy movements along a roadway and the cell phone used to report on them to sophisticated cyber equipment employed to penetrate enemy cyber infrastructure and exfiltrate data. In certain cases, a location may render an object a military objective,[127] as with

122. Pursuant to the "use" criterion found in Additional Protocol I, *supra* note 2, at art. 52(2).

123. Additional Protocol I, *supra* note 1, art. 52(2); CIHL, *supra* note 2, r.8; DOD MANUAL, *supra* note 3, § 5.6. The definition is in accordance with other treaties. *See, e.g.*, Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices art. 2(6), May 3, 1996, 2048 U.N.T.S. 93. For a discussion on qualifying as a lawful military object subject to attack, see Michael N. Schmitt & Eric W. Widmar, *"On Target": Precision and Balance in the Contemporary Law of Targeting*, 7 J. NAT'L SEC. L. & POL'Y 379, 391–97 (2014).

124. ADDITIONAL PROTOCOL COMMENTARIES, *supra* note 43, ¶ 2020; PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE, cmt. accompanying r.22(a) (2013) [hereinafter AMW MANUAL].

125. ADDITIONAL PROTOCOL COMMENTARIES, *supra* note 43, ¶ 2022; AMW MANUAL, *supra* note 124, cmt. accompanying r.22(d). 8.

126. ADDITIONAL PROTOCOL COMMENTARIES, *supra* note 43, ¶ 2022; AMW MANUAL, *supra* note 124, cmt. accompanying r.22(c).

127. ADDITIONAL PROTOCOL COMMENTARIES, *supra* note 43, ¶ 2021; AMW MANUAL, *supra* note

a high point in an urban area that the OAG uses to observe and report on its enemy's tactical movement. It must be cautioned that designating an object or location used for intelligence purposes as a military objective cannot be based upon mere speculation or instinct;[128] such a determination must be reasonable in the attendant circumstances and is therefore made on a case-by-case basis.

As with designation as an OAG and direct participation in hostilities, there must be a nexus between the object in question and military operations. This is clear from the dual requirements that the object make an effective contribution to the enemy's military actions and that its destruction, capture, or neutralization afford the attacking force a definite military advantage.[129] Thus, for instance, by the same logic that precludes a law enforcement intelligence organization from qualifying as part of an OAG if it performs purely civilian policing duties, the equipment of that organization consists of civilian objects protected from attack and that count as collateral damage if likely to be harmed during an attack on a military objective.

However, like the group that performs both civilian and military functions, an object used for both civilian and military purposes is a valid military objective subject to attack.[130] The extent to which the OAG uses these so-called "dual use" objects for military purposes has no bearing on their qualification as such.[131] To illustrate, a non-State group's law enforcement IT equipment that is regularly used to conduct remote searches related to criminal activity, but occasionally employed to penetrate enemy military systems to gather intelligence, is unambiguously a military objective.

The sole exception to the rule that even slight military use renders equipment a military objective arises when facets of the same object are clearly separate and distinct, and one or more of them serves no military

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124, cmt. accompanying r.22(b).

128. DOD MANUAL, *supra* note 2, § 5.4.3.2; JOINT CHIEFS OF STAFF, JOINT TARGETING, at A-2 to -3 (2013). See also the unofficial, but authoritative, commentary on the Additional Protocols. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 336 (2d ed. 2013); Michael N. Schmitt & Michael Schauss, *Uncertainty in the Law of Targeting: Towards a Cognitive Framework*, 10 HARV. NAT'L SEC. J. 148, 157–58 (2019).

129. DOD MANUAL, *supra* note 2, §§ 5.6.5, 5.6.6.2, 5.6.7.3; ADDITIONAL PROTOCOLS COMMENTARIES, *supra* note 44, ¶ 2018.

130. THE STATE OF ISRAEL, MINISTRY OF FOREIGN AFFAIRS, THE OPERATION IN GAZA 27 DECEMBER 2008 – 18 JANUARY 2009: FACTUAL AND LEGAL ASPECTS § 223 (2009), https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf.

