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# Thresholds in Flux – the Standard for Ascertaining the Requirement of Organization for Armed Groups under International Humanitarian Law

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## 1. Introduction

In law, the notion ‘organization’ can be defined as ‘[a] group of people, structured in a specific way to achieve a series of shared goals’<sup>1</sup> or as ‘an association of persons characterized by a structure that allows it to coordinate purposeful action’.<sup>2</sup> In situations of an international armed conflict (IAC), the requirement of organization is supposedly of special relevance to irregular/independent armed groups covered by Article 4A(2) of the Third Geneva Convention. This is part of the conditions to be fulfilled for enabling their members to claim the prisoners of war (POW) status in case of capture.<sup>3</sup> Yet, both in the case-law and the literature on international humanitarian law (IHL), there is striking paucity of discussions relating to this requirement in IACs. In contrast, in the context of a non-international armed conflict (NIAC), this requirement has elicited more scrupulous assessments and enriched debates in the jurisprudence of the international criminal tribunals.

The primary purpose of this paper is to demonstrate how the standard for assessing the requirement of organization may vary in diverse situations or phases of IACs and NIACs and to provide coherent explanations for such different standards. The structure of this paper is as follows. Section Two, immediately following this introductory section, clarifies the legal nature of this requirement both under Article 4A(2) of the Third Geneva Convention and in the context of NIACs. Section Three dwells upon the constituent elements of organization, on the assumption that identifying those elements may shed

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<sup>1</sup> Black’s law dictionary.

<sup>2</sup> G. Werle and B. Burghardt, ‘Do Crimes against Humanity Require the Participation of a State or a “State-like” Organization?’, (2012) 10 *Journal of International Criminal Justice* 1151 at 1156-1157. For the case-law, see International Criminal Court (ICC), *Prosecutor v. Katanga*, Trial Judgment, ICC-01/04-01/07, 7 March 2014, para. 1119; and Cour of Justice of the European Union (CJEU), General Court, *Al-Aqsa, Case T-348/07*, Judgment, 9 September 2010, para. 58. See also Article 2 of the UN Convention against Transnational Organized Crime.

<sup>3</sup> G.I.A.D. Draper, ‘The Status of Combatants and the Question of Guerrilla Warfare’, (1971) 45 *British Yearbook of International Law* 173 at 188. See also Article 5(2)(a) of the Seville Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, (1998) No. 322 *International Review of the Red Cross* 159

some light on determining the threshold for this requirement. Section Four addresses various issues relating to the standard for assessing this requirement. Section Five tests the hypothesis that the threshold for this requirement might be high under Article 4A(2) of the Third Geneva Convention. Section Six explores why contrariwise, a more rigorous standard for the eponymous requirement is demanded in NIACs. Section Seven proposes a distinct model ('compensatory model') as a way to rationalize the lowering of a generally elevated standard for organization in NIACs. The crux of this model is to allow the standard for organization to be eased in inverse proportion to the intensity of violence. Section Eight highlights the need for a nuanced assessment of the organizational level of an armed group in some specific phases of the ongoing armed conflict whose legal character shifts (from an NIAC to an IAC, vice-versa, and from a NIAC to a law-enforcement model). Finally, Section Nine explores if the proposed compensatory model may be bolstered by an emerging 'tendency' to lower the organizational level of an armed group involved in violence that may constitute crimes against humanity.

## **2. The Nature of the Requirement of Organization**

### **A. The Requirement of Organization under Article 4A(2) of the Geneva Convention**

#### **III**

In situations of an international armed conflict (IAC), the requirement of organization is implicit for all the irregular/independent armed groups that aspire to be covered by Article 4A(2) of the Third Geneva Convention. This is part of the conditions to be fulfilled for enabling their members to claim the prisoners of war (POW) status in case of capture.<sup>4</sup> For the independent armed groups that are desirous of assuring their members' POW status, it is essential to demonstrate the hallmarks of a military organization. This can be done by showing that its members should be able to 'act within a hierarchical framework, embedded in discipline' while 'subject to supervision by upper echelons to whom the subordinate units in the field report'.<sup>5</sup>

At the 1949 Diplomatic Conference, there were only sparse discussions on this requirement. There was no proposal for any specific element of organization with which insurgents would have to be equipped.<sup>6</sup> Likewise, in the post-1949 doctrines and case-

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<sup>4</sup> Draper, *ibid.*, at 188.

<sup>5</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2016), 3<sup>rd</sup> ed., para 108.

<sup>6</sup> *Final Record of the Diplomatic Conference of Geneva, 1949* (hereinafter, *Final Record*), Vol. II-B, at 335 (Switzerland emphasized 'a rebellion involving a certain degree of organization' to differentiated it from 'individual banditism' or a mere riot).

law, there has been shortage of discussions on this requirement under Article 4A(2) of the Geneva Convention III.<sup>7</sup> The paucity of discussions in the case-law and the literature in relation to this requirement<sup>8</sup> presents the starkest contrast to the luxuriant discussions on the eponymous requirement in NIACs, which will be explored below.

## **B. The Requirement of Organization in the IHL of NIACs – its Nature and Legal Basis**

For the purpose of undertaking inquiries into the requirement of organization in NIACs, it is essential to start with common Article 3 of the Geneva Conventions. Needless to say, this provision, which has been depicted as ‘the Convention in miniature for conflicts of a non-international character’,<sup>9</sup> is expressive of customary IHL.<sup>10</sup> While this provision is destitute of definitional elements,<sup>11</sup> it is generally understood that both the minimum level of organization of an armed group and the intensity of fighting are the common accepted criteria for ascertaining a NIAC under this provision and customary IHL.<sup>12</sup>

Under this provision, this requirement can be read in the expression ‘each Party to the conflict’. Clearly, this expression presupposes the presence of the parties or some armed

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<sup>7</sup> For a limited reference to this requirement, see Draper (1971) (n. 2), at 195-196, and 199-200; A. Rosas, *The Legal Status of Prisoners of War*, (Institute for Human Rights/Abo Akademi University, originally published in 1976 and reprinted in 2005), at 326 and 340; Dinstein (2016) (n. 5), para. 100; and E. Debuf, *Captured in War: Lawful internment in Armed Conflict*, (Pedone/Hart, 2013), at 191.

<sup>8</sup> See Draper (1971) (n. 3), at 196; Mallison and Mallison, ‘The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict’, (1977) 9 *Case Western Reserve Journal of International Law* 39, at 50; Rosas (n. 7), at 340.

<sup>9</sup> *Final Record* (n. 6), Vol. II-B, at 326. See also the ICRC’s *Commentary to the Geneva Convention I* (2016), para. 356; and ICRC’s revised *Commentary to GC III* (2020), para. 390.

<sup>10</sup> ICJ, *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, (1986) ICJ Rep 14, para. 218; ICRC’s revised *Commentary to GC III* (2020), para. 539.

<sup>11</sup> L. Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press, 2002), at 32; J. Pejić, ‘Status of Armed Conflicts’, in E. Wilmshurst and S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, (Cambridge University Press, 2007) 77, at 85.

