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Cover picture: Chocó Department. An ICRC employee speaks to members of the ELN armed group about the principles of international humanitarian law and the obligation to protect the lives of the civilian population, health personnel, and the sick or wounded.
Photo: Juan Arredondo. Reproduced with permission: Getty Images/ICRC

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In Memoriam—Frits Kalshoven (1924–2017)

It is with profound sadness that the Editorial Board of the *Yearbook of International Humanitarian Law* was informed about the passing, on Wednesday 6 September 2017, of Prof. Emeritus Frits Kalshoven. We are proud to say that Frits was a member of the Yearbook's Board of Recommendation, and for good reason: he can safely be positioned within the international humanitarian law's hall of fame, as he was instrumental in the development of this important field of law. The theme of belligerent reprisals cannot be studied without consulting Frits' 1971 Ph.D., reprinted in 2005; he was one of the drafters of the 1977 Additional Protocols; in January 1987, Alexandre Hay, the then President of the International Committee of the Red Cross, correctly predicted in his preface to the first edition of Frits' book *Constraints on the Waging of War*, that "it will become one of the classics of the law of armed conflicts"; he was the first Chairman of the UN Commission of Experts to investigate serious violations of international humanitarian law in the former Yugoslavia, which paved the way for the International Criminal Tribunal for the former Yugoslavia; and in 2003, Frits was awarded the Henry Dunant Medal of the International Red Cross and Red Crescent Movement for his continued effort to improve the knowledge of and respect for the law of war.

In addition to all of this (and the above is only a very brief selection of his professional achievements), Frits was a friend, mentor and inspiration to many, both inside and outside the Netherlands. This is discernible from the various personal comments that were written in the days after his passing (and again: the following is a brief selection only): "very kind, warm and humble person—insisting, for example, to always be addressed by his first name"; "the great, and always humble, Frits Kalshoven"; "[w]e lost an IHL giant, gent and a wonderful man" and "[a] crusader for the right cause, a teacher of many, a gentleman until the very end".

It is clear he will be dearly missed by many. Including all of us.

On behalf of the entire team of the *Yearbook of International Humanitarian Law*,

Terry D. Gill (Editor-in-Chief) and Christophe Paulussen (Managing Editor)

Contents

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This has the added benefit of the reports being fully searchable, thereby better serving the needs of scholars and practitioners.

Part I
Armed Groups

Chapter 1
Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organization Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict

Tilman Rodenhäuser

Abstract Identifying non-state parties to armed conflicts becomes increasingly complex. As seen in recent conflicts in Syria, Libya, Yemen, or the Central African Republic, turmoil or inter-communal tensions escalate into armed conflicts, armed groups fragment increasingly, and some armed groups operate transnationally. Over the past decade, international jurisprudence developed numerous indicative factors to identify organized armed groups. While recognizing their great value, this chapter proposes to take a step back from these concrete indicators in order to recall broad but fundamental characteristics that any party to non-international armed conflict needs to have under international humanitarian law. It is shown that every party to a non-international armed conflict has to fulfil three criteria: it has to be (1) a collective entity; (2) with capabilities to engage in sufficiently intense violence; and (3) internal structures sufficient to ensure respect for basic humanitarian norms. Building on this basic understanding, the chapter provides an analysis of two questions that are highly relevant in contemporary conflicts but understudied: First, what link needs to exist between different armed groups in order to be considered one party to a conflict? And second, at what point can two or more groups that operate in different states form one transnational party to conflict?

Keywords Non-state armed group · Organized armed group · Non-international armed conflict · Party to a conflict · Organization · Organization criterion · Transnational conflict · Transnational armed group · Global war on terrorism · Islamic State

Dr. Tilman Rodenhäuser is Legal Adviser in the Legal Division of the ICRC. This chapter was written in the author's personal capacity and does not necessarily reflect the views of the ICRC.

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Contents

1.1 Introduction

In order to classify internal violence as a non-international armed conflict (NIAC), it is generally agreed that armed violence has to reach a certain level of intensity, and it needs to occur between two or more sufficiently organized parties.[1] Recent conflicts in Syria, Libya, or the Central African Republic show, however, that conflict classification becomes increasingly complex. Turmoil or inter-communal tensions escalate into armed conflicts, armed groups fragment increasingly, and violence is becoming more and more regionalised.[2] While determining a certain degree of violence is often obvious from the facts, it is more challenging to identify different groups involved in armed violence and to determine whether they are sufficiently organized to constitute a party to a NIAC. This is mainly for two reasons: first, determining a sufficient degree of organization is factually complex. Being normally engaged in a conflict with a militarily superior adversary, armed groups tend to operate secretly. In order to protect their forces and leadership, they avoid disclosing their internal command, communication, or disciplinary structures. Second, defining what constitutes a sufficiently organized group under international humanitarian law (IHL) is legally challenging. As Sivakumaran emphasized in his recent study of the laws of NIAC: "the element of organisation and the workings of armed groups are only just starting to be understood" because "insufficient attention has been paid to armed groups, their structure, and workings".[3]

[1] See ICTY, *Prosecutor v Duško Tadić a/k/a "Dule"*, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Case No. IT-94-1-AR72 (*Tadić* 1995), para 70; ICRC 2016, paras 393–451; Moir 2015.

[2] For a description of today's conflict environment, see ICRC 2015.

[3] Sivakumaran 2012a, p. 210.

Indeed, lawyers struggle to make sense of the organization criterion and its practical application. The task of analysing at what point non-state armed groups involved in conflicts in Syria, Libya, and Yemen were sufficiently organized under IHL led a group of legal experts to "ask whether too much emphasis is placed on the organizational criterionno needno or whether the problem lay with the [legal] indicia of an OAG [organized armed group] rather than with the existence of such a group".[4] In light of these difficulties, some have cautioned that looking strictly at whether both the organization and the intensity requirement are fulfilled risks "not seeing the forest for the trees" because too much weight is given to "technical legalities".[5] Instead, they suggest that in order to classify a situation as a NIAC, the "totality of the circumstances" needs to be taken into account.[6] Accordingly, it is argued that if the intensity criterion is overwhelmingly satisfied, the organization criterion can to some extent be offset: "a situation of intense hostilities without significant opposition force organization indicates the exact type of heavy-handed government military response that necessitates humanitarian regulation".[7] The proposal of looking at the intensity and organization requirements together has important merit and is taken up below. At the same time, the suggestion to call heavy-handed state violence too readily an armed conflict also warrants a word of caution. Granting states larger discretion to use force according to a conduct of hostilities paradigm instead of a law enforcement one as applicable outside armed conflicts might not mitigate violence and suffering—the contrary is likely to be the case. Thus, moving too far away from established—and admittedly restrictive—legal criteria for conflict classification, and thereby making it easier to invoke IHL as the applicable legal framework, risks legalizing conduct which would otherwise be in violation of international human rights law (IHRL) or amount to an international crime.[8]

A second avenue to practically address the challenge of determining whether or not a non-state armed group is sufficiently organized has been to focus the analysis on a group's capabilities to engage in armed violence. At the International Criminal Court (ICC), for example, Trial Chambers I and III recently argued that an organised armed group under the Rome Statute of the International Criminal Court

[4] Arimatsu and Choudhury 2014, p. 40.