131. DOD MANUAL, *supra* note 2, § 5.6.1.2; ARMY MANUAL, *supra* note 52, ¶ 2-36; Christopher Greenwood, *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, *in* PETER ROWE, THE GULF WAR, 1990-91 IN INTERNATIONAL AND ENGLISH LAW 63, 73 (1993).

purpose.[132] Consider an OAG member who has set up an intelligence cell with the requisite equipment in the garage of his home located in the yard. The garage is a military objective, whereas his house is not.

VII. CONCLUSION

Targetability of non-State intelligence personnel in armed conflict depends on their status under IHL. The initial task in the non-State group targeting analysis is to identify the OAG, which must be sufficiently organized and armed and conduct activities with a nexus to the conflict to qualify as such.

In some cases, a non-State group is mixed in the sense of containing organization engaged in the hostilities, including fighting wings, and organizations that perform non-conflict related functions. An intelligence organization of the non-State mixed group that is distinct from other elements thereof and shoulders no duties that aid a fighting wing's conduct of hostilities is not part of the group's OAG; its members may only be attacked pursuant to the rules on direct participation.

However, if the organization engages in any activities facilitating the conduct of hostilities, including many counterintelligence functions, it is part of the group's overall OAG by virtue of function. The one exception is when an intelligence organization is itself mixed and members of a distinct and identifiable department therein are engaged in purely civilian functions. Such individuals are targetable only in the event they directly participate in the hostilities, and not as members of an OAG. Thus, membership is the *conditio sine qua non* to application of the OAG specific targeting rules, which permit attack around the clock, subject, of course, to other IHL rules such as that of proportionality and the requirement to take precautions in attack.

Even assuming membership of intelligence personnel in an OAG, including the intelligence component of an overall OAG, disagreement remains over whether all members of an OAG are targetable or only those who have a continuous combat function. The better view, and the one best reflecting the balance between humanitarian considerations and military necessity that infuses IHL, is the former. Nevertheless, even by the latter, most individuals in a non-State group involved in intelligence activities at the tactical or operational levels of war would have a continuous combat

132. Additional Protocol I, *supra* note 1, art. 51(5)(a); CIHL, *supra* note 1, r.13; Interestingly, the DoD and US Army/Marine Corps manuals do not address this issue, but the 2017 US Navy/Marine Corps/Coast Guard manual does include such a prohibition. U.S. NAVY, U.S. MARINE CORPS & U.S. COAST GUARD, NWP 1-14M/MCTP 11-10B/COMDTPUB P5800.7A, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.8.1.1 (2017).

function and thus be targetable as OAG members.

Should an individual not qualify as a member of an OAG, protection from attack would only be lost for such time as he or she directly participates in hostilities. Direct participation results when three cumulative constitutive elements are satisfied: 1) threshold of harm, 2) direct causation, and 3) belligerent nexus. In considering whether the harm caused is direct enough, and as with the issue of mixed non-State groups, the level of war to which the intelligence contributes is a useful indicator of directness. Belligerent nexus is also often a determinative criterion, for many intelligence activities are unrelated to the armed conflict, law enforcement being the paradigmatic example.

The targetability of objects used by OAGs or direct participants in hostilities to perform intelligence activities is assessed by reference to qualification as a military objective. The two-pronged test requires that the object contribute to the OAG's military action and that an attack on the object will yield a definite military advantage to the attacker. Almost every object used for intelligence purposes related to the conflict may be targeted as a military objective, subject to the rule of proportionality and the requirement to take precautions in attack.

In sum, individuals who perform intelligence functions that contribute meaningfully to the ability of a non-State group to conduct hostilities are subject to lawful attack under IHL. Other individuals who do not do so but are members of an intelligence organization that is part of a non-State group's OAG are also targetable. All equipment and other assets used to perform intelligence functions that facilitate the conduct of hostilities are likewise subject to attack as military objects.