<sup>12</sup> ICTY, Appeals Chamber, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereinafter, *Tadić Appeals Chamber’s Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), para. 70; and Trial Judgment, 7 May 1997, IT-94-1-T, para. 562; Special Court for Sierra Leone (SCSL), Trial Chamber, *Prosecutor v. Sesay, Kallon and Gbao*, Judgment, 2 March 2009, SCSL-04-15-T, para. 95; ICC, *Prosecutor v. Bemba*, Decision on the Confirmation of Charges, ICC-01/05-01/08, 15 June 2009, para. 231, and Trial Chamber, Judgment, 21 March 2016, para. 128; ICRC, ‘Humanitarian aid to the victims of internal conflicts. Meeting of a Commission of Experts in Geneva, 25-30 October 1962, Report’, in (1963) 3 (No. 23) *IRRC* 79, at 82-83; ICRC’s revised *Commentary to the Third Geneva Convention* (2020, hereinafter, ICRC’s revised *Commentary to GC III*), paras 457, 469, 485, 508, 512. For the doctrines, see D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’, (1979) 163 *Collected Courses of the Hague Academy of International Law* 117 at 146-147; E. La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008), at 13; S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) at 166; Y. Dinstein, *Non-International Armed Conflicts in International Law*, (Cambridge University Press, 2014), at 30-36, paras 90-109.

organized entities that are at variance with each other.<sup>13</sup> As understood in the doctrine,<sup>14</sup> it is reasonable that the question if an insurgent can be said to be a ‘party’ should be *generally* measured on the basis of the ‘objective’ elements of its organization.<sup>15</sup> The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Haradinaj* confirmed ‘the principle that an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means’.<sup>16</sup> By imposing specific duties on the opposing parties to armed violence, this provision can be construed as underwriting the axiom of the equality in applying IHL to all the belligerents involved.<sup>17</sup>

### 3. The Elements of Organization for Armed Groups

#### A. The Elements of Organization for Independent Armed Groups under Article 4A(2) of the Geneva Convention III

Prior to the Diplomatic Conference, the ICRC made it clear that a ‘military organization’ contemplated in Article 3(1) of the Stockholm Draft POW Convention (which would

<sup>13</sup> J.K. Kleffner, ‘From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities – on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years after the Second Hague Peace Conference’, (2007) 54 *Netherlands International Law Review* 315 at 324; Pejić (2007) (n. 11), at 85; J. Pejić, ‘The protective scope of Common Article 3: more than meets the eye’, (2011) 93 *International Review of the Red Cross* 1, at 3; N. Lubell, *Extraterritorial Use of Force against Non-State Actors*, (Oxford: Oxford University Press, 2010), at 105-106; D. Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, E. Wilmschurst (ed.), *International Law and the Classification of Conflicts*, (Oxford University Press, 2012), 32, at 51. See also R. Bartels, ‘Terrorist Groups as Parties to an Armed Conflict’, in: *Proceedings of the Bruges Colloquium, Terrorism, Counter-Terrorism and International Humanitarian Law, 17<sup>th</sup> Bruges Colloquium 20-21 October 2016*, (Bruges: College of Europe/ICRC, 2016), at 63.

<sup>14</sup> Moir (2002) (n. 11), at 36; Kleffner (2007) *ibid.*, at 324; K. Higuchi, ‘Kokusai-Jindo-ho no Tekiyo-niokeru “Buryoku-funso” no Sonzai’, in S. Murase and Z. Mayama (eds), *Buryoku-funso no Kokusai-ho*, (Toshin-do, 2004), 121, at 133-135.

<sup>15</sup> For a proposal for *subjective* analyses that focus on the purpose pursued by an armed group, see International Law Association, *Final Report on the Meaning of Armed Conflict in International Law* (The Hague, 2010), at 28. For discussions on this matter, see: R. Geiß, ‘Armed Violence in Fragile States: Low Intensity Conflicts, Spill Over Conflicts and Sporadic Law Enforcement Operations by External Actors’, (2009) 91 *International Review of the Red Cross* 127 at 136; ICRC’s revised Commentary to GCIII (2020), para. 482.

<sup>16</sup> ICTY, Trial Chamber, *Prosecutor v. Haradinaj et al.*, IT-04-84-T, 3 April 2008 (hereinafter *Haradinaj* Trial Judgment), para. 60. See also N. Lubell and Nathan Derejko, ‘A Global Battlefield? – Drones and the Geographical Scope of Armed Conflict’, (2013) 11 JICJ 65, at (contending that ‘[t]he armed group must itself be an active party in the conflict; like a tango, it takes two to war’).

<sup>17</sup> Dinstein (2014) (n. 12), at 31, para. 93. For this axiom, see H. Meyrowitz, *Le principe de l’égalité des belligérants devant le droit de la guerre*, (Pédone, 1970); and also M. Sassòli, ‘Introducing a Sliding Scale of Obligations to Address the Fundamental Inequality between Armed Groups and States?’, (2011) 93 *International Review of the Red Cross* 426, at 427-431.

become Article 4A of the Third Geneva Convention) should be equipped with ‘the main attributes common to all armed forces’. It highlighted such attributes as discipline, military cadres, responsibility and military honour.<sup>18</sup> However, clearly, requiring the irregular armed group to partake of the attributes comparable to those of national armed forces would pose a considerable obstacle. By portraying national armed forces as the archetype to be followed, the independent armed groups would be expected to live up to an unrealistically high threshold. This would narrow the chance of its members acquiring the POW status under Article 4A(2) of the Third Geneva Convention.<sup>19</sup> Nevertheless, at the 1949 Diplomatic Conference, there was no discussion on the elements of organization. Even the ICRC did not advance any specific follow-up proposal.

## **B. The Minimum Elements of Organization for Armed Groups in NIACs**

Given the dearth of the scholarly and judicial debates on the requirement of organization under Article 4A(2) of the Geneva Convention III, it can be proposed that some guidance be obtained from the case-law of international criminal tribunals that have scrutinized the constituent elements of this requirement when ascertaining the onset of NIACs. The only caveat is that extrapolating points of reference from the IHL of NIACs and applying them *mutatis mutandis* in the IHL of IACs should be done prudently. Due account ought to be taken of contextual differences.<sup>20</sup>

The ICTY Trial Chamber in *Boškoski* has provided five indicative elements of organization.<sup>21</sup> These are: (1) a command structure;<sup>22</sup> (2) the ability to carry out an organized military operation;<sup>23</sup> (3) its level of logistics;<sup>24</sup> (4) a sufficient level of

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<sup>18</sup> ICRC, *Revised and New Draft Conventions for the Protection of War Victims, Remarks and Proposals submitted by the International Committee of the Red Cross* (ICRC 1949) (hereinafter, *Revised and New Draft Conventions*), at 38.

<sup>19</sup> In NIACs, there has been a parallel debate on how much of comparability or analogy to the armed forces of a government should be demanded of armed groups: *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict 1974-77*, Vol. 8, 204, para 15.

<sup>20</sup> When analogies are drawn to fill ‘unregulated areas’ in IACs, contextual disparities between IACs and NIACs that remain in place should be duly noted. See K.J. Heller, ‘The Use and Abuse of Analogy in IHL’, in J. Ohlin, *Theoretical Boundaries of Armed Conflict and Human Rights*, (Oxford University Press, 2016), 232, in particular 262-275. In a more general legal context, see N. McCormick, *Rhetoric and the Rule of Law - A Theory of Legal Reasoning*, (Oxford University Press, 2005), at 206-207.

<sup>21</sup> ICTY, Trial Chamber, *Prosecutor v. Boškoski and Tarčulovski*, IT-04-82-T, Judgment, 10 July 2008 (hereinafter *Boškoski Trial Judgment*), paras 194-206; and 250-291. See also *Haradinaj Trial Judgment* (n. 16), paras 60.

<sup>22</sup> *Boškoski Trial Judgment*, *ibid.*, para. 199 (‘establishment of a general staff or high command which appoints and gives directions to commanders’), footnote omitted.

<sup>23</sup> *Ibid.*, para. 200.

<sup>24</sup> *Ibid.*, para. 201.

discipline and the ability to implement the basic obligations of common Article 3 of the Geneva Conventions;<sup>25</sup> and (5) the ability to speak with a unified voice.<sup>26</sup> In some cases<sup>27</sup> the Trial Chambers of the International Criminal Court (ICC), when ascertaining if an armed conflict was of non-international character, highlighted five factors which more or less correspond to the *Boškoski* indicia. These are comprised of: (1) the group's internal hierarchy; (2) the command structure and rules; (3) the extent to which military equipment, including firearms, are available; (4) the group's ability to plan military operations and put them into effect; and (5) the extent, seriousness, and intensity of any military involvement.<sup>28</sup>

A diagnosis of the international criminal tribunals' reasoning uncovers an implicit distinction between 'merely indicative factors' on one hand, and 'determinative factors', on the other. It seems that the absence of the latter would *ipso facto* defeat the purpose of assessing the applicability of the IHL of NIACs.<sup>29</sup> This paper proposes that what should be earmarked as the minimum organizational attributes for any armed group<sup>30</sup> are: (1) responsible command; (2) the capacity to undertake a military operation (supposedly pursuant to IHL);<sup>31</sup> and (3) the existence of an external representative function with the capacity to enter into a (political) negotiation.<sup>32</sup>

As regards the first proposed core element, the ICRC's *Commentary on the 1973 ICRC Draft Text of Additional Protocol II* confirmed that this element, together with its affiliated

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<sup>25</sup> *Ibid.*, para. 202.