[5] Blank and Corn 2013, p. 746.

[6] Blank and Corn 2013.

[7] Ibid., p. 740. Going in a similar direction, others have argued that "it is of minor importance whether armed groups are 'organized' or not if they are able to conduct armed resistance to such a degree that governmental forces must use military means and methods to achieve their aims". Dahl and Sandbu 2006, p. 376.

[8] As Garraway puts it, the result of such proposals "is not so much to increase protection but to widen the authority for armed forces to use lethal force". Garraway 2015, p. 443. Indeed, under international law, a heavy-handed government response to violence by poorly organised armed elements falls into the category of severe human rights violations, or crimes against humanity, rather than into that of potentially lawful acts of warfare.

(Rome Statute) must "have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence".[9] On the other hand, Trial Chamber II emphasised that organised armed groups under the Rome Statute must have a sufficient degree of organisation not only to be able to engage in a protracted armed conflict but also "to be able to implement rules of international humanitarian law applicable" in NIAC.[10] Unlike the other two trial chambers, this approach suggests that in addition to being sufficiently organized to engage in armed violence, an armed group under IHL is also required to be able to implement basic humanitarian norms.

These diverging views and the apparent lack of legal clarity are worrying because determining whether or not a non-state armed group is sufficiently organised to qualify as a party to an armed conflict has major implications. First, unless intense armed violence takes place between at least two sufficiently organised parties, a situation cannot classify as a NIAC. As hinted to above, conflict classification determines which bodies of law—either only IHRL outside armed conflicts, or IHL and IHRL during armed conflict—govern elementary questions such as the permissibility of the use of force, grounds and procedures for deprivation of liberty, or questions on humanitarian relief.[11] As IHL is generally considered more permissive on the use of force and deprivation of liberty, determining whether and in relation to which actors IHL applies has significant implications for those affected by violence. Second, conflict classification is a cardinal question with regard to prosecuting crimes. War crimes as defined in international criminal law can only be committed in the context of an armed conflict. Thus, unless a situation of armed violence qualifies as a NIAC, acts such as torture, rape, or intentionally attacking civilians are likely to amount to crimes under national law but cannot be prosecuted as war crimes.

Against this background, the objective of the present chapter is to show what signifies the "organization criterion" under IHL and how it should be understood in increasingly complicated conflict situations. Section 1.2 examines the "organization criterion" under IHL treaties and their contemporary interpretations. It argues that at a minimum, any party to a NIAC needs to meet three broad criteria: it needs to be (1) a collective entity; (2) with the capabilities to engage in sufficiently intense violence; and (3) internal structures sufficient to ensure respect for basic humanitarian norms. Building on this basic understanding, Sects. 1.3 and 1.4 of the chapter provide an analysis of two questions that are highly relevant in contemporary

[9] ICC, *Prosecutor v Thomas Lubanga Dyilo,* Judgment, 14 March 2012, Case No. ICC-01/04-01/06-2842 (*Lubanga Dyilo*), para 536; ICC, *Prosecutor v Jean-Pierre Bemba Gombo,* Judgment, 21 March 2016, Case No. ICC-01/05-01/08-3343 (*Bemba*), para 134. Contrary to Trial Chamber II, Trial Chamber III considered the ability to impose discipline an indicative factor only and not a strict criterion.

[10] ICC, *Prosecutor v Germain Katanga,* Judgment, 7 March 2014, Case No. ICC-01/04-01/07-3436 (*Katanga*), para 1185.

[11] On practical differences between IHL and IHRL, see Kretzmer 2009, pp. 24–25; ICRC 2011, p. 22; Kress 2010, p. 26; on the difference regarding humanitarian relief, see Rodenhäuser and Giacca 2016.

conflicts but understudied. Section 1.3 examines the question of which link needs to exist between different armed groups in order to be considered one party to a NIAC. Section 1.4 extends these considerations to transnational armed groups, meaning groups consisting of subgroups operating in different states.

1.2 The Organization Requirement Under Contemporary IHL

In the absence of clear definitions in IHL treaties of which criteria define a non-state armed group that is sufficiently organized to become party to a NIAC, international jurisprudence over the past 20 years has suggested a variety of indicators or factors for examination.[12] They are not strict criteria, but "indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled".[13] The International Criminal Tribunal for the former Yugoslavia (ICTY) has generally examined five groups of factors: (1) the presence of a command structure; (2) the ability to carry out operations in an organised manner; (3) the group's level of logistics; (4) the group's "level of discipline and its ability to implement the basic obligations of Common Article 3"; and (5) the group's ability to speak with one voice.[14] For their part, ICC Trial Chambers present the following non-exhaustive list of indicators:

> [T]he force or group's internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group's ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.[15]

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[12] As will be seen below, the definition found in Article 3 common to the four Geneva Conventions (Common Article 3) is rather ecliptic. Article 8(2) of the Rome Statute of the International Criminal Court does not provide a clear definition either. The criteria listed in Additional Protocol II apply under that treaty and are generally understood as setting out a threshold that is slightly higher than the lowest NIAC threshold as found in Common Article 3. See Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (ICC Statute); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II).

[13] ICTY, *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj,* Judgment, 3 April 2008, Case No. IT-04-84-T (*Haradinaj* et al. 2008), para 60; *Lubanga Dyilo,* above n 9, para 537.

[14] ICTY, *Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj,* Retrial Judgment, 29 November 2012, Case No. IT-04-84bis-T (*Haradinaj* et al. 2012), para 395; ICTY, *Prosecutor v Ljube Boškoski and Johan Tarčulovski,* Judgment, 10 July 2008, Case No. IT-04-82-T (*Boškoski and Tarčulovski*), paras 199–203.

