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Otto C. Fiala*

Legitimizing the Resistance

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Abstract: This article examines how a state that chooses to authorize a resistance organization as part of its national defence plan in order to increase its national resilience legitimizes that organization through the three phases of pre-conflict, conflict and occupation, and resumption of sovereignty. It will demonstrate the necessity of a legal framework for its authorization to obtain both domestic and international legitimacy. It will also cover the necessity of compliance with the Law of Armed Conflict (LOAC) during hostilities. Furthermore, it will touch on how this legal framework functions on behalf of the legitimate government in occupied territory against an adversary by not allowing adversarial political consolidation, while also assisting in the prevention of the creation of competing organizations in occupied territory with goals that deviate from those of the sovereign and legitimate government.

Keywords: resistance, resilience, warfare, legitimacy

* **Corresponding author:** Otto C. Fiala, PhD, J.D. COL ret. US Army Reserve. Present affiliation: Lukos LLC., Team Lead, Sensitive Activities Research and Development at US Army Special Operations Command. e-mail: ocfiala@hotmail.com

Introduction

This paper will focus the legitimation of a state-organized resistance. To do this, we will first examine the concept of an authorized and organized resistance entity, established by the state as a part of its deterrence and defense against an adversary. Next, we will examine and define keywords and concepts that are necessary to build an understanding regarding the topic. Lastly, we will examine the concept of legitimacy and its application to the government's authorized resistance throughout its stages of existence. The stages will be broken into three general phases. The first is the pre-crisis or peacetime period, when no imminent threat exists. The second phase is that of conflict and occupation by the adversary. Last is the ousting of the occupying adversary and post-conflict resumption of sovereignty through the return of national sovereignty to the invaded state.

Over the past several years, the United States and its allies and partners have become more aware of the reality of potential conflict with Russia and the People's Republic of China (PRC). The threats from those two powers come at the geographical periphery of US military power. In recent years, the recognition of this lack of conventional military capabilities to defeat potential incursions from Russia or the PRC has led to the concept of resistance warfare becoming more central for several nations threatened by Russia and the PRC. The nations most concerned with conducting this type of warfare are the nations under the most direct physical threats by Russia and the PRC due to proximity to those two nations, coupled with their comparative lack of conventional military capability against those two nations; e.g., Estonia, Latvia, Lithuania, Poland, Taiwan, Georgia, Moldova, and Ukraine.

We will examine resistance primarily as an organization established by the sovereign government to lead the nation's whole of society resistance against an occupier. The planning of resistance occurs in peacetime, prior to imminent conflict, when an assessment is made that a neighbouring adversary has potential designs to occupy some or all of a nation's sovereign territory for the purpose of either consolidating it as its own or exerting some form of control

over it. The purpose of planning for such a resistance is to add an additional layer of deterrence into national defense planning, meaning that the existence of this organization cannot be secret in order for it to possess its deterrence value. This layer is designed to deny the political consolidation of invaded sovereign national territory to an adversary. Its additional purposes are to maintain the popular morale to fight the adversary through all means, ranging from violent to non-violent, to give the sovereign national government an organized capability to use against the adversary in occupied territory, to assist partner nations in their own efforts against a common adversary, and to help ensure post-conflict political stabilization and return of the sovereign representative government (Fiala, 2020, pp. 1-5).

Planning for resistance against an adversarial occupation also enhances national resilience, which can be described as, 'The will and ability to withstand external pressures and influences and/or recover from the effects of those pressures or influences' (Fiala, 2020, p. xv). A nation's resilience encompasses its whole society. It ranges from the individual person to government and non-government organizations. It is the full range of civil and military preparedness from the local to the national levels. Resilience is the critical foundation of resistance, the confident belief in the nation and preparation for survival and the regaining and continuation of national sovereignty (Fiala, 2020, pp. 7-11).

Legitimacy is critical to conducting a successful resistance. In today's interconnected world, with the nearly instantaneous worldwide communication of words and pictures, and the interpretation of those words and pictures by individuals, news organizations, and governments receiving them, effective communication of the legitimacy of a nation's resistance to an occupying adversary is critical to successful resistance. Externally, the legitimacy of this struggle must reach the voting citizens of partner democracies, which is translated into that nation's popular support for the nation resisting the occupying adversary, which then becomes a positive factor that supports the decision-making process of that country's leadership in its backing of the resisting nation.