<sup>26</sup> *Ibid.*, para. 203. See also ICTY, Trial Chamber, *Prosecutor v. Limaj et al.*, Judgment, 30 November 2005, IT-03-66-T (hereinafter *Limaj* Trial Judgment), paras 44-46, 94-134; *Haradinaj* Trial Chamber (n. 16), 3 April 2008, IT-04-84-T, paras 60 and 63-90.

<sup>27</sup> ICC, Trial Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012 (hereinafter *Lubanga* Trial Judgment pursuant to Article 74), ICC-01/04-01/06, paras 537-538; *Katanga* Trial Judgment (n. 2), para 1186. Compare *ibid.*, para. 1119; *Prosecutor v. Bemba*, Judgment, 21 March 2016, ICC-01/05-01/08, para. 134; *Prosecutor v. Ntaganda*, Judgment, 8 July 2019, ICC-01/04-02/06, para. 704. The ICC Trial Chamber expressly referred to the ICTY case-law: *Limaj* Trial Judgment (n. 25), para 90; *Haradinaj* Trial Chamber (n. 16), para. 60; *Boškoski* Trial Judgment (n. 21), paras 199 – 203.

<sup>28</sup> *Lubanga* Trial Judgments (n. 26), para. 537; and *Katanga* Trial Judgment (n. 2), para. 1186. See also ICC, *Bemba* Trial Judgment (n. 12), para. 134.

<sup>29</sup> J.K. Kleffner, 'The Legal Fog of an Illusion: Three Reflections on "Organization" and "Intensity" as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict', (2019) 95 *International Law Studies* 161, at 168.

<sup>30</sup> Debuf (n. 7), at 191-192. See also Lubell (2010), (n. 13), at 110 (suggesting that the minimum should include 'the ability to command and control members of the group, and carry out the group's operations').

<sup>31</sup> See Pejić (2007) (n. 11), at 85.

<sup>32</sup> A. Rodiles, 'Law and Violence in the Global South: The Legal Framing of Mexico's 'NARCO WAR'', (2018) 23 *Journal of Conflict and Security Law* 269-281, at 277.

element of an internal disciplinary mechanism, forms the edifice of organization.<sup>33</sup> The ICTY Appeals Chamber in *Hadžihasanović* held that ‘there cannot be an organized military force save on the basis of responsible command’.<sup>34</sup> This element is essential to ensure compliance with IHL.<sup>35</sup> The notion ‘responsible command’ should be understood broadly. Even a commander of *de facto* kind is sufficient.<sup>36</sup> It is not necessary that an armed group be possessed with a rigid hierarchical military structure.<sup>37</sup>

In relation to the capacity to pursue a military operation as the second mandatory element, its content and scope are inevitably shaped by added complexity of particular circumstances and context-specific factors. Still, it can be argued that this element is largely contingent on the modality of military operations. It stands to reason that the operational capacity of an armed group intent on launching kinetic attacks<sup>38</sup> is likely to differ from the necessary ingredients for the armed group that engages only in cyber operations (or in both kinetic and virtual attacks).<sup>39</sup> Further, it is essential to differentiate the material capacity to pursue a military operation from the rational ability to ensure application of IHL. On one hand, the sufficiency of logistics and human resources to sustain military operations for a certain period is essential for any group as a hallmark of

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<sup>33</sup> ICRC, Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary (October 1973), 132.

<sup>34</sup> ICTY, *Prosecutor v. Hadžihasanović, Alagić, and Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003, paras 16-17 (though this point was made in the specific context of assessing if customary international law recognized command responsibility in NIACs).

<sup>35</sup> See Court of Justice of European Union (CJEU), Case C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, opinion of Advocate General Mengozzi, 53.

<sup>36</sup> ICRC’s Commentary to Additional Protocols, para. 4463. See also M. Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’, (2005) 105 *Columbia Law Review* 1751, at 1778.

<sup>37</sup> Sassòli (2011) (n. 17), at 429-430; Sivakumaran (2012) (n. 12) at 176.

<sup>38</sup> Tallinn Manual explains that:

It is ‘organised’ if it is under an established command structure and can conduct sustained military operations. The extent of organisation does not have to reach the level of a conventional militarily disciplined unit. However, cyber operations and computer attacks by private individuals do not suffice. Even small groups of hackers are unlikely to meet the requirement of organisation. Whether or not a given group is organised must be determined on a case-by-case basis.

M. Schmitt (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2<sup>nd</sup> ed., (Cambridge: Cambridge University Press, 2017), Rule 83, at 389, para. 11, footnote omitted. See also *ibid.*, at 389-391, paras. 12-15. Compare R. Geiß, ‘Cyber Warfare: Implications for Non-international Armed Conflicts’, (2013) 89 *International Law Studies* 627, at 636-637 (excluding ‘a decentralized virtual group’ from qualifying as an organized armed group).

<sup>39</sup> C. Dröge, ‘Get off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians’, (2012) 94 (No. 886) *IRRC* 533 at 549-550. See also ICRC’s revised Commentary to GC III (2020), para. 471.



a military organization.<sup>40</sup> This element encompasses skills and aptitudes relating to recruitment, training, and enforcement of tactics.<sup>41</sup> Often (albeit not necessarily) the inability to undertake military operations is discernible in parallel to the cessation of the ‘continuous combat function’<sup>42</sup> of members of an armed group.<sup>43</sup> On the other, the actual capacity of an armed group to implement the rules of IHL should not be pre-determined or indispensable. Indeed, any *ex ante* assessment of this criterion prior to an armed group’s participation in a military operation may be self-defeating.<sup>44</sup> For example, to require an armed group to be equipped with sufficient organizational infrastructure to meet fair trial guarantees mentioned in common Article 3 Geneva Conventions<sup>45</sup> would risk narrowing the scope of application of IHL.<sup>46</sup> In this author’s view, this should not be woven into the organizational fabric required for armed groups. Instead, this should be posited more as the issue of compliance with IHL obligations, which can be addressed by a nuanced assessment in view of the *de facto* inequality between armed groups and State armed forces.<sup>47</sup> Nonetheless, it remains essential for an armed group at least to show its commitment to applying IHL as its policy.<sup>48</sup>

<sup>40</sup> International Criminal Tribunal Rwanda (ICTR), Trial Chamber, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 626; ICC, Pre-Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007 (hereinafter *Lubanga Pre-Trial Decision*), para. 234. See also R.J. Wilhelm, ‘Problèmes relatifs à la protection de la personne humaine par le droit international dans les conflits armés ne présentant pas un caractère international’, (1972-III) 137 *Recueil des Cours* at 348 (considering it amenable to an ‘objective’ assessment).

<sup>41</sup> S. Vité, ‘Typology of Armed Conflicts in International Humanitarian law: Legal Concepts and Actual Situations’, (2009) 91 *International Review of the Red Cross* 69 at 77; Rodiles (n. 32), at 277.

<sup>42</sup> For the criterion ‘continuous combat functions’, see ICRC, N. Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009, hereinafter ICRC, *Interpretive Guidance on DPIH*), at 16, 17, 27, 33-36, 38-39, 45, 69-73, 83 and 85.

<sup>43</sup> R. Bartels, ‘From *Jus In Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’, in: C. Stahn, J.S. Easterday and J. Iverson (eds), *Jus Post Bellum – Mapping the Normative Foundations*, (Oxford University Press, 2014), 297, at 312. The notion ‘hostilities’ is defined by the ICRC’s *Interpretive Guidance on DPIH* as ‘the (collective) resort by the parties to the conflict to means and methods of injuring the enemy’: *Interpretive Guidance on DPIH, ibid.*, at 43. Yet, this author considers the notion ‘hostilities’ broader than the notion ‘military operations’, so that the incapacity to carry out military operations does not logically result in the end of the ‘continuous combat functions’ of members of an armed group.