[15] *Lubanga Dyilo,* above n 9, para 537. For establishing these factors, the Trial Chamber refers to ICTY jurisprudence. The same list was reproduced in *Katanga,* above n 10, para 1186; see also *Bemba*, above n 9, para 134.

A variety of additional indices has been discussed in jurisprudence.[16]

These factors are useful and enjoy general support among most commentators and actors involved in conflict classification.[17] At the same time, the existence of clear sets of indicators bears the risk of taking these factors as an easy-to-use *de facto* definition of what constitutes a non-state party to a NIAC, without inquiring further into why these factors are required, which ones are really pertinent, and in what different ways they can be met in practice. For example, reading the factors only in light of early ICTY jurisprudence risks interpreting them with only one type of armed groups in mind, namely those existing in the Former Yugoslavia.[18] When examining conflicts in different geographical regions, increasingly fractured insurgencies, armed groups operating in different states' territories, or cyber armed groups, the factors do provide guidance. However, in order not to misinterpret them, to be able to grasp the broader picture behind the indicative factors, and to apply this broader picture to varying contexts, it is important to understand the factors' origins and rationale.

This chapter proposes to take a step back from the indicative factors and to recall how the organization criterion developed in IHL. The chapter further inquires into the question of which broader legal requirements derive from IHL treaties and what the rationale behind the organization criterion is. Based on this analysis, the present piece identifies three broad but strict criteria that any party to an armed conflict needs to fulfil. Instead of dismissing the indicative factors developed in jurisprudence, however, this chapter builds on some of the factors and shows how they can be used to prove the three identified criteria. The resulting understanding of what it means to be party to a NIAC provides the basis for analysing more complex cases, such as horizontally structured armed groups, coalitions of armed groups, or groups operating transnationally.

1.2.1 A Glance at the Origins of the Organization Criterion

As public international law in general, the laws of war traditionally applied only to conflicts between states.[19] However, this understanding broadened in the

[16] For good summaries, see Sivakumaran 2012a, b, pp. 170–171; see also Akande 2012, pp. 52–54.

[17] See, for instance, Human Rights Council 2011, para 64; UN Security Council 2014, para 87; ICRC 2016, paras 422–437; Moir 2015, paras 38–39.

[18] When the ICTY developed the first set of indicative factors in the *Haradinaj* case, it analysed non-state forces as examined in the *Tadić* case, the *Celebici* case, or the *Halilovic* case, which where highly organised forces linked to state-like entities.

[19] As, for example, the eminent Italian jurist Gentili emphasised in 1648, warring parties that are not sovereign states "are not properly enemies, even although they conduct themselves as soldiers and commanders and meet the attack of commanders of opposing legions. He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace'. Gentili 1589, pp. 24–25. For further discussion, see Rodenhäuser 2018 (forthcoming).

seventeenth and eighteenth centuries. Lawyers such as the Dutch Grotius or the Swiss De Vattel started to rethink the concept of war so as to include conflicts involving non-state forces. In 1758, de Vattel provided a striking explanation for why the laws of nations should apply to "civil war":

> A civil war breaks the bands of society and government, or, at least, suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. […] On earth they have no common superior. They stand therefore in precisely the same predicament as two nations, who engage in a contest and, being unable to come to an agreement, have recourse to arms.[20]

In line with these considerations, in state practice the concept of "recognition of belligerency" developed.[21] If a state recognised belligerency, the customary laws of war became applicable between the recognizing state and the recognised non-state belligerent.[22] In the first half of the twentieth century, legal experts identified four necessary criteria for recognition of belligerency by third states: high intensity of violence; the necessity to recognise belligerency; the existence of a *de facto* government administrating parts of the territory; and a high degree of organization among the non-state forces, which had to act under a "responsible authority" or "military discipline" and in accordance with the laws of war.[23] While the first two criteria required a situation that amounted "in fact to a *war*"[24] and had an impact on the interests of the recognising state, the latter two criteria concern the requisite characteristics and capabilities of the non-state belligerent.

In broad terms, these criteria suggest a non-state entity had to show at least three characteristics in order to be recognizable as a belligerent: first, it needed to be a *de facto* government, meaning the non-state belligerent had to operate a civilian administration. Second, as belligerency could only be recognised if there was in fact a "an armed conflict of a general […] character",[25] non-state belligerents needed to have the capabilities to engage in such a conflict against a state. And third, non-state forces needed to operate under a command and control structure seemingly akin to

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[20] Vattel 1758, p. 293.

[21] For example, in some cases the U.S. Supreme Court directly cited de Vattel. See The Brig Amy Warwick; The Schooner Crenshaw; The Barque Hiawatha; The Schooner Brilliante (The United States Supreme Court, 1862), in Scott 1923, p. 1436. For in-depth discussion of relevant state-practice, see Rodenhäuser 2018 (forthcoming).

[22] See Sandoz et al. 1987, para 4345; Sivakumaran 2012a, b, p. 16. If the state recognizing belligerency was a third state, recognition essentially meant that the law of neutrality applied between that state and the belligerents.

[23] The most prominent sets of criteria are those presented by the Institut de Droit International in 1900 and by Lauterpacht in 1947. Institut de Droit International 1900, Article 8; Lauterpacht 2012, p. 176.

[24] Wheaton 1936, p. 30, n 15.

[25] Lauterpacht 2012, p. 176.

that of state armed forces and factually comply with the laws of war.[26] As argued by the American author Beale in 1895, these elements could simply be summarised as requiring "on the part of insurgents an organization purporting to have the characteristics of a state, though not yet recognized as such".[27] At the same time, at least the latter two of the three elements, namely that a belligerent needed to have military and disciplinary structures, are also found in contemporary interpretations of what constitutes a non-state party to a conflict. As shall be seen next, they cannot purely be justified by requiring a "state-like" entity but have an underlying rationale in IHL.

1.2.2 A Party to an Armed Conflict Not of an International Character

While the concept of recognition of belligerency arguably continues to exist, under contemporary treaty and customary IHL two thresholds are of primary importance to determine whether or not a non-state armed group is sufficiently organised to become party to a NIAC and subject to specific legal regimes.[28] The first one is based on Article 3 common to the four Geneva Conventions (Common Article 3) and customary IHL, the second one is found in Article 1(1) of Additional Protocol II.[29] This chapter will focus on the threshold based on Common Article 3 and customary IHL, first because this threshold is not explicitly defined in treaty law, and second because this lower threshold is of paramount practical importance. Once it is met, IHL of NIAC, including customary IHL, applies, and certain violations of this body of law are prosecutable as war crimes.