The Resistance

Throughout history, nations have resisted more powerful foreign occupiers. Most often, such resistance arose and was haphazardly organized while a nation was occupied. However, resistance is also a type of warfare for which a state can prepare, prior to conflict, in order to broaden its national defense strategy by adding it as a layer of deterrence. Its purpose is to deny the adversarial political consolidation of an occupied territory. This planning, through the establishment of a planned resistance organization, in compliance with the nation's legal framework, results in an authorized and legitimate resistance organization that can be employed in the event of adversarial occupation.

A state's primary focus is on the establishment of a core resistance organization or entity as the primary emphasis of a nation's organized, whole-of-society effort in preparation for conducting resistance against an occupier. Its activities range from nonviolent to violent, led by the legally established government, even if exiled, with the objective of re-establishing independence and autonomy within its sovereign territory, wholly or partially occupied by a foreign power (Fiala, 2020, p. xv). This authorized and organized resistance structure or entity is a group of people, organized along a military style hierarchical command structure, reporting to the legally established sovereign government. This is distinguishable from the larger resistance effort of the population against the occupier. Indeed, resistance by the population, individually or in groups (e.g., teachers, trade unions, or other groups of people acting in concert), may be supported or directed by the government's resistance organization (Cosgrove and Hahn, n.d., p. 35).

An organized resistance typically has four traditional components: the underground, the auxiliary, guerrillas, and a public component (Leonhard, 2013, p. vii). The underground is the clandestine organization within the occupied territory (Bos, 2013, p. 35). It contains the leadership of the resistance organization, which functions on behalf of the legitimate sovereign government that has been displaced or exiled. It performs political and armed tasks, including acts of violence, subversion, sabotage, control of the guerrilla

component, and direction of networks of logistics, recruitment, training, escape and evasion, and intelligence gathering (Bos, 2013, pp. 45-46).

Part of the underground leadership may also perform the functions of a shadow government. A shadow government mimics the attributes and functions of the governing state, here the occupier, and may be used to undermine the governing authority of the adversary while also lending legitimacy to the resistance through the support of the occupied populace. Because a shadow government mimics the functions and attributes of the governing state organs, thus seeking legitimacy for itself among the population, it is sometimes referred to as a counter-state (Agan et al, 2019, p. 144).

The auxiliary component functions as the support element of the resistance organization (Bos, 2013, p. 35). It can range from supporters who assist the resistance based on presented opportunities (e.g., a doctor who is contacted by the resistance once to assist an injured member) to people exercising more functional roles as occasional participants who intermittently provide things such as information, transportation, safe houses, communications, and medical resources (Bos, 2013, pp. 35, 50, 121; Cosgrove and Hahn, no date, p. 13). Thus, it is a supporting component of part-time functional assistance to the organized resistance, with task requirements decided by the leadership of the underground.

The guerrilla, or armed component, conducts armed violence traditionally associated with guerrilla warfare such as raids and ambushes in occupied territory (Bos, 2013, p. 35; Laqueur, 1976; Asprey, 1974). The word guerrilla refers to both the actor and the type of warfare. It has long historic roots, dating back to the Peninsular Campaign during the Napoleonic Wars, and since then has it has possessed a connotation of a rurally-based entity. Despite that connotation, the word is useful for historic research regarding tactics and effects. However, using the term 'armed component' allows us to focus on the

today's expected tactics and effects, especially important given that much of such activity will take place in urban environments (Bos, 2013, p. 35).

The public component is an overt component with leadership functions that frequently overlap with the underground, having the responsibility for managing political efforts and communications (Bos, 2013, p. 35). Historically, the public component that operates within the occupied territory often becomes the new government upon departure of the occupier (Leonhard, 2013, p. 188). In the context of resistance as described here, it operates on behalf of the displaced or exiled sovereign government and represents its interests. However, a public component is not always possible because such political activity may be outlawed by the occupier as seditious, especially immediately after occupation.

These several components make up the internal structure and division of responsibility of the organized resistance entity and its conduct of activities on behalf of the sovereign government in occupied territory. The resistance organization membership, specifically the underground and armed components and their capabilities, must remain secret. It can be a mix of military and civilian personnel with the ratio being a national decision based on the threat, survivability, and national culture. The Cold War Swiss model provides an excellent example of such a mix (Stringer, 2017; Osburg, 2016).