<sup>44</sup> M. Sassòli, ‘Transnational Armed groups and International Humanitarian Law’, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No 6, Winter 2006, at 6-7 (criticizing that this criterion is not foreseeable at the outset of a conflict, and that to require this would entail a spurious consequence of making compliance with IHL obligatory only when hostilities are seen to become protracted). See also Lubell (2010) (n. 13), at 105-106; Sivakumaran (2012) (n. 12), at 177-178.

<sup>45</sup> See Advocate General Mengozzi in *Diakité* when he ascertained the meaning of NIACs under IHL: CJEU, *Diakité* (n. 35), opinion of Advocate General Mengozzi, para. 51.

<sup>46</sup> Annyssa Bellal, ‘ICRC Commentary of Common Article 3: Some Questions Relating to Organized Armed Groups and the Applicability of IHL’, EJIL: Talk!, 5 October 2017.

<sup>47</sup> Sassòli (2011) (n. 17), at 426-431 (proposing for a ‘sliding scale of obligations’ for parties to NIACs).

<sup>48</sup> Compare F. Kalshoven, ‘The Position of Guerrilla Fighters under the law of War’, (1972) 11 *Military*

The third core element corresponds to the fifth element hammered out in *Boškoski*. As highlighted in *Limaj*,<sup>49</sup> this component is crucial for differentiating an armed group that is considered a party to a NIAC from a horizontal, fragmented and diffuse network of peripheral and semi-autonomous armed cells.<sup>50</sup> This criterion may be of special pertinence to the ‘independent forces’ when it meets the requirement of belonging to a party to the conflict contained in Article 4A(2) of the Third Geneva Convention,.

#### **4. The Threshold for Assessing the Requirement of Organization**

##### **A. The Standard of Organization under Article 4A(2) of the Geneva Convention III**

As discussed above, in one of the earlier *travaux préparatoires* of the Geneva Convention III, the ICRC proposed a relatively elevated standard for this requirement. The ICRC document, prepared for the 1949 Diplomatic Conference, recommended that an independent militia should partake of the essential attributes of national armed forces.<sup>51</sup> Yet, little discussion on the requirement of organization (much less on its core elements) occurred at the Diplomatic Conference.<sup>52</sup> A handful of post-1949 scholarly opinions, which have touched on this requirement, point unmistakably to a low threshold.<sup>53</sup> Arguably, the fact that any issue relating to this requirement, including its constituent elements, has attracted hardly any meticulous analyses can be taken as supposing that this requirement should be measured by a generally low threshold.

Needless to say, under Article 4A(2) of the Geneva Convention III, there is no built-in requirement that an independent armed group must exercise control over part of a State’s territory or have its potential to do so. The fact that independent militia, including an organized resistance movement, does not exert any control over part of a belligerent party’s territory or occupied territory never handicaps its members’ eligibility for post-capture POW status (provided all other POW criteria are met).

##### **B. Two Standards of Organization in the Conventional IHL of NIACs**

As well-known, the conventional rules of IHL suppose two thresholds for the NIACs:

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*Law and Laws of War Review* 55 at 87 (stressing actual practice of the majority members).

<sup>49</sup> *Limaj* Trial Judgment (n. 26), paras 125, 128-129, 171.

<sup>50</sup> *Report to the Committee on Foreign Relations of the United States Senate*, ‘Al Qaeda in Yemen and Somalia: A ticking Bomb’, (111<sup>th</sup> Congress, 2<sup>nd</sup> session, 21 January 2010), p. 5. See also Bartels (2016) (n. 13), at 64.

<sup>51</sup> ICRC, *Revised and New Draft Conventions* (n. 18), at 38.

<sup>52</sup> See the debates in Section 2A above.

<sup>53</sup> Rosas (n. 7), at 340; Mallison and Mallison (n. 8), at 50 (‘the most rudimentary elements’).

the one based on common Article 3 of the Geneva Conventions; and the other predicated on the Additional Protocol II. The latter is higher than the former in view of specific strings attached in Article 1 of the Second Additional Protocol.<sup>54</sup> Above all, the criterion of territorial control contained in this provision is susceptible to a heightened threshold for a NIAC.<sup>55</sup> Contrariwise, the absence of any equivalent requirement of territorial control under common Article 3 of the Geneva Conventions<sup>56</sup> can be read as corroborating the view that the overall threshold for a NIAC under this provision is lower than that under the Additional Protocol II.

Correspondingly, it is possible to suggest a binary yardstick for gauging the organizational level in NIACs. The standard for assessing the organization of an armed group may be bifurcated into: (1) a threshold for armed groups in ‘common-Article 3 NIACs’; and (2) a relatively higher threshold in ‘Additional Protocol II- NIACs’. As will be examined at depth below, the suggestion that the two-tier thresholds for NIACs in the IHL treaties may give rise to a rift in the organizational level of an armed group is expressly endorsed by the case-law.<sup>57</sup>

### **C. The Standard for Organization under Common Article 3 of the Geneva Conventions**

At the 1949 Diplomatic Conference, there was even a proposal that the organizational level of armed groups should be set as high as it would be equivalent to that of belligerent parties in an IAC,<sup>58</sup> or sufficient to meet the condition for the ‘recognition of belligerency’<sup>59</sup> or ‘recognition of insurgency’.<sup>60</sup> There was yet another suggestion that insurgents should hold some territorial control.<sup>61</sup> However, the post-1949 case-law and doctrine has rejected any such rigorous threshold. They have consistently navigated toward a downward trajectory over years.<sup>62</sup> Nowadays, the general consensus is to tune

<sup>54</sup> Dinstein (2014) (n. 12), at 38-50, paras 115-160.

<sup>55</sup> Ibid., para. 133.

<sup>56</sup> Ibid., para. 418. Compare GIAD Draper, ‘The Geneva Conventions of 1949’, (1965-I) 114 *Recueil des Cours* 63, at 90 (reading such territorial control under common Article 3 of the Geneva Conventions).

<sup>57</sup> See *Boškoski* Trial Judgment (n. 20), para. 197.

<sup>58</sup> See Y.M. Lootsteen, ‘The Concept of Belligerency in International Law’ (2000) 166 *Military Law Review* 109, at 130; and R. Bartels, ‘Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts’, (2009) 91 *International Review of the Red Cross* 35, at 65.

<sup>59</sup> Bartels (2009), *ibid.*, at 67. See also Y. Lootsteen, *ibid.* at 130

<sup>60</sup> For this doctrine, see S.C. Neff, *War and the Law of Nations – A General History*, (Cambridge University Press, 2005), at 269; Dinstein (2014) (n. 12), at 113-114, paras 354-356.

<sup>61</sup> *Final Record* (n. 5), Vol. II-B, p. 121; *Pictet’s Commentary to Geneva Convention I*, at 49-50.

<sup>62</sup> Bartels (2009) (n. 58), at 61-64; R. Bartels and K. Fortin, ‘Law, Justice and a Potential Security Gap: The ‘Organization’ Requirement in International Humanitarian Law and International Criminal Law, (2016)

the overall threshold for common Article 3 of the Geneva Conventions unstintingly at a lower level,<sup>63</sup> allowing the compass of this provision to be read in a wide manner.<sup>64</sup>

#### **D. The Higher Standard for Organization under the Additional Protocol II**

As well-known, the Additional Protocol II's higher threshold for organization can be attested by the text of Article 1, which spells out the conditions for the application of this treaty. This provision ordains that on top of organization and intensity (and certain duration) of violence, an insurgent must exert control over a certain portion of the territory or show its capacity to do so.<sup>65</sup> Hence, whether an insurgent exercises control over part of the State's territory is seen as one of the litmus tests for the applicability of the Second Additional Protocol.<sup>66</sup>

Such a requirement of territorial control under the Additional Protocol II can be considered to inform the question how organized an armed group should be under this treaty.<sup>67</sup> The correlation, and even a causal relation, between territorial control and organizational level has been recognized by the international criminal tribunals.<sup>68</sup> The ICTY has expressly endorsed the insight that the criterion of territorial control has special bearing on the level of organization required of an armed group. According to the Trial Chamber in *Boškoski*, the elevated bar for the Additional Protocol II-NIACs may be translated into a more rigorous standard of organization demanded of an armed group under the Additional Protocol II. Conversely, as confirmed by the ICC's Pre-Trial Chamber in *Lubanga*,<sup>69</sup> common Article 3 of the Geneva Conventions<sup>70</sup> is deemed to demand a correlatively reduced degree of organization.