The chapeau of Common Article 3 states that "[i]n the case of armed conflict not of an international character […] each Party to the conflict" shall be bound to apply certain minimum norms. It does not define the notion "Party to the conflict". Commentators agree that the ordinary meaning of the notion "Party to the conflict" intrinsically suggests a "modicum of organisation".[30] In order to identify which elements define this "modicum" of organisation, the notion "Party to the conflict" needs to be interpreted in light of its context and its object and purpose.[31]

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[26] If these requirements were not met, violence was sometimes referred to as "insurgency" or "rebellion", which did not make the laws of war applicable. For some discussion on these concepts, see Moir 2002, p. 4.

[27] Beale 1896, p. 407.

[28] There has been debate on whether a third threshold exists under the ICC Statute, above n 12. See, for example, Meron 2000, p. 260; Kress 2001, p. 118; Sivakumaran 2009, p. 377; Cullen 2014.

[29] Additional Protocol II, above n 12.

[30] Dinstein 2014, para 95. See also ICRC 2011, p. 8; Schmitt 2012, p. 255.

[31] See Article 31(1) of the Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

Under Common Article 3, a non-state armed group becomes party to an "armed conflict not of an international character". Thus, a contextual interpretation suggests that defining the notion "Party to the conflict" is intimately linked to what constitutes a NIAC. As interpreted by the ICTY and commonly accepted as customary IHL,[32] a NIAC exists

> whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[33]

In the following sections, it will be argued that interpreting the notion "Party to the conflict" as defined under Common Article 3—or "organized armed group" engaged in "protracted armed violence" and subject to IHL—suggests that any such entity needs to fulfil at least three criteria: it must be a collective entity (Sect. 1.2.2.1) with the ability to engage in sufficiently intense violence (Sect. 1.2.2.2) and to ensure respect for basic norms of IHL (Sect. 1.2.2.3).

1.2.2.1 A Collective Entity

Considering the notions "Party to a conflict" or "organized armed group", the terms "party" or "group" require the existence of a collectivity of persons that are linked for a certain purpose. Requiring a party to a NIAC to form a collective entity is also in accordance with the general understanding that armed conflicts under international law do not signify a relation between individuals but between collective entities.[34] While the prototype party to an armed conflict is the state, it is almost a truism that non-state armed groups "are necessarily always organized differently than State armed forces".[35] Still, one concept that seems to be present in all conflicting parties is leadership. As the notorious rebel leader Mao Tse-tung pointed out, no matter how small or unorganised a guerrilla force might be, the common "quality that makes organisation possible" is leadership.[36] In armed forces, leadership is normally exercised through a command structure.[37] Leadership and some

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[32] See Bothe 2002, p. 423; Sivakumaran 2012a, b, p. 155; Akande 2012, p. 51.

[33] *Tadić* 1995, above n 1, para 70.

[34] This notion can be traced back to the work of the Genevan philosopher Rousseau, who found already in 1762 that "[w]ar then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers". Rousseau 1762, p. 6. For further discussion, see Greenwood 2008, p. 20.

[35] Watkin 2009, p. 374. Social science research has shown numerous ways of how to understand armed groups as such. See, for example, Weinstein 2007; Hoffman 2006.

[36] Tse-tung 1937, Chapter 1. While Mao likely referred also to ideological leadership, the importance of leadership in non-state armed groups is also stressed in more recent analysis. See, for instance, Gunaratna and Oreg 2010, p. 1044; Hashim 2006, p. 156.

[37] What the term "command structure" may mean in organised armed groups is further discussed below and should not be understood narrowly. However, as Dinstein points out: "When divested of any command structure, an armed group will not count as organized." Dinstein 2014, para 132.

kind of command structure distinguish an armed group from loosely connected individuals: Members of armed groups do not operate as independent individuals but conform with rules prevailing in the group and are subject to the command of group leadership.[38]

Social science researchers have suggested a variety of organisational structures of non-state armed groups, or have divided armed groups into certain categories.[39] For the purposes of IHL, armed groups can be broadly considered under two types of command structures: vertical and horizontal ones.[40] In very broad terms, a vertically structured group is one with a hierarchical command and control system as normally found in state armed forces. In contrast, for the purpose of this chapter horizontally structured groups are defined as those that unite different groups or cells under one umbrella or command structure with a more informal and flat hierarchy.[41] These structures and the question of how strong the link between different groups or cells in horizontal groups need to be to qualify the groups as one party to a NIAC will be further discussed in Sect. 1.3.

In practice, a number of factors might testify to the existence of a collective entity with a command structure. For example, internal regulations that define the group's organisational structure, rules, responsibilities, and a chain of command constitute evidence.[42] While tribunals have also placed some emphasis on the existence of headquarters,[43] parties may choose not to have one headquarters owing to the high risk of being attacked, or may choose to have different regional headquarters.[44] Moreover, the idea of headquarters should be understood functionally, including control rooms from where parties command their operations,[45] or places at which members obtain weapons and training.[46] Another frequently assessed indicator is a party's "ability to speak with one voice"—for example by engaging in

[38] See ICTY, *Prosecutor v Duško Tadić,* Judgment, 15 July 1999, Case No. IT-94-1-A (*Tadić* 1999), para 120; see also Dinstein 2014, para 95.

[39] Sinno, for example, categorises armed groups into "centralized, decentralized, networked, patron–client, multiple, and fragmented" ones. Sinno 2011, p. 316. See also Mackinlay 2002, p. 43.

[40] Alternatively, these structures have also been called "pyramidal" and "horizontal" or "hierarchical" and "decentralized". See Sivakumaran 2012a, b, pp. 172–174; Hashim 2006, p. 152.

[41] For more detail, see Rodenhäuser 2018 (forthcoming).

[42] See ICTY, *Prosecutor v Fatmir Limaj, Haradin Bala and Isak Musliu,* Judgment, 30 November 2005, Case No. IT-06-66-T (*Limaj* et al.), para 112; ICC, *Prosecutor v Callixte Mbarushimana,* Decision on the Confirmation of Charges, 16 December 2011, Case No. ICC-01/04-01/10, para 104. For example, Macedonia's National Liberation Army's internal regulations are publicly available. See Sivakumaran 2012a, b, p. 171.

[43] *Boškoski and Tarčulovski,* above n 14, para 199; *Haradinaj* et al. 2008, above n 13, paras 64–65.

[44] See *Limaj* et al., above n 42, para 104. For example, the chairman of the Acheh-Sumatra National Liberation Front, Arif Fadhillah, emphasised this point to the author.

[45] This has been the case, for example, in Libya and Syria. See McQuinn 2012, pp. 41–42.

