

Captured individuals in the hands of armed groups not forming part of a party to a conflict"¹

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Title is very broad and needs to be narrowed. This presentation does not purport to be comprehensive one on this issue as it is not possible to broach it in depth within the lapse of time allocated for this presentation. For this reason, I have chosen to outline this topic under a specific angle: the status of detained individuals in the hands of groups/forces not forming part of the armed forces of a party to a conflict.

Idea here is not to propose you a tailor made answer specific to the context but merely to provide the legal tools enabling you to make your own analysis.

Indeed, in order to determine the status under IHL of a detained individual in the framework of international armed conflict, it is necessary not only to scrutinize the legal status of the detained individual but also to assess the legal status of the captors, of the detaining power. Status of the detainees and status of the captors are the two faces of the same medal.

As I mentioned, the question revolving now around the status of the armed groups participating in an international armed conflict as well as the legal qualification of their actions under IHL is almost important not to say more than the issue of the detainee's status itself. Indeed, the latter depends also upon the former.

Bottom line: individuals captured cannot be protected by the GCIII or GCIV if not detained by a "party to the conflict" or groups acting on behalf a party to a conflict fulfilling criteria for belligerency. Within the meaning of IHL, a party means a State as defined by public international law. For the purposes of IHL, only states or groups fighting on behalf a State are "parties" to an international armed conflict, save the exception of national liberation wars as defined under article 1§4 of the API where the latter instrument is applicable.

Consequently a set of questions must be raised regarding the status of the captors:

- Can they be considered "privileged" combatants, in other words, are they authorized to legally participate in the hostilities and therefore to detain legally individuals captured on the battlefield?
- If not, how does the status of "unlawful combatants" impact the legal nature of their actions in relations to the hostilities including detention?
- What would be the influence of such determination on the legal status of the detainees themselves?

As the matter of fact, armed groups must be qualified as "organized resistance movements" or "militias" in order to be legally entitled under IHL to detain individuals within the framework of an international armed conflict. They must be recognized as combatants for the purposes of IHL in order to be "legal jailers".

Under IHL the combatant status denotes the right to participate directly in the hostilities. It can be interpreted as a licence to kill, to wound the enemy, destroy military objectives and

¹ The content of this presentation reflects the views of the author alone and not necessarily those of the International Committee of the Red Cross. This paper is only the written transcription of the oral presentation and does not purport to represent a comprehensive analyse of the subject but rather an outline of the main legal issues at stake.

more generally to perform activities related to the international armed conflict including capture and detention of enemies. Those combatants will benefit from immunity for lawful actions committed in the frame of hostilities.

The conditions for combatant status flow from art. 4 of the GCIII and article 43 and 44 of API (the latter being not applicable in the IL/OT/AT context). [Give here overview of art. 4A1.] According to article 4A2 of the GCIII, resistance movement and fighters to be considered combatants must fulfilled the following 5 criteria: belong to a party to a conflict, being commanded by a person responsible for his subordinates, having a fixed and recognizable distinctive insignia, carrying arms openly and conducting operations in accordance with laws of war. It is of a fundamental importance to keep in mind that these criteria are cumulative and not alternative.

Let me here dwell on the first criteria set forth in article 4A2 of the GCIII. Very often this very first criterion ("belonging to a party") is neglected, taken for granted and deemed to be fulfilled. But this is not necessarily the case, on the contrary, this condition is – legally speaking - the one of the more difficult to assess.

Resistance movement must be fighting on behalf a party to a conflict in the sense of article 2 of the GC, otherwise the provisions of article relating to non international armed conflict will be the referral ones applicable since such militias or groups are not entitled to style themselves a "party to the conflict". Initially under IHL and until The Hague Conferences of 1899, such groups were only entitled to fight after express authorization of the sovereign. Since The Hague Conference and the adoption of the related conventions, this condition is no longer a prerequisite. Now it suffices that *de facto* relationship between the resistance movement and the party to the international armed conflict be proved *inter alia* through a tacit agreement. As Professor Rosas mentioned in his book even if the notion of "belonging to a party to a conflict" should be interpreted liberally, it nonetheless should exist a certain factual link between the resistance movement and the Party. This has been defined more closely by saying that the relationship should be of such nature that it entails the international responsibility of the party to the conflict for which the resistance movement claims to fight along or on behalf.