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21 *Journal of Conflict and Security Law* 29 at 31.

<sup>63</sup> Sivakumaran (2012) (n.12) at 162.

<sup>64</sup> Pictet's Commentary goes so far as to propose that the ambit of common Article 3 should be 'as wide as possible': ICRC, *Pictet's Commentary to Geneva Convention IV*, at 36. However, this is far-fetched: James E. Bond, 'Internal Conflict and Article 3 of the Geneva Conventions', (1971-72) 48 *Denver Law Journal* 263 at 270; Moir (2002) (n. 11), at 36-38; C. Kress, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts', (2010) 15 *Journal of Conflict and Security Law* 245 at 261.

<sup>65</sup> J. Fernandez, X. Pacreau and M. Ubéda-Saillard, *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2<sup>nd</sup> ed., (Pedone, 2019), at 647.

<sup>66</sup> La Haye (n. 12), at 13; Dinstein (2014) (n. 12), at 46, para. 147.

<sup>67</sup> Fernandez et al. (n. 65), at 647.

<sup>68</sup> Apart from the cases discussed here, see also ICC, *Lubanga* Trial Judgment pursuant to Article 74 (n. 27), para. 536. See also CJEU, *Diakité* (n. 35), opinion of Advocate General Mengozzi, para. 44.

<sup>69</sup> *Lubanga* Pre-Trial Decision, (n. 40), paras. 232-233.

<sup>70</sup> The Trial Chamber in *Boškoski* expressly recognized that 'the degree of organisation required to engage in "protracted violence" is lower than the degree of organisation required to carry out "sustained and concerted military operations"': *Boškoski* Trial Judgment (n. 21), para. 197.

Still, in the subsequent cases, the ICC Trial Chamber has appeared to shift its policy. It has reframed the controversy over territorial control as part of the intensity requirement. In *Al-Mahdi*, the Trial Chamber held that ‘the fact that these groups exercised control over such a large part of Mali for such a protracted period – with the resulting effect on the civilian population concerned – clearly demonstrates a sufficient degree of intensity of the conflict’.<sup>71</sup> In *Ntaganda*, the Trial Chamber went further. After confirming that ‘exercise of control over a part of the territory is not required for a group to meet the minimum level of organisation’, it found that ‘in the absence of active hostilities, it may be a determinative factor in assessing whether the intensity threshold is fulfilled’.<sup>72</sup> The *Ntaganda* Trial Chamber advanced that the element of territorial control should be shifted from the heading of the requirement of organization to that of the intensity criterion. Yet, short of any proof of actual or imminent attack from the area held by an armed group, the motion that territorial control should be a yardstick by which to measure the intensity of armed violence seems far-fetched.

#### **E. A Critique of Pigeonholing the Standards for Organization on the Basis of the Distinction between IACs and NIACs**

The foregoing examinations have compartmentalized the standard for organization relating to non-State armed groups in three different contexts: (1) IACs; (2) common-Article 3 NIACs; and (3) Additional Protocol II-based NIACs. Nonetheless, it may be objected that what holds the decisive sway over the variation in the standard for organization should not necessarily be the distinction between IACs and NIACs. Several grounds may be put forward.

On practical level, one may see a certain symmetry in the organizational structure between independent forces (including organized resistance movements) that aspire to qualify under Article 4A(2) of the Geneva Convention III and armed groups in NIACs. Their empirical symmetries can be elucidated when those groups are deconstructed into its functional components. It may well be that both are devoid of a refined system of vertical command equivalent to that of the national armed forces. This point was highlighted by

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<sup>71</sup> ICC, Trial Chamber, *Prosecutor v. Al-Mahdi*, Judgment, 27 September 2016, ICC-01/12-01/15, para. 49. This was reasonable given that the occupation of the historic city of Timbuktu was decisive as a launching pad for sustained attacks. The Trial Chamber held that ‘[i]t would not have been possible for these armed groups to carry out the attack without their conquest of Timbuktu, and the justifications stated during the attack were the same as those advanced by the armed groups for taking over Timbuktu and Northern Mali more generally’: *ibid.*

<sup>72</sup> ICC, *Ntaganda* Trial Judgment (n. 27), para. 717, footnote omitted.

the ICRC several years before the adoption of the Additional Protocol II.<sup>73</sup>

The suggestion that the standard for organization should be gauged with subtle gradation and not on the basis of the IAC/NIAC dichotomy can be supported by the permeability of the boundaries between IACs and NIACs where the legal character of the conflict may be in flux. Suppose that a foreign State wields some degree of control over an armed group that is engaged in a NIAC against the national armed forces of the territorial State. The legal character of an ongoing NIAC may be internationalized when the external power's degree of control over the armed group grows progressively to reach that of 'overall control'.<sup>74</sup> Conversely, an IAC may switch (back) to a NIAC in case the degree of linkage between the armed group and the supporting State diminishes to fall below the threshold of 'overall control'. Faced with such fluid nature of the armed conflict,<sup>75</sup> it seems fallacious to propose that the level of organization should differ across the 'artificial' line between an IAC and a NIAC.<sup>76</sup>

Further, on a more general level, there is a proposition to unpack and expose the flimsiness of the normative construct of IHL based on this 'rigid bifurcation' in armed conflicts between IACs and NIACs.<sup>77</sup> A critique goes further, suggesting that such dichotomy be nullified by merging much of the standards of IHL which are applicable to any armed conflict.<sup>78</sup> Those suggestions may be bolstered by the effect of the progressive expansion

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<sup>73</sup> ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts* (1969), p. 116.

<sup>74</sup> ICTY, Appeals Chamber, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999 (hereinafter *Tadić Appeals Judgment*), para. 120, 122-123, 128, 131, 141, 145, 146, 154-157, 162. See also *Tadić Appeals Chamber*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n. 12). The commentaries to the *Tadić* case are numerous. See, for instance, C. Greenwood, 'International Humanitarian Law and the Tadic Case', (1996) 7 *European Journal of International Law* 265; M. Sassòli and L. Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case', (2000) 839 *International Review of the Red Cross* 733.

<sup>75</sup> See also Remy Jorritsma, 'Where General International Law meets International Humanitarian Law; Attribution of Conduct and the Classification of Armed Conflicts', (2018) 23(3) *JCLS* 405, at 408.

<sup>76</sup> W. Reisman, 'Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman', (1991) 85 *Proceedings of the American Society of International Law* 83, at 85; and G. Aldrich, 'The Laws of War on Land', (2000) 94 *American Journal of International Law* 42, at 62.

<sup>77</sup> For comments on such a proposition, see, for instance, Dinstein (2014) (n. 12), at 23-24, para. 73; and E. David, *Principes de Droit des Conflits Armés* 6th. ed., (Bruylant, 2019), para. 1.6.5. See also A.J. Carswell, 'Classifying the conflict: a soldier's dilemma', (2009) 91 (No. 873) *International Review of the Red Cross* 143, at 148-149.

<sup>78</sup> E. Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts', (2002) 20 *Leiden Journal of International Law* 441 at 448-52; J. G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian law: A Critique of Internationalized Armed Conflict', (2003) 85 (No. 850) *International Review of the Red Cross* 313 at 344-349.

of the customary IHL of NIACs<sup>79</sup> in narrowing the perceived NIAC/IAC chasm. However, notwithstanding such growing opening in the separation wall between IACs and NIAC, it is predictable that at least in State practice, the divergence in the key IHL concepts and principles across the IAC/NIAC binary is likely to resonate for a good while.<sup>80</sup> Above all, the ICC's jurisdictional purview of war crimes under Article 8 of the Rome Statute is demarcated on the strength of such a dichotomy. The point that there is need for nuanced analyses in the case where such boundaries are fluid is revisited at greater depth in Section 8 below.