[46] See, for example, *Katanga,* above n 10, paras 679–681; *Haradinaj* et al. 2008, above n 13, para 65.

political, military, or humanitarian negotiations,[47] or by making public announcements in the name of the party as a whole.[48] Indeed, the ability to engage externally in the name of a collective entity and to implement the results of negotiations testifies to a degree of internal authority and leadership, and it shows external recognition thereof.[49]

While being a collective entity is a rather broad criterion, can be reflected in a number of factors, and may serve different purposes, under IHL any collective entity must have two essential qualities to become party to an armed conflict: it must have the abilities to engage in sufficiently intense armed violence (Sect. 1.2.2.2) and to ensure respect for basic humanitarian norms (Sect. 1.2.2.3).

1.2.2.2 The Ability to Engage in Sufficiently Intense Armed Violence

In addition to being a collective entity with a certain command structure, being party to an armed conflict necessarily requires the ability to engage in sufficiently intense violence. When Common Article 3 was adopted in 1949, the notion of armed conflict was understood as applying to factual circumstances of what was generally understood as "war".[50] While the notion of armed conflict and the question of its requisite intensity have evolved since 1949,[51] with regard to the required degree of organization of a party to a NIAC, the basic concept remains the same: any party to an armed conflict needs to have the capability to bring about, and to engage in, armed violence going beyond "a mere riot or disturbances caused by bandits".[52]

In practice, a number of factors are relevant in this context. First, as military-type violence is not conducted by uncoordinated individuals but according to military tactics and coordination, "a unified military strategy", "operational units [that] coordinate their actions", or "the effective dissemination of […] orders and decisions" may testify to the existence of an organisation with military-like capabilities.[53] Second, armed groups must possess sufficient logistics to engage in hostilities, including manpower and weapons. The type and quantity of logistics cannot be determined in the abstract. What is decisive is that they enable the group

[47] See *Boškoski and Tarčulovski,* above n 14, para 203.

[48] See *Haradinaj* et al. 2008, above n 13, para 88.

[49] See *Limaj* et al., above n 42, para 125; ICTY, *Prosecutor v Vlastimir Đorđević,* Judgment, 23 February 2011, Case No. IT-05-87/1-T, para 1576.

[50] Based on its observations at the 1949 Conference, the ICRC commented: "Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war." Pictet 1958, p. 36.

[51] See ICRC 2016, paras 431–437.

[52] Federal Political Department (Switzerland) 1949, p. 129. This idea is also found in Article 1(2) Additional Protocol II, above n 12, as well as in Articles (2)I and (e) ICC Statute, above n 12.

[53] See *Boškoski and Tarčulovski,* above n 14, para 200.

to engage in sufficiently intense hostilities.[54] Third, the group must be able to conduct operations that contribute to an escalation of violence between the parties. While this can be achieved through "large scale military operations",[55] this ability depends to some extent on the conflict dynamics. Concretely, it seems that an armed group needs more sophisticated operational and logistical capabilities to escalate armed violence if confronted with powerful state security forces than what is required to trigger an armed conflict against a state with weak law-enforcement or armed forces. Last but not least, territorial control may testify to the group's capacity to militarily contest its adversary. Yet, territorial control is not a strict requirement to qualify an armed group as a party to a NIAC.[56]

1.2.2.3 Ability to Ensure Respect for Basic Humanitarian Norms

Common Article 3 sets out that "each Party to the conflict shall be bound to apply" certain basic rules of IHL. Indeed, determining the existence of a NIAC under Common Article 3 or customary IHL means that each party to the conflict—state or non-state in nature—is bound by the applicable IHL provisions. The underlying concept that all parties have equal obligations under IHL suggests that each party needs to have the capacity to apply IHL, meaning the ability to ensure respect for the law among its forces. While a recent commentary on Common Article 3 concluded that "there seems to be a general consensus that […] [the required level of organisation] would enable the parties to carry out the obligations imposed by Common Article 3,"[57] as seen in the introductory section this requirement seems to split judges at international tribunals and is also disputed among scholars.[58]

At least three reasons corroborate the view that the ability to ensure respect for basic humanitarian norms is an inherent requirement for any party to a NIAC.

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[54] For example, because of a general shortage of weapons, fighters of the Kosovo Liberation Army received weapons such as hunting rifles from the population. See *Limaj* et al., above n 42, para 122. Similarly, at the beginning of their struggle, the Forces de résistance patriotique en Ituri were only equipped with traditional hunting weapons. See *Katanga,* above n 10, para 530. In many cases, weapons are also obtained locally, in particular through raiding the opponent's stocks. Reportedly, advances on military targets supplied armed groups in Syria with more weapons than had been previously available. See Human Rights Council 2012b, Annex III, para 14.

[55] *Boškoski and Tarčulovski,* above n 14, para 200.

[56] See, for example, *Lubanga Dyilo,* above n 9, paras 536–537; *Katanga,* above n 10, para 1186.

[57] Moir 2015, para 36.

[58] For a view looking primarily at a group's ability to engage in armed violence, see *Lubanga Dyilo*, above n 9, para 536; *Bemba*, above n 9, para 134. For a view also requiring the ability to ensure respect for IHL, see *Katanga*, above n 10, para 1185. For diverging views in ICTY judgments, compare, for example, *Haradinaj* et al. 2008, above n 13, para 60 to *Boškoski and Tarčulovski*, above n 14, para 196. Views favoring a focus on primarily the capabilities to engage in armed violence are also found in UN reports. See, for example, Human Rights Council 2011, para 57; Human Rights Council 2012b, Annex III.