Nation, State, Government, Legitimacy, and Sovereignty

It is necessary to define several more terms; nation, state, government, sovereignty, and legitimacy. The people or citizens of a state are the nation. The state refers to the bureaucratic organs or institutions of governance, such as state level ministries, legislative, executive, and judicial bodies, ranging from the state level, sometimes referred to as the national level, and understood as the highest level within the state's jurisdiction. The government refers to the persons placed in charge of administering the state.

The process of national elections to select those persons who will govern the state is a particular type of legitimacy or social authority. Max Weber reduced the concept of social authority or legitimacy to three forms: the traditional,

charismatic, and rational-legal. Traditional authority is perpetuated by habitual custom, and charismatic authority relies on personality. Rational-legal authority relies on the belief in the validity of legal statutes and practical competence of execution based on rational rules (Weber, 1922). This last form defines Western states, embodying their concepts of rule of law and constitutional democracy, granting the state a monopoly on the use of force. If the state is defined as the entity with monopoly of physical force, then the provision of security, with this monopoly, can be surmised as its primary obligation (Lemay-Hébert, 2009). The state, in this conception, retains a monopoly of force based on popular legitimacy, and in return, the state provides security to this population.

The context of this analysis is limited to states with democratic forms of governance within rational-legal states. The process of selecting people through a form of popular election to administer the state is a common denominator of each threatened state mentioned herein, as well as practically all their partner states. Within this group of states, this process of selection grants legitimacy to both the persons elected to govern as well as to the state itself.

Sovereignty is a political concept. It refers to dominant power or supreme authority. In a state ruled by a monarchy, supreme power resides in the 'sovereign', or king. In democracies, sovereign power rests with the people and is exercised through representative legislative bodies such as a Congress or Parliament. Sovereignty is essentially the authority to make and enforce laws. Sovereignty also implies autonomy; to have sovereign power is to be beyond the power of others to interfere (Cornell, 2022). Additionally, autonomy is extended over a specifically defined physical or geographic territory.

Legitimizing the Resistance Organization during Peacetime/Pre-Crisis

In this phase, the government decides to authorize, organize, man, equip, and train a resistance organization. Authorizing this capability is done through the state's legal or legislative process. Such authorization, accomplished through the state's regular, democratically supported legislative processes, ensures it both domestic and international legitimacy. Its existence need not be secret. This helps ensure both national and international support during a crisis. The knowledge of its existence, and the fact that it came about as a decision of the people's elected representatives, legitimizes the organization and contributes to national resiliency.

If it is not accomplished by such methods, it risks being an illegitimate organization in the minds of many citizens. Further, absent its establishment within a proper legal framework, it can lack legal and political accountability. This lack of accountability, places it outside of the state's legal framework, which brings various problems, such as financing, training, and obtaining and storing weapons, explosives, and communication devices, as well as the matter of direction and leadership.

During the Cold War, several NATO nations maintained 'stay-behind' organizations, similar to the type of organization discussed herein. These organizations were intended to remain in place during a Soviet invasion and operate within the occupied territory. Their intended purposes were primarily to conduct guerrilla activities, sabotage Soviet forces and send intelligence to non-occupied NATO states. The Italian plan was code-named 'Gladio' (Ganser, 2005, pp. 3-14). When the Soviet Union began disintegrating, its revelation in 1990 came as a shock to most Italians. It was not organized within an authorized legal framework and legitimized for its citizens, and as such, it was blamed for criminal and terrorist acts. Several other NATO and non-NATO nations soon revealed and disbanded similar networks, most of which had purported problems of legitimacy, arising primarily due to their secretive nature with little to no legislative or parliamentary oversight and often with

additional anti-communist missions that entered the realm of domestic politics. (Ganser, 2005, pp. 15-24; Nuti, 2007; Sinai 2021).

Once a resistance organization is authorized, an office of primary responsibility for it must be established within the state structure in order to advance, coordinate, and synchronize this effort. Such an office is likely best placed inside of the Ministry of Defense (MOD), as the primary task of an MOD is to make recommendations that will support the armed forces and national defense. That office can oversee and coordinate both military and civil defense planning and preparation, employing an interagency approach for a whole of government effort, expanding to a whole of society effort.