### **5. A Hypothesis That the Standard for Organization under Article 4A(2) of the Geneva Convention III Might be Higher Than That in NIACs**

It may be hypothesized that the organized level of an irregular armed group covered by Article 4A(2) of the Geneva Convention III should measure up to a higher standard than an armed group in a NIAC (whether covered by common Article 3 of the Geneva Conventions or by the Additional Protocol II). It is worth testing this hypothesis. As a rationale for this hypothesis, one might argue that the former must brace itself to reinforce its organizational structure sufficiently to ensure that the group as a whole and their members can be perceived as conforming to the POW criteria under Article 4A(2) of the Third Geneva Convention. This rationale might be bolstered when compared with the IHL of NIACs. In the absence of any special agreement pursuant to Common Article 3(3) of the Geneva Conventions or of any unilateral act of one or more parties to the conflict,<sup>81</sup> there is no equivalent to POW status in the IHL of NIACs.<sup>82</sup>

However, the cogency of this hypothesis is eclipsed by the underlying assumption of this requirement in the context of IACs. This requirement is purported to serve as a relatively trouble-free vehicle for steering a detaining power toward a more substantive assessment of the four classic POW criteria under Article 4A(2) of the Third Geneva Convention. The evaluation of the sufficiently organized level of an armed group hinges ultimately upon its compliance with those criteria.<sup>83</sup> Such a low-key tone for this requirement lends

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<sup>79</sup> Bartels and Fortin (n. 62), at 31.

<sup>80</sup> The rules relating to the personal status of combatants and 'protected persons' and to the law of occupation are absent in the IHL of NIAC: D. Kritsiotis, 'The Tremors of Tadic', (2010) 43 *Israel Law Review* 262 at 299; *ICRC's Revised Commentary to GC III* (2020), para. 425. See also Lubell (2010) (n. 13) at 18-19.

<sup>81</sup> Kleffner (2007) (n. 13), at 321-323.

<sup>82</sup> Dinstein (2014) (n. 12), at 220, para. 705.

<sup>83</sup> K. Okimoto, 'The Relationship Between a State and an Organised Armed Group and its Impact on the Classification of Armed Conflict', (2013) 5 *Amsterdam Law Forum* 33 at 38.

itself to a suggestion that the organizational level should be tested by a laxer threshold,<sup>84</sup> and that this requirement be presumed to be met. Hence, it is more persuasive to propose that any negative finding of this requirement should not be lightly assumed.<sup>85</sup> The rationale of this proposition is that the captured members of a self-professed independent militia should be given a chance to prove their compliance with the four POW criteria.

There is another dimension of argument that militates against this hypothesis. The group-based duty relating to the requirement of organization under Article 4A(2) of the Geneva Convention III is not so burdensome as it appears. As discussed above, the system of responsible command that is supposed to secure control over conduct of its members need not be of formal kind. To ensure its members to distinguish themselves from civilians, the group's collective duty may be limited to adopting distinctive insignia, instructing its members to wear them, and to bear weapons openly. As concerns the group duty to honour IHL, it is generally comprehended that this signifies 'operational diligence',<sup>86</sup> the concept akin to an obligation of conduct and means, but not an obligation of result.<sup>87</sup> Further, with the large corpus of the IHL of NIACs becoming progressively harmonized with the IHL of IACs, this duty cannot be considered starkly more onerous than the equivalent duty imposed on armed groups in NIACs.<sup>88</sup>

In the light of those considerations, this paper rejects the hypothesis that the standard for organization under Article 4A(2) of the Third Geneva Convention might rise to a high level. In the sections that follow, the investigations turn to the contrary thesis, namely, that the bar for assessing this requirement may be pitched higher in ascertaining a NIAC. It is explained that this counter-thesis is generally tenable, yet that there are some special situations in which a more nuanced assessment is called for.

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<sup>84</sup> For the similar rationale to justify a low threshold for assessing the requirement of belonging, see K. Del Mar, 'The Requirement of "Belonging" under International Humanitarian Law', (2010) 21 *European Journal of International Law* 105-124, at 111, 113 and 123.

<sup>85</sup> As argued by Rosas (n. 7), at 340-341.

<sup>86</sup> Strictly speaking, this can be differentiated from the standard of due diligence. See A. Berkes, 'The Standard of "Due Diligence" as a Result of Interchange between the Law of Armed Conflict and General International Law', (2018) 23 *Journal of Conflict and Security Law* 433 at 435 and 439.

<sup>87</sup> Compare European Court of Human Rights, *Kelly and Others v. UK*, Judgment, 4 May 2001, para. 96. Infractions of IHL perpetrated by its individual members do not automatically translate into the finding that the group as a whole is tainted with insufficient level of organization: *Boškoski* Trial Judgment (n. 21), para 205. For the doctrines, see David (n. 77), para. 1.70a; and Tom Gal, 'Territorial Control by Armed Groups and the Regulation of Access to Humanitarian Assistance', (2017) 50 *Israel Law Review* 25, at 43.

<sup>88</sup> See ICTY, *Tadić* Appeals Chamber's Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n. 12), para. 126.



## **6. A Rigorous Standard for Organization in Relation to an Armed Group in NIACs**

### **A. Rhetoric versus the Actual Standard**

At first glance, under customary IHL of NIACs, the ICTY seems to endorse an ostensibly moderate degree of organization. Its dictum in the relevant case-law is peppered with such an expression as ‘a minimal degree of organization’,<sup>89</sup> ‘organized to a greater or lesser extent’<sup>90</sup> or ‘some degree of organization’.<sup>91</sup> In parallel to this, both the ICRC<sup>92</sup> and scholars<sup>93</sup> have suggested a minimalist to a modest standard of organization, indicating *prima facie* a lower threshold. However, peering closely, one may be struck by the scrupulous extent with which the international criminal tribunals have ascertained the ‘level of organization’ of an armed group involved in NIACs.<sup>94</sup> As discussed above, this is bolstered by their alacrity to supply the elaborate inventory of the indicia for what is meant by sufficiently organized structure.<sup>95</sup> Their meticulous analyses suggests that contrary to the rhetoric, their actual policy was to apply a rigorous standard for this requirement in NIACs.

### **B. The Requirement of Organization Grasped as One of the Threshold Conditions for a NIAC as a Rationale for a Higher Standard**

It is submitted that the main reason why an onerous standard for organization is required of an armed group in NIACs is that this requirement is invoked, alongside that of intensity, as one of the two threshold conditions for determining the onset of a NIAC. A finding that this requirement (again, together with that of intensity) is fulfilled signals a change in the relevant legal regimes, triggering the application of the IHL of NIAC.<sup>96</sup> It marks a departure from the mere situation of ‘below-the-threshold’ violence that is governed by domestic law and international human rights law (IHRL).<sup>97</sup> Further, by being one of the

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<sup>89</sup> *Boškoski* Trial Judgment (n. 21), para. 197.

<sup>90</sup> ICTR, *Akayesu* Trial Judgment (n. 40), para. 620. In this respect, the ICTR Trial Chamber referred to the ICRC’s *Commentary on Additional Protocol II*, paras 4338-4341.

<sup>91</sup> *Limaj* Trial Judgment (n. 26), para. 89.

<sup>92</sup> ICRC, ‘How Is the Term “Armed Conflict” Defined in International Humanitarian Law’, Opinion Paper (March 2008) at 5.

<sup>93</sup> See Draper (1965) (n. 56), at 90; Schindler (n. 12), at 147; K. Dörmann, *The ICRC’s Commentary to the Elements of War Crimes*, (Cambridge University Press, 2003), at 442; Geiß (n. 15), at 134 and 136-137; Pejić (2011) (n. 13), at 3-4; Akande (n. 12), at 51; Bartels and Fortin (n. 62), at 33.

<sup>94</sup> *Boškoski* Trial Judgment (n. 21), paras 194-206 and 250-291; *Haradinaj* Trial Judgment (n. 16), paras 63-89. See also ICTY, *Milosevic*, Rule 98bis Decision, para 23; *Limaj* Trial Judgment (n. 26), para 89.

<sup>95</sup> See also A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press, 2010), at 123-127.