First, the expectation that non-state parties to NIACs have the capacity to ensure respect for the law has been expressed in various IHL instruments traditionally linked to the concept of a "person responsible for his subordinates",[59] a "responsible authority",[60] or a "responsible command".[61] The obligation to ensure respect for IHL among its troops is a customary obligation for any party to an armed conflict.[62] Second, IHL is the body of law applicable in the exceptional circumstance of armed conflict and exists to set out a legal framework under which a party to a conflict is permitted to operate while expecting similar conduct by other parties.[63] If one party to a NIAC is absolutely unable to implement any rules, this logic would be defied. Third, the laws of war do not only restrict certain conduct but have, arguably, also certain permissive aspects. Concretely, it is argued that IHL recognises an "inherent power to intern" certain persons,[64] and that IHL contains less restrictive rules on the use of force than human rights law requires in times of peace. If the object and purpose of IHL is to protect victims of armed conflict, permissive aspects of IHL should not become applicable if the conflicting parties cannot also comply with elementary restrictions IHL imposes, including on internment or the use of force. Against this background, it has been pointed out correctly that "[o]rganization for the purposes of the enforcement of the law is equally as important as, indeed even more important than, organization for the purposes of the intensity of the violence".[65]

This requirement raises at least two questions: first, what capacities are required from an armed group to ensure respect for IHL in general; and second, what capacity must non-state entities have to implement the obligations listed in Common Article 3 or customary IHL? In this chapter, only the first question can be examined.[66] Suffice it to recall that for the purpose of conflict classification, IHL does not require that a party to a NIAC is able to implement all applicable norms.[67]

A group's ability to ensure respect for fundamental humanitarian norms is largely dependent on the level of discipline within the group. Behaviour studies show that structures to ensure respect for internal rules, including IHL, depend on three factors: clear rules; training and orders; and effective sanctions.[68] Similarly,

[59] Article 1 of the Regulations concerning the Laws and Customs of War on Land, Annex to Hague Convention (IV) respecting the Laws and Customs of War on Land, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910).

[60] Lauterpacht 2012, p. 176.

[61] Article 1 Additional Protocol II, above n 12.

[62] See Rule 139 of the ICRC Customary IHL Study, in Henckaerts and Doswald-Beck 2005.

[63] ICRC 2003, p. 232.

[64] ICRC 2014, p. 7.

[65] Sivakumaran 2012a, b, p. 179.

[66] For in depth discussion of the second question, see Rodenhäuser 2018 (forthcoming).

[67] For example, no tribunal requires an armed group to have the capacity to conduct fair trials in order to become party to a NIAC. What IHL requires, however, is that any party has the capacity to refrain from certain conduct unless it is also able to implement the corresponding limitations. See also Draper 1965, p. 91; Sivakumaran 2012a, b, p. 186.

[68] See Munoz-Rojas and Fresard 2004.

notorious rebel leaders have stressed that guerrillas must internalise the rules of the group, and if "discipline is violated, it is necessary always to punish the offender, whatever his rank, and to punish him drastically in a way that hurts".[69] Discipline not only enables a group to implement internal rules including IHL, but "lack of discipline among the rank and file wastes resources, alienates potential supporters, and may undermine military efforts".[70] Thus, if a group is to function effectively, it needs to ensure some degree of internal discipline.

Analysing whether a group has the capacity to comply with basic IHL norms is not a question of examining specific structures designed for implementing IHL, such as a classical military command and control systems. Instead, the requirement needs to be understood in a wider sense, meaning that a group needs to have the capacity to implement any kind of internal rules. If a group has sufficient structures to require its members to respect a simple code of conduct, or if the group operates under strict unwritten rules, this should be sufficient proof for its ability to also implement basic IHL. Concretely, if a group's code of conduct prescribes attacking members of the group's own constituency, it could similarly include rules prohibiting attacks against civilians. Likewise, it does not take sophisticated structures to absolutely prohibit torture. There is no objective reason why a basic set of rules applicable and respected within a group could not contain fundamental IHL norms. As it is well known, however, for the purpose of conflict classification it is not required that parties to the conflict actually comply with IHL.[71]

Against this background, international tribunals have listed "the existence of internal regulations and whether these are effectively disseminated to members", "proper training", and "the establishment of disciplinary rules and mechanisms" as indicators of a group's ability to respect IHL.[72] In vertically structured groups, discipline is normally enforced through a hierarchical model: the group's leadership issues rules and orders and the hierarchical structure ensures that they are followed and enforced throughout the group.[73] In contrast, in armed groups with a "cellular structure […] commands cannot be given centrally to the whole group".[74] Even in such groups, however, leadership "must, as a minimum, have the ability to *exercise some control* over its members so that the basic obligations […] may be implemented".[75] In practice, this could mean that central leadership issues general rules and orders that all parts of the group follow, but their implementation and the

[69] Guevara 1961, p. 153; see further quotes from Mao Tse-tung and Guevara in Weinstein 2007, p. 30.

[70] Ibid., p. 43.

[71] See *Boškoski and Tarčulovski,* above n 14, paras 204–205.

[72] See, for example, ibid., para 202.

[73] For example, at the height of the armed conflict in Kosovo, the KLA's disciplinary system included different measures taken at different hierarchical levels of the group, such as subjecting soldiers to "an oral reprimand, a written critique, a short-term detention sentence, or a referral to the General Staff and to the Military Court". *Đorđević,* above n 49, para 1575.

[74] See ICRC 1971, p. 17.

[75] *Haradinaj* et al. 2012, above n 14, para 393 (emphasis added).

imposition of discipline is ensured by the different subgroups according to their own methods.[76]

To sum up, while Common Article 3 does not provide a definition of what constitutes a party to a NIAC, interpreting the notion "Party to the conflict" in accordance with established rules of treaty interpretation enables to identify three criteria that every party to a NIAC has to fulfil. Under IHL, a party to a NIAC needs to be a collective entity with sufficient capabilities to engage in hostilities and the capacity to ensure respect for fundamental norms of IHL. In order to analyse whether these criteria are fulfilled, a variety of factors—including those identified in international criminal law—can provide useful indications. However, assessing the structures and capacities of different armed groups needs to take the group's operational context and cultural background into account. The criteria identifying a "Party to the conflict" are best understood in a functional sense, focusing strictly on what is necessary to become party to an armed conflict as understood in IHL.

1.3 Uniting Multiple Armed Groups into One Party to a NIAC

Identifying a sufficiently organised party to a NIAC is particularly challenging if violence does not break out between pre-existing groups but develops in a decentralised manner—for example, as a result of mass protest. History shows that "all guerrilla bands that spring from the masses of the people suffer from lack of organization at the time of their formation".[77] Recent examples of such situations include the escalation of protests into armed conflicts in Libya and Syria in 2011–2012. For instance, almost one year into the Syria crisis, a UN Commission of Inquiry (CoI) found itself "unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups had reached the necessary level of organization" in order to determine the applicability of IHL.[78] The CoI pointed out that while a number of armed groups identified themselves with the FSA, this did not mean that the "group has been recognized by the FSA leadership or obeys the command of the FSA leadership abroad".[79] Similarly, while an early UN CoI report on Libya could be read as suggesting that opposition forces were united under the "National Libyan Army" banner,[80] the CoI

[76] For discussion on how armed groups' disciplinary systems operate in practice, see Sivakumaran 2012a, b, pp. 1146–1148.