As the matter of fact, the content of the requirement of belonging to a party to the conflict is far from being clear and precise, even ICRC commentaries are rather vague on this very issue. The rationale behind article 4 GCIII was that it was universally agreed that states should be responsible for conduct of the irregular forces they sponsor. As it has been underline by the ICTY in *Tadic* case, the Third GC by providing in article 4 the requirement of belonging to a Party to the conflict" implicitly refers to a test of control. **Acts of the resistance movement shall be attributable to a Party to the conflict in order to prove the "belonging to a party" condition.**

Now the question is the following: does the action of armed groups at stake trigger the international responsibility of the state to which they contend to fight for?

Unfortunately IHL does not provide any tailor made answer to this interrogation.

Indeed IHL does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be made upon the conditions established in the general rules on state responsibility, in particular the UN Draft Articles on States' responsibility as well as the international jurisprudence developed in this area of law.

Article 8 and 9 of the UN Draft Articles are of particular relevance respectively broaching the state's responsibility for conduct carried out under instructions, direction or control of a state

organ as well as the conduct involving elements of governmental authority carried out in absence of state officials.

Here the questions to be raised are: Can the armed groups be assimilated to an organ of lawful government? Is the armed group acting on behalf and under the control of the lawful government? Is the "effective control" test fulfilled (the lawful government's involvement in organizing, planning, coordinating military actions of the armed group)?²

All these preliminary questions need to be solved in order to move ahead with the analysis of the four others criteria set forth in article 4A2 of the GCIV. Once done, we will know at this stage whether these armed groups can be assimilated to organized resistance movement and militias under IHL.

Under IHL, a person not fulfilling the criteria of article 4 GCIII and article 43 API is necessarily a civilian. Therefore, individuals forming part of armed groups not fulfilling the abm criteria belong to the category of civilian for the purposes of IHL.

Except for the case of *levée en masse* (inhabitants of a non-occupied territory taking up arms spontaneously to resist invading forces), civilians do not have the right to participate directly in hostilities³. However if they participate in combat actions, they will be labelled "unlawful/unprivileged combatants". This term is not drawn directly from IHL but is commonly understood by the legal doctrine as encompassing all individuals taking a direct part in hostilities without being entitled to do so.

The other question at stake here is whether actions undertaken by civilians directly participating in the hostilities can be lawful under IHL despite not being authorized to do so under IHL. It must be noted that we are not challenging here the legitimacy of the fight, which is another question to be dealt with under other bodies of public international law such as *jus ad bellum* in particular, but only the legality under IHL of the related actions when carried out by unlawful/unprivileged combatants.

The common position of the legal literature is that persons not fulfilling the criteria set by article 4 GCIII engaged in combat actions are civilians that "unlawfully take part in hostilities" according to the formula proposed by M. Sassoli⁴.

As a consequence of the unlawfulness of their mere participation in combat operations, it is commonly admitted that unlawful combatants may be prosecuted for such participation in

² At this stage, it is important to note that any state is under the duty to exert due diligence so that its territory will not be used for acts violating the rights of other states or otherwise contrary to international law. In this respect, states must take all the necessary measures permitting to prevent the occurrence of any such actions (cf. ICJ 1949, *Corfu* case or the arbitration rendered by M. Huber in the *de Palmas Islands* case (1949). Today practice and doctrine incline to consider that states not implementing their obligation of due diligence have not infringed the obligation violated by the private actor but only the state's general obligation to take all measures necessary to prevent and stop the violations of international law. To illustrate that point, a state which did not prevent the murder of a diplomat is not infringing the principle of inviolability laid down in the Vienna Convention but only its duty to protect the diplomat.

³ K. Doermann, "The legal situation of unlawful/unprivileged combatants", IRRC March 2003, n°849, p. 46. Despite the fact not being entitled to fight, if civilians are nonetheless engaged in hostilities they lose their immunity from attack for the time of the participation.