As part of this interagency effort, other ministries also have responsibilities. The Ministry of Justice can assist the national legislative body to write laws as part of the nation's legal framework to support the establishment, development, and material support and supply of a resistance organization in peacetime, as well as the potential conduct of its activities in occupied territory. This adherence to the rule of law further legitimizes the organization and the effort. The Ministry of Foreign Affairs can secure agreements with allies and partners to ensure legal recognition and potential placement of a potentially exiled government, as well as recognition of resistance networks as operating on behalf of the sovereign exiled government. It can also engage international organizations, including non-government organizations to develop and establish support agreements in case of crisis.

Additionally, the government must ensure that its people, who are not regular members of the authorized resistance entity, are aware of how they can contribute to a possible resistance against an occupation in this phase (Chernov et al, 2022). Such popular activities support and complement the resistance organization through preparation for general participation for resistance, legitimizing both the core resistance organization, as well as priming popular participation for resistance, as was done when the President of Ukraine signed a law 'On the Fundamentals of National Resistance' on 20

July 2021 (Government of Ukraine, 2021). This can involve informing and educating the populace regarding personal and family resilience, such as stocking up on canned food, first aid supplies, power and communication alternatives, and transportation options (Swedish Civil Contingencies Agency, 2018). They can also be informed of peaceful and passive methods of resistance to employ during occupation (Sharp, 2005, pp. 49-65), and they can even be informed of how to coordinate such activities (Ebert, 1967, pp. 255-273).

Recognition and integration of this effort must also be coordinated with allies and partners. The Estonian Defense League (EDL) serves as an example. The EDL is a voluntary national defense organization of the Estonian Ministry of Defense, organized with a military structure. It possesses weapons and conducts military-style exercises. The EDL's mission is to enhance national readiness to defend the independence of Estonia and its constitutional order (Kaitseliit, 2022). Until recently, its status as a voluntary organization with only traditional association with the Estonian military and emergency services hampered the ability of the US Department of Defense to participate in joint training with its members. The United States has strict and specific laws regarding what type of training events and material support can be made available through its Department of Defense to foreign militaries (United States Department of Defense, 2017). This was rectified several years ago, when the Estonians passed a law placing the Defence League under their Ministry of Defense. Its placement firmly within the Estonian legal framework allowed this joint training to occur.

The domestic democratic process which authorizes the resistance organization and associates it with the government gives it international legitimacy with its allied and partner democracies. This allows a nation such as the U.S. to assist this organization in the pre-crisis stage with training exchanges and equipment, in the same way that the U.S. conducts such mutual training and equipment sales and compatibility assurance with the nation's conventional military forces. Allied and partner governments must be assured that the resistance organization is a legitimate part of the threatened nation's defense structure,

to be assured that it is an authorized legitimate organization, they can support (Winkie, 2022).

Legitimizing the Resistance Organization During Conflict and Occupation

During an invasion by the adversary's conventional forces, the nation as a whole will resist with regular, uniformed military units, specialized organizations, such as border guards, and the average citizen, as recently occurred in Ukraine (Savitsky, 2022). In the case of Ukraine, participation by the average citizen was legitimized domestically by the domestic law mentioned above as well as under the international legal concept of *levée en masse*. *Levée en masse* is part of customary international law, within international humanitarian law (IHL), which is also the law of armed conflict (LOAC). The term applies to the inhabitants of a territory that has not yet been occupied, and who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had the time to organize themselves into regular armed forces (ICRC, no date). In these circumstances, they must be regarded as combatants if they carry arms openly and respect the laws and customs of armed conflict; if captured, they have a right to be treated as prisoners of war (GC III, 1949, Art. 4(A)(6)). The protection of *levée en masse* gradually subsides over time if the citizens begin organizing themselves into a resistance within occupied territory. It offers protection under international law only during the initial adversarial assault. After the adversary has consolidated occupied territory by control, though subjective and without continued defensive combat by the invaded nation's ground forces, protection of *levée en masse* ceases. Unorganized violent resistance at that point can be deemed criminal activity. Only organized resistance under the requirements of LOAC, as stated below, can offer any protection to violent resistance activity in occupied territory. Therefore, *levée en masse* must not be confused with an organized resistance (ICRC, no date).

As a crisis approaches and conflict begins, select resistance underground networks must be activated in coordination with the national political authority, which maintains hierarchical control of the resistance organization. Thus, the organization retains its legitimacy through responsiveness to the national governmental authority.