[77] Tse-tung 1937, Chapter I. See also Dinstein 2014, para 131.

[78] Human Rights Council 2012a, para 13.

[79] Ibid. Stated differently, a researcher pointed out that "FSA headquarters does not appear to exercise command over the autonomous groups that fight in its name; however, many of the most important groups who are fighting the regime acknowledge the FSA's leadership, inasmuch as they are able to do so". Holliday 2012, p. 17.

[80] Human Rights Council 2012c, paras 56–57.

later clarified that the "Libyan National Army neither coordinated nor led the military struggle against Qadhafi forces".[81]

To be clear, classifying a situation of violence involving different non-state armed groups as a NIAC does not require all actors to be united under one structure. A NIAC exists as soon as violence between two sufficiently organised parties meets the intensity threshold. This means that if a number of distinct non-state armed groups challenge state forces, the bilateral relationships between the state and each non-state group need to be examined to determine whether or not a NIAC exists.[82] However, as it was the case with the FSA or the "National Libyan Army", in practice different armed groups might also unite under a joint military or political structure. For the purpose of IHL, in such situations the key question is at what point a joint group, or umbrella group, consisting of different subgroups is sufficiently organised to form one party to a NIAC. This question is particularly relevant if different organised armed groups are present on a state's territory but have not (yet) engaged in violence with an adversary that is sufficiently intense to qualify their bilateral relation as a NIAC.

Nothing in IHL suggests that an organised armed group uniting different subgroups needs to meet different criteria than any other party to a NIAC. Thus, in line with the above analysis, three criteria need to be met: the umbrella group has to be a collective entity able to engage in sufficiently intense violence and to ensure respect for basic IHL. For the sake of the present analysis, it is assumed that every subgroup is itself a collective entity able to engage in armed violence and to ensure respect for basic humanitarian norms. If different such groups unite, they will be able to engage in intense violence, and each group's disciplinary system will continue to operate. Consequently, the key issue to examine is what kind of link needs to exist between these groups in order to consider them as one collective entity operating under one command structure, with the ability to ensure respect for basic humanitarian norms within the group as a whole.

A clear case would be if the different groups merge into one vertically-structured armed group with one hierarchical command and control system.[83] If this is not the case, the question of which other links between subgroups could classify these groups as one party to a NIAC arises. IHL treaty law applicable in NIAC does not provide an answer. Yet, two concepts existing in IHL applicable in international armed conflicts might be instructive to answering this question.[84] The first one is the "belonging test" as interpreted in the 1960 ICRC Commentary to the Third Geneva Convention (1960 ICRC Commentary) to determine whether a non-state

[81] Ibid., Annex I, para 66.

[82] For a more detailed examination of how IHL would apply in such situations and how it could also apply to armed elements not identified as a sufficiently organised armed group, see Dörmann and Rodenhäuser 2017.

[83] Allegedly, this has been the case with the "Seleka" coalition in the Central African Republic, which shortly after its formation apparently operated under "a clear hierarchical military command structure". ICC—The Office of the Prosecutor 2014, para 65.

[84] For a discussion of other possible approaches, see Radin 2013, pp. 723–734.

militia belongs to a party to an international armed conflict so that its members can be considered prisoners of war.[85] The second one draws on the "overall control test", meaning a test analysing the requisite degree of control a state needs to exercise over an armed group in order to consider the state and the group one party to an armed conflict.

1.3.1 The "Belonging Test"

It has been argued that in a situation in which different armed groups each constitute "a body having a military structure" that is "commanded by a 'person responsible for his subordinates'", the decisive link to form one party to a NIAC would be that "they must '*belong to*' a party to the conflict".[86] Based on how the term "belonging to a Party to the conflict" has been understood in the context of determining prisoner of war status under Article 4(A)(2) of the Third Geneva Convention,[87] this approach proposes a rather loose link if the 1960 ICRC Commentary is followed. Accordingly, in order to form one party to a NIAC, a "de facto relationship" between the entities would suffice, which "may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting".[88] In addition, the "belonging test" would also be met if an "official declaration" by the party to the conflict would be "confirmed by official recognition by the High Command" of the individual armed group.[89]

For the purpose of determining the requisite link between different armed groups in order to form one party to a conflict, the "belonging test" appears to be rather loose. As shall be seen below, international jurisprudence requires more than a *de facto* relationship that could express itself in fighting a common enemy. Likewise, the threshold that different groups form one party based on a declared affiliation might be too low. Such a declared affiliation would need to be corroborated by operational and strategic collaboration. It is widely accepted that sharing "a common ideology"[90] or "[m]ere 'acting toward a collective goal' against the Government is not enough […] some leadership is essential".[91] This suggests that any declared coalition based on political or ideological grounds would need to translate into establishing some form of a joint command structure in order to

[85] de Preux 1960.

[86] Melzer 2014, p. 314 (emphasis added).

[87] Geneva Convention (III) relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

[88] de Preux 1960, p. 57. This is the test suggested by Melzer. See Melzer 2014, pp. 314–315.

[89] de Preux 1960, p. 57.

[90] ICRC 2011. This position is also accepted by the US, which explains that in its fight against Al Qaida and "associated forces" a "group that simply embraces al-Qa'ida's ideology is not an 'associated force'". U.S. Department of Defense 2015.

[91] Dinstein 2014, para 95; see also Arimatsu and Choudhury 2014, p. 41.

qualify as a party to a NIAC. This point is further developed in the following section.

1.3.2 The "Control Test"

A narrower interpretation of when an armed group can be considered as "belonging" to a party to an international armed conflict is the "overall control" test suggested by the ICTY Appeals Chamber.[92] The question of whether or not the "overall control" test is the right one to determine that an armed group belongs to a state continues to be subject to debate.[93] Moreover, the "overall control" test was developed in the context of either attribution of acts to a state for the purpose of state responsibility, or to determine whether an armed group belongs to a state and thereby forms part of a party to an international armed conflict. While the question of whether one armed group belongs to another armed group for the purposes of conflict classification is obviously related, hardly any relevant documents or practice exist on this question. Thus, the test cannot, *ipso facto*, be assumed to apply to the circumstances at stake in the present analysis.[94] Still, as shall be seen below, the idea underlying the "overall control" test has some merit for examining when two or more armed groups constitute one party to a NIAC.