<sup>96</sup> See Sivakumaran (2012) (n. 12), at 170-180; and Dinstein (2014) (n. 12), at 30-32, paras 90-109; O. de Frouville, *Droit international pénal – Sources, Incriminations, Responsabilité*, (Pedone 2012), at 209; Bartels and Fortin (n. 62), at 31. See also David (n. 77), paras 1.68-1.82

<sup>97</sup> Pejić (2007) (n. 11), at 85; Dinstein (2014), *ibid.*, paras 110-114. See also ICRC’s revised Commentary to GC III (2020), para. 451 (referring to States’ hesitation to recognize NIACs due to concern over intrusion

preconditions for a NIAC, the requirement of organization serves as the ‘door-opener’ for the war crimes law.<sup>98</sup> Those considerations provide the sound rationale for the need to engage in relatively in-depth analyses of this requirement.<sup>99</sup>

## **7. Quest for the Method to Rationalize the Lower Standard for Organization**

### **A. The ‘Interdependence Model’ or the ‘Compensatory Model’**

Notwithstanding the general tendency that a scrupulous standard is required for assessing the organizational level of armed groups in NIACs, this section explores if such a standard may nonetheless be lowered with the effect of either triggering or maintaining the application of the IHL of NIACs. This inquiry is undertaken on the understanding that even assuming IHRL to be the default rule to regulate armed violence as far as possible,<sup>100</sup> there are some transitional phases of armed violence in which nuanced assessments may be judged reasonable. The crux of the investigation is how to rationalize such a laxer standard for this requirement, which would dispense with any meticulous assessment of the question of compliance with it. For such a purpose, this section proposes two possible modes of thought (or ‘models’).

The first way to defend a lower standard of organization is to start with the bottom-line premise that the two threshold conditions for the NIACs (intensity and organization) are closely interconnected with each other.<sup>101</sup> This premise was observable in the nascent case-law of the ICC. In *Lubanga*, the ICC Pre-Trial Chamber suggested that the requirement of organization had an unarticulated but close link to the capacity to carry out ‘large-scale military operations for a prolonged period of time’.<sup>102</sup> From such a premise, the first approach proposes that the strong indicia for intensity be taken as presuming (rebuttably) that the minimum organizational level must be attained. The thrust of this approach (‘interdependence model’) is that the armed group’s capacity to pursue violence of intensive nature is read as the sufficient basis for inferring its minimally organized character and forgoing any in-depth inquiry (if any) into this question.

The second model is to propose that any insufficiency in the organized structure of an

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into their sovereignty).

<sup>98</sup> Bartels and Fortin (n. 62), at 31. See ICC, *Lubanga* Trial Judgment (n. 27), para. 537; *Katanga* Trial judgment (n. 2), para. 1186; *Bemba* Trial Judgment (n. 12), para. 134.

<sup>99</sup> See, for instance, *Boškoski* Trial Judgment (n. 21), paras 175-206; and the Appeals Judgment, 19 May 2010, paras 19-24; *Lubanga* Judgment pursuant to Article 74 (n. 27), paras 537-538.

<sup>100</sup> D. Kretzmer, ‘Rethinking the Application of IHL in Non-International Armed Conflicts’, (2009) 42 *Israel Law Review* 8, especially at 23-31, 37-44.

<sup>101</sup> Cullen (n. 95), at 127.

<sup>102</sup> ICC, Pre-Trial Chamber, *Lubanga* Decision (n. 40), paras. 237.

armed group may be ‘compensated for’ by the prevalence in the intensity of violence. On this model (‘compensatory model’), a lower threshold for organization can be exceptionally recognized, on the proviso that there is an indication that the violence at hand is of considerable intensity in terms of destruction, casualties, scale, temporal length, and other factors.

The two proposed models are united in allowing the lower threshold for organization to be rationalized. There is, however, a limit to either of them resolving the dilemma over the question of applicability of IHL to violence generated by a loosely coordinated group. The three elements of organization that this author has proposed above set the minimum threshold. They serve as the bulwark against any overzealous application of IHL in a situation of violence orchestrated by a leader-less ‘horizontalized’ armed unit.

The *ICRC’s revised Commentary* to common Article 3 Geneva Conventions can be read as endorsing either the ‘interdependence model’ or the ‘compensatory model’. The *Commentary* starts with observing that ‘...the criteria of intensity and organization must be present cumulatively in order for a situation of violence to reach the threshold of a non-international armed conflict’.<sup>103</sup> Yet, it swiftly qualifies such a cumulative approach and allows for an exception based on a compensatory interaction of those two criteria. It states that ‘[d]epending on the circumstances, however, it may be possible to draw some conclusions from one criterion for the other’.<sup>104</sup> It should be noted that for such an interaction or a compensatory effect to kick in, it is immaterial whether the opposing side of an armed group is a State armed force or another armed opposition group. The only proviso given by the *Commentary* is that hostile acts be the result of ‘armed confrontations’.<sup>105</sup> This excludes unilateral violence, however intense and destructive this may be.<sup>106</sup> Still, the approach of the *ICRC’s revised Commentary* that recognizes such *mutual* (compensatory) interaction between the two requirements exceptionally marks a contrast to the ICRC’s actual practice.<sup>107</sup> Interestingly, the ICRC’s policy has leaned toward a painstaking verification of the minimum organizational level of an armed group, even when it is engaged in high-intensity armed violence.<sup>108</sup>

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<sup>103</sup> ICRC’s revised Commentary to GC III (2020), para. 468.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*, emphasis added.

<sup>106</sup> See Lubell (2010), (n. 13), at 106-107 (excluding unilateral force used in a one-off manner, as in a quick drone strike).

<sup>107</sup> For the possibility of such mutually compensatory effect, see discussions in Section 8D below.

<sup>108</sup> For instance, in situations of armed conflicts in Syria, the ICRC did not recognize the situation of armed violence orchestrated by a Free Syrian Army as a NIAC until July 2012 despite serious nature of violence. It is suggested that this was precisely because of the lack of minimum organization of that group: Bartels

## **B. Intensity as the Fulcrum of Evaluations - Inverse Ratio Operating Mostly in a Unidirectional Manner**

It should be appreciated that both models make the supposition of the minimum organizational level conditional upon the index of intensity. Neither of them assumes that the two preconditions for a NIAC (intensity; and organization) hold equal leverage for activating the IHL of NIACs. Instead, they are built on the premise that the fulcrum should rest chiefly on the requirement of intensity. As bolstered by the ICC's reasoning,<sup>109</sup> the requirement of organization is of relatively diminished importance as compared with that of intensity of violence.<sup>110</sup>

Both the interdependence and compensatory models propose that the minimum organization of an armed group may be extrapolated from violence of considerable intensity that is mounted by that group. For sure, such proposition may be overturned. Yet it can be said that such inference is likely to be upheld in the situation where the level of violence becomes of such high intensity that the law enforcement paradigm predicated on IHRL is hard-pressed to cope with it. This is the case even though there is yet to be shown conclusively all the three core minimum elements of organization proposed above.

Given the paramount importance of intensity for both models, it is essential to establish that the armed violence at hand is more than an isolated or one-off incident. Examinations should focus on the geographically widespread manner in which the violence is laid out and the temporal length with which it endures.<sup>111</sup> With special regard to the temporal

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and Fortin (n. 62), at 39 and the sources cited therein.

<sup>109</sup> In both *Lubanga* and *Katanga* cases, the ICC held that:

[w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant .... The test, along with these criteria, should be applied *flexibly* when the Chamber is deciding whether a body was an organised armed group, *given the limited requirement* in Article 8(2)(f) of the Statute *that the armed group was "organized"*.

ICC, *Lubanga* Trial Judgment (n. 27), para. 537; and *Katanga* Trial judgment (n. 2), para. 1186, emphasis added. See also *Bemba* Trial Judgment (n. 12), para. 134.

<sup>110</sup> See also Higuchi (n. 14), at 135.

<sup>111</sup> Akande suggests the possibility of identifying a NIAC in the situations of 'pin-pricks' that are lacking in any extensive casualties or destruction, if they are of prolonged nature. He also recognizes the activation of the IHL of NIACs in the opposite, namely, where violence occurs for short duration but on a wide scale: Akande (n. 12), at 53. His suggestion tends toward the 'interdependence' of different 'variables' within the constituent elements of intensity, and not interdependence between intensity and organization.

element, it is a staple of judicial<sup>112</sup> and doctrinal disputes whether or not the term ‘protracted armed violence’<sup>113</sup> or ‘protracted armed conflict’<sup>114</sup> forms part of the requirement of intensity<sup>115</sup> or a separate and third criterion for a NIAC.<sup>116</sup> Irrespective of this, it is reasonable that for the ‘interdependence model’, any armed group that has demonstrated an ability to carry out sustained attacks provides a robust indicator for its minimum organizational degree. For the compensatory model, the intensity of attacks is seen as ascending in inverse ratio to the organizational level of an armed group.