⁴ M. Sassoli, "Legitimate target of attacks under IHL", Background document, Harvard Program on Humanitarian Policy and Conflict research. This illegality of civilian's engagement in hostilities is reaffirmed by K. Doerman: "the fact that civilian has *unlawfully* participated in hostilities is not a reason to deprive him from his rights under the GCIV" (emphasis added).

hostilities even if they respect all the rules of IHL⁵. This possibility to bring unlawful combatants to trial has been also expressly foreseen by the GIV in its article 66 or 146 and reflects a jurisprudence well established by the International Tribunal of Nuremberg in the famous *Hostage* case.

Moreover, the Army British Manual mentions very clearly: "[the civilian] must not be allowed to kill or wound members of the army of the opposing belligerent..." as a logical consequence must not be allowed to detain armed forces. In addition, in its § 634, the British Manual interestingly specifies that "if private persons take up arms and commit hostilities without having satisfied the conditions under which they may acquire the privilege of members of the armed forces, they are guilty of unlawful acts". This position epitomizes a common understanding of the main legal doctrine.

Therefore, armed groups not fulfilling the criteria set by article 4 GCIII are not authorized under IHL to conduct military actions. Such actions cannot be legal in light of IHL.

Indeed, and by virtue of the principle *ex injure jus non uritur* (e.g. legality cannot derive from an unlawful act or action) - as transposed to detention cases - the confinement of a individual cannot be a legal one (e.g. sanctioned by IHL) insofar as the action that led to that detention was not vested with the cloak of legality under IHL. In more simple words, if armed groups are not legally entitled to conduct an attack within an international armed conflict, the detention of an individual as a result thereof is similarly illegal.

On the contrary, authorizing persons not fulfilling the criteria set forth in article 4 of the GCIII (e.g. civilians) would finally legalize or legitimize, beyond what is actually permitted under IHL, a genuine *jus insurrectionis* that was clearly not foreseen by the IHL drafters.

Moreover, all IHL provisions relating to conditions of detention have been clearly elaborated with the view to being concretely and effectively implemented by the detaining powers and presuppose that the jailers have the adequate logistical, technical, material and human resources necessary to comply with IHL and to provide the detainees with appropriate conditions of detention. Such capabilities are identified under IHL notably through the criteria set in article 4 of the GCIII and 43 API. This also explains why resistance movement fulfilling the abm conditions would be entitled to detain members of armed forces of the opposing party. Those who are not complying with these requirements will be logically and legally deprived of the entitlement to detain individuals in relation to the conflict.

In view of above, we can only here come to the conclusion that the detention of the individuals by armed groups falling short of article 4A2 of the GCIII requirements is unlawful for the purposes of IHL.

Therefore such individuals will not be in the hands of a party to an international armed conflict nor in the hands of "privileged combatants" but rather under the control of a non state actor not entitled to participate in the hostilities related to an internal armed conflict.

Consequently, an individual detained by groups falling short of GCIII requirements will thus benefit from the treatment granted to persons captured and arrested in relation with the conflict. Common article 3 as well as customary provisions of APII such as article 4 (fundamental guarantees) and 5 (persons whose liberty has been restricted) and the rules 87 to 105 of the ICRC Customary Law Study will be the appropriate references to treat such cases

⁵ Dinstein, "The distinction between unlawful combatants and war criminal", in Dinstein *International Law at a time of perplexity*, 1989, p. 112., See also A. Cassese in "Expert opinion on whether Israel's Targetting killings of Palestinian terrorists is consonant with IHL", p 5.

Indeed, to be protected by the GCIII or the GCIV, the POW/civilian must "have fallen into the power of the enemy" (art. 4 A GCIII) or "in the hands of a party to a conflict" (GCIV art. 4). According to the ICRC commentaries of the GCIII, the term "enemy" covers any adversary during an armed conflict which may arise between two or more High Contracting Parties" pursuant to article 2 §1 of the Four GC 1949. Under IHL, High Contracting Parties are necessarily States.