In the *Tadić* judgment, the ICTY Appeals Chamber emphasised that, under international law, the action of an organised armed group can be attributed to "a State (or, in the context of an armed conflict, the Party to the conflict)" if the party to which the acts shall be attributed "*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group".[95] It is not necessary that the controlling entity issues "specific orders", or provides "direction of each individual operation".[96] Conceptually, the situation of uniting different armed

[92] *Tadić* 1999, above n 38, paras 88–123. The purpose of this chapter does not necessitate an engagement with the continuing discussion on whether the ICTY's "overall control" or the ICJ's "effective control" constitute the correct test for determining state responsibility for acts committed by armed groups. While the ICJ dismissed the overall control test with regard to state responsibility, it left open whether it serves its purpose with regard to conflict classification. See ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* Judgment, 26 February 2007, [2007] ICJ Rep 43, para 404.

[93] For a recent concise summary of discussion on this issue, see ICRC 2016, paras 265–273.

[94] Note, in this context, that it is not clear whether the control criterion, as found in Article 7 of the Draft articles on the responsibility of international organisations, for the attribution of acts to international organizations, is to be interpreted similar as the control criterion for attributing acts to states. See International Law Commission 2011, pp. 19–26. For some discussion, see Palchetti 2013.

[95] *Tadić* 1999, above n 38, para 137 (emphasis in original).

[96] Ibid.

groups under the banner of one party to a NIAC is not too different.[97] Both with regard to the Kosovo Liberation Army (KLA) in the former Yugoslavia and the FSA in Syria, at one point the key question was whether different subgroups formed part of one of these umbrella organizations.[98] Following the "overall control" test as expressed by the ICTY Appeals Chamber, independently-formed groups could be considered one party to an armed conflict if an authority within that united party to the conflict—be it an individual or a command council consisting of members from different groups—is involved in organizing and coordinating the different groups' military operations, and provides some material support.

ICTY and ICC jurisprudence seem to have developed this approach further without explicitly referring to the overall control test. With regard to the KLA, the ICTY found that at the very early stages of the conflict, when KLA-affiliated groups consisted mostly of "spontaneous and rudimentary military organization[s] at the village level", the "initial phases of a centralized command structure above the various village commands" were crucial for the KLA to qualify "as an 'organized armed group' under the *Tadić* test".[99] The Chamber emphasised particularly the "*de facto* authority" consolidated by a "popular commander" called Haradinaj, who coordinated some activities of different village defence groups.[100] In addition, the KLA smuggled a significant number of weapons into Kosovo, or facilitated the smuggling by different village organisations.[101] To the extent possible, KLA "professionals" also provided military training for "KLA soldiers" in different villages.[102] In other case law, the ICTY explained that the leadership's ability to coordinate the operations of groups claiming to be part of it, to divide territory into operation zones, and to organise assistance when one group comes under attack testifies to a degree of organisation required to be a party to a conflict.[103] A centralised command structure does not need to be able to command each military operation, or have a functioning reporting system.[104]

[97] For example, referring to Article 7 of the International Law Commission Draft articles on the responsibility of international organizations, it has been suggested that determining whether an international organisation or individual states are parties to a multinational armed conflict would depend on whether the multinational organisation exercises "overall control" over the forces on the ground. See Ferraro 2013, pp. 590–592.

[98] See, for example, *Haradinaj* et al. 2012, above n 14, paras 18–22; Holliday 2012, pp. 14–16.

[99] *Haradinaj* et al. 2008, above n 13, para 89.

[100] Ibid., paras 67 and 89.

[101] Ibid., paras 89 and 76–82.

[102] Ibid., paras 89 and 86.

[103] See *Limaj* et al., above n 42, paras 95 and 108; *Haradinaj* et al. 2012, above n 14, paras 407 and 409; ICTY, *Prosecutor v Slobodan Milošević,* Decision on Motion for Judgment of Acquittal, 16 June 2004, Case No. IT-02-54-T, paras 24–25.

[104] Even if armed groups aim to introduce command and reporting structures, implementation can be challenging if means of communication are limited. See *Haradinaj* et al. 2008, above n 13, paras 63; 78–84; *Limaj* et al., above n 42, para 105.

In the *Katanga* case, the ICC followed a comparable approach with regard to the "Ngiti militia", also known as the "Forces de Résistance Patriotique d'Ituri" (FRPI) active in the "Walendu-Bindi *collectivité*" in Ituri, Democratic Republic of the Congo. The Chamber had to determine whether the different militias that "were spread among several camps placed under the authority of various commanders" constituted one "organized armed group".[105] The Chamber answered the question affirmatively, explaining vaguely that "various means of communication and weapons and ammunition were available to them" and its members "pursued common objectives and conducted joint military operations for a protracted period".[106] However, when assessing the group's organisational structure in more detail, the Chamber emphasised the role played by the "president" of the movement, called Katanga.[107] The Chamber could not establish "beyond reasonable doubt" that Katanga "was vested […] with effective hierarchical power over all the commanders and combatants of the Ngiti militia".[108] However, in order to classify the FRPI as an "organized armed group", the Chamber relied on Katanga's "role as coordinator" that "testifies to the real military authority he wielded" over the other commanders in the group.[109] This authority was underlined by Katanga's role in facilitating "the receipt and storage of weapons and ammunition" and his power to allot them to the sub-groups.[110]

While the "overall control test" as originally stated in the *Tadić* case emphasises a state's role in organising, coordinating or planning the military actions of a non-state group as well as a degree of material support, in order to determine whether or not different armed groups form one party to an armed conflict, more recent jurisprudence appears to require a slightly higher threshold. In order to find a sufficient link between different groups to turn them into one collective entity, there needs to be a uniting element that has been described as "initial phases of a centralized command" exercising some authority beyond the mere coordination of subgroups.[111] Likewise, interpreting the "overall control" test under IHL, in the ICRC's view "[t]he notion of overall control does not […] refer simply to monitoring or checking, but also requires the exercise of some form of authority over the

[105] *Katanga,* above n 10, para 1209.

[106] Ibid.

[107] Ibid., paras 684 and 1359–1365.

[108] Ibid., para 1365.

[109] Ibid., paras 1342 and 1343.

[110] Ibid., para 1362.

[111] An element of "collective coordination […] as an indicator for the organizational criterion" also received support recently from IHL experts. Arimatsu and Choudhury 2014, p. 40. For example, in Misrata, a number of individuals formed the "Misratan Military Council" (MMC) as the central "military authority" of the opposition in that location, without, however, being able to exercise command-and-control functions. Under the overall coordination of the MMC, brigades active in Misrata set up "control rooms" in which military commanders would coordinate their action and share intelligence. Within the MMC and the control rooms, different commanders participated on a horizontal—not hierarchical—basis. McQuinn 2012, pp. 41–42.