### C. Evaluations of the Two Proposed Models

Turning to the relative advantage of each model, it is important to dwell upon the

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<sup>112</sup> The ICTY tended to treat duration as part of the intensity standard. See, *inter alia*, ICTY, *Prosecutor v. Dorđević*, IT-05-87/1-T, 23 February 2011, para. 1523; *Boškoski* Trial Judgment (n. 21), para. 243; *Limaj* Trial Judgment (n. 27), paras 168-169. The fledging case-law of the ICC is inconclusive on this question. See, *inter alia*, ICC, Pre-Trial Chamber, *Lubanga* Decision (n. 40), paras 233-237, especially para. 234; *Katanga* Trial Judgment, paras 1187 and 1217; Pre-Trial Chamber, *Prosecutor v. Jean-Pierre Bemba Gombo*, No ICC-01/05-01/08, 15 June 2009, para. 235; *Bemba* Trial Judgment (n. 12), paras 139 and 663.

<sup>113</sup> This is the term minted by the ICTY, *Tadić* Appeals Chamber’s Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n. 12), para. 70.

<sup>114</sup> When finding its way into the Rome Statute and subsequently into Article 28(D)(f) of the 2014 Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples’ Rights (Malabo Protocol), the original term ‘protracted armed violence’ in *Tadić* has been modified into ‘protracted armed violence’. For the meaning of this term, see Dinstein (2014) (n. 12), at 32-33, paras 96-98 (considering it a temporal element); E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (2013) at 48 (reading the notion ‘protracted’ as the amalgam encompassing both the temporally ‘sustained nature and the large-scale’ volume of friction).

<sup>115</sup> See *inter alia*, the ICRC’s revised Commentary to GC III (2020), paras 4754-475 (on common Article 3 GCs); Akande (n. 13), at 53; Sivakumaran (2012) (n. 12), at 167-168; Dörmann (n. 93), at 441; J. Grignon, ‘The Beginning of Application of International Humanitarian Law: A Discussion of a Few Challenges’, (2014), 96 (893) *IRRC* 139, at 161. See also H. von Hebel, and D. Robinson, ‘Crimes within the Jurisdiction of the Court’, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, (Kluwer 1999), pp. 79–126, at 119-121; T. Meron, ‘The Humanization of Humanitarian Law’, (2000) 94(2) *American Journal of International Law*, pp. 239–278 at 260; D. Fleck, ‘The Law of Non-International Armed Conflict’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., (Oxford University Press, 2013), pp. 581–610 at 588, margin. 1201; A. Cullen, ‘The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8 (2)(f)’, (2007) 12 *JCSL* 419, at 435-438; S. Sivakumaran, ‘Identifying an Armed Conflict Not of an International Character’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2008) 363, at 371-377, especially 373, 375); Kritsiotis (n. 80), at 288-290; M. Hrnjaz and J. Simentić-Popović, ‘Protracted Armed Violence as a Criterion for the Existence of Non-International Armed Conflict: International Humanitarian Law, International Criminal Law and Beyond’, (2020) 25 *JCSL* 1 at 6-7 and 13-20.

<sup>116</sup> See M. Bothe, ‘War Crimes’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. IA, (OUP, 2002), 379-426, at 423; Dinstein (2014) (n. 12), at 32-34 and 191, paras 96-102 and 610; M. Sassòli and A. A. Bouvier, and A. Quintin, *How Does the Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, 2012), Vol. I, at 123; C. Kress, ‘War Crimes Committed in Non-International Armed Conflicts and the Emerging System of International Criminal Justice’, (2000) 30 *Israel Yearbook on Human Rights* 103, at 117-118; Vité (n. 41), at 82.

implication of the overriding importance of the requirement of intensity as compared with that of organization for ascertaining the existence of a NIAC. In view of such an *a priori* skewed assumption in favour of the precondition of intensity, it is misleading to use the denomination ‘interdependence’ lest this implies interaction of more or less equal degree. As examined above, in most situations, it is the prevalence in the intensity of violence brought about by an armed group that can be taken as filling any deficiency in the organizational level of that group. Hence, there is no suggesting that there is a mutual interaction of the two variables. This is where the two proposed models can be considered to part company. Suppose that despite the scale or duration of violence unleashed by an armed group, its sufficiently organized level appears not only uncertain but even questionable for the purpose of identifying a NIAC. The notion ‘interdependence’ would be stretched too far to encompass such a situation. In contrast, the rationale underpinning of the ‘compensatory model’ should be wide enough to capture that situation. This model is open to the proposition that even where an armed group is *ostensibly* short of meeting the requisite level of organization, such deficiency should be offset by the preponderance in the other variable (namely, the high-intensity nature of violence), which serves as a ‘gap-filler’. Hence, the IHL of NIACs could be activated, triggering the application of the war crimes law of NIACs.<sup>117</sup>

In the light of the broader coverage contemplated by the compensatory model, this paper proposes that the whole issues relative to the methods to ease the standard for organization should be repackaged and examined with focus on this model. It is essential to explore how this model can be operationalized as a vehicle for lowering the threshold for the requirement of organization in different phase of an ongoing armed conflict.

#### **D. The Need for Caution When the Compensatory Model is Invoked Either to Trigger or to Maintain the Application of the IHL of NIACs**

For sure, the compensatory model that has an effect of facilitating the application of IHL ought to be taken cautiously and subject to review and even rebuttal. If violence can be neutralized and sufficient protection from violence secured in the realm of law enforcement in unison with the (intra- and extra-territorial) application of IHRL, the activation of IHL is neither advisable nor justifiable.<sup>118</sup> This paper agrees with the presumption briefly mentioned above: that the law-enforcement paradigm should be the

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<sup>117</sup> This model may trump an understanding that the premise for the applicability of the IHL of NIACs is vitiated when violence fails or ceases to fulfil the two preconditions of intensity and minimum organization: Dinstein (2014) (n. 12), at 48, para. 153.

<sup>118</sup> Lubell (2010) (n. 13), at 108.

default position in order not to trigger too readily the application of the IHL paradigm on conduct of hostility.<sup>119</sup> This is especially the case in the beginning phase where the volume of violence is about to be characterized as a NIAC. In a situation of liminality where there is uncertainty about how to categorize legally a series of violent acts that are of oscillating level and attributable to a crudely organized group, one should be circumspect in trumping that presumption.

Nevertheless, when it comes to sporadic but high-intensity acts of violence as continua of the ongoing violence, this paper argues that some fine-tuning to the aforementioned general default stance may be defended. This is the case, insofar as the earlier phase of such continuing violence has been judged to meet the threshold of a NIAC. Such calibrating form of assessment may be vindicated by the consideration of ramifications of international criminal law. Those isolated, unsystematic but fierce acts of violence perpetrated by members of a loosely coordinated armed group may be relegated to the heading of common law offences. Yet, the option of describing them as war crimes based on a lower standard of organization does not seem unreasonable.<sup>120</sup>

#### **E. The Compensatory Model and the Requirement of Organization as its Central Vehicle?**

It seems counter-intuitive to propose that violence which remains sporadic, low and lasting only for short duration should be identified as a NIAC, on the putative ground that this may be ‘balanced out’ by the skilfully organized nature of armed group(s).<sup>121</sup> Nevertheless, it is worth examining if the compensatory model can exceptionally be applied in a situation where the proportion of the two variables goes the other way.

Intriguingly, the *ICRC’s revised Commentary*, in respect of Article 3 common to the Geneva Conventions, suggests the possibility of the ‘compensatory effect’ in both directions. As discussed above, the *Commentary* admits of the exception of the *mutually* compensatory interaction when stating that a NIAC may be recognized on the basis of ‘draw[ing] some conclusions from one criterion for the other’.<sup>122</sup> Yet, the instance that