Of the other ministries and their required tasks during crisis and conflict, the Ministry of Foreign Affairs is the entity most likely tasked with coordination of planning for government exile if necessary. It must coordinate the execution of a plan to safely transport predetermined key members of the government to a pre-planned location in an allied or partner nation that is willing to host the government-in-exile, per agreements concluded prior to the crisis.

During the conflict, the most critical decision to be made by the sovereign government is arguably whether to go into exile. If during the invasion, it judges that the capital city is about to be occupied, then the defending government should at least internally shift the locus of legitimate governmental power to another city. Alternatively, and perhaps eventually, it may need to make the decision to go into exile to a foreign state in order to continue the representation of national sovereignty and to continue the fight, based on the strength of adversary forces. Going into exile is an extremely difficult choice to make. If the most senior members of the government and their families depart the country, then they can be seen as abandoning their people. However, if they remain, they run the risk of capture, which brings its own deleterious effects to national morale. In this regard, it is important to note that a government's head of state need not be the one to continue governmental authority in exile (Talmon, 1998, pp. 149-163). This power of representation can be passed on, or delegated, through rights of legation under international law; the details of which we will not delve into here. An exiled government can retain the recognition of its allied and partner states (Talmon, 1998, pp.14-29), represent the people and the sovereignty of the state, reduce the risk of an adversary-installed government gaining much international recognition, and advocate for its people among its partners.

Prior to a conflict during the pre-crisis period is when the leadership must create these plans and decide who will become the exiled government, where they will go into exile, and create the decision criteria as to when to go into exile. A significant additional value of such an exiled government is to provide the leadership with a lawfully valid chain of command under international law, comporting with LOAC or IHL, and Geneva Conventions, for its organised resistance.

Once a conflict in sovereign national territory ends and falls under adversary occupation, the organized resistance becomes the sovereign government's legitimate representative organization within that territory. These networks, structured as cells, are the designated stay-behind elements tasked to conduct pre-planned activities to combat the occupier, maintain civilian morale, and prepare for incoming national or allied forces. These organized resistance networks conduct activities against the occupier guided by the political leadership of a displaced or exiled government. Primarily, the organization conducts sabotage, subversion, intelligence gathering, and the conveyance of that intelligence to outside of the occupied territory.

The most critical aspect of the actions of the organized, government-sponsored resistance is to maintain a consistency with the LOAC in order to maintain its legitimacy. That is, the organization and its individual members must comply with the following: (a) be commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; (d) conduct operations in accordance with the laws and customs of war (GC III, 1949, Art. 4(A)(2)). It must conduct itself as a military-style unit responsible to its sovereign government and with a chain of command that leads to it in order that it remain a party to the conflict or as a lawful combatant acting on behalf of a belligerent party under international law (GC III, 1949, Art. 4(A)(1); Dinstein, 2016, pp. 54-55). Its actions, complying with the law of land warfare, give it the ability to argue that its underground and guerrilla fighters (members of the organized resistance) possess combatant's privilege and that if any of its members are captured by

the enemy, then they should be treated as prisoners of war under the Geneva Conventions. However, the enemy will likely not abide and agree that it is a legitimate organization because doing so would damage its own claim to legitimacy to rule over the territory. Resistance supporters within the auxiliary who assist intermittently by providing resources, information, and similar support activities presently have no such protection under international law. Nonetheless, the resistance organization must conduct itself in accord with LOAC to maintain its legitimacy under international law with the nation's partner states as well as to maintain the morale of its own population.

This organization, as well as the general population in occupied territory, can also monitor and collect information on adversary activities that are clear violations of the law of armed conflict (e.g., starving or killing the civilian population or denying it access to adequate medical care) to de-legitimize adversarial presence and further its own continuing legitimate claim to the occupied territory.

The organized resistance conducts activities in the occupied territories such as sabotage, raids, subversion, and intelligence gathering while ensuring that a portion of these activities are adequately publicized among the occupied population in order to maintain their morale. This also functions to maintain the organization's legitimacy with the population.

Another purpose of this organization within the occupied territories is to prevent another resistance organization contrary to the aims and will of the sovereign government to arise. Such an organization could challenge the return of the sovereign government for its own political purposes or for the purposes of the occupier. Therefore, the government's resistance organization must occupy this political space and prevent a contrary organization from being established. Much of the work against such a contrary resistance organization can be done by denying it material support as well as operating against it in the information environment. It can also be threatened with sanctions by the sovereign government that would be enforced when that government resumes its rightful control. The sovereign government and its resistance organization must explain to the people that any contrary resistance organization operates in contradiction to return of the sovereign government.

In the extreme, and at the right time, direct operations may be required against it. In this way, the legitimate resistance organization also fights to maintain not only its own legitimacy but also that of the sovereign government. The critical function of the resistance is to refuse political consolidation to the occupier and to continue to assert the legitimacy of the sovereign government and the legitimacy of fighting for its reinstatement.

However, if an organized network of individuals opposed to the occupier and supportive of the legitimate government arises in the occupied territories, the government must have a method of legitimizing them under the sovereign government. This gives such an organization and its members protection under international law as outlined above. It must support the sovereign government, be brought under its hierarchy, and conduct itself under LOAC. If a group cannot adhere to such requirements, then the government must protect itself from potential wrongdoings committed by such a group as well as protect the legitimacy of its own resistance organization by letting it be known that the group operates outside the purview of the government, and is illegitimate.

A recent example of a similar such unit arising during conflict is the Azov Battalion in Mariupol, Ukraine. It arose in 2014 in response to Russian incursion, but its political goals were not aligned with those of the nation's government in Kiev (Walker 2014). However, it was eventually brought under the Ukrainian National Guard in 2015 and during the Russian invasion of 2022, it played a major role in the defense of the city of Mariupol (Koshiw 2022).

Legitimizing the Resistance Organization During Post-Conflict Resumption of Sovereignty

The starting point here is after the occupier has withdrawn or been forced out of the occupied territories with the assistance of the resistance organization. During this last phase, the displaced or exiled government returns to its

sovereign national territory. This return is internally facilitated by its organized resistance and the general will of the populace. Critical to success is that competing internal resistance groups with goals other than the return of the previously mandated government are not allowed political or physical space.

The message to the domestic population is that their lawfully elected representative government is returning, even if some of its members have changed by legal processes during displacement or exile, but that it is still indeed the legitimate government that is returning. In order to maintain its own legitimacy, the returning government must assure its people that the previous legal and constitutional regime will return to govern. To further reinforce its legitimacy, the returning government should also inform the people as to when the next elections will be held so as to return the normal elective process to the people. The government must also assure the people that if any foreign support comes into the country, that it is with the permission of the government. This legitimizes partner and allied presence and assistance in post-conflict stabilization. The message to the people is that the occupier has been defeated and is departing due to popular resilience and resistance and that the nation will resume its self-determination under its legitimate government.

The resistance organization has a reduced role in this phase. It can use information gathered under occupation to assist potential war crime trials of adversary soldiers as well as to present evidence of crimes or collaboration with the adversary by the nation's own citizens. It is a facilitator in this phase. It is not the entity that returns the sovereign government to power any more than the military has the power to return the sovereign government. The resistance organization, like the state's military, are tools of the state, under the authority of the government. Like the regular military, it continues to comply with direction of the government and retains its own legitimacy by continued support to the legitimate people's representative government, as with all the other government agencies.

Conclusion

As in many issues involving society at large, the concept of legitimacy is in the minds of people and is critical to its continued cohesion. If a sovereign government anticipates that it may not be able to exercise its powers within all or some of the state's boundaries during a conflict due to foreign occupation, then as part of its defensive preparations and as part of its deterrence of adversarial action, it must also prepare an authorized resistance organization to conduct specific activities on its behalf in occupied territory. This planning assists in the prevention of adversarial political consolidation over those territories, forces the adversary to expend resources to protect itself, and assists the return of the sovereign government through the provision of intelligence and limited kinetic activities to contribute to the return of national or partner military forces. Additionally, the resistance organization can perform legitimate military-type activities within the occupied territories while continuing to assert the right of the legitimate displaced government to rule over those territories. An authorized resistance organization functioning in occupied territory is a legitimate extension of the sovereign government's power into that occupied territory. The necessity and criticality of a national legal framework to support the organization, development, and authorized use of this form of warfare cannot be overemphasized. A legal framework authorizing its existence communicates legitimacy both internally, under domestic law, and externally, under international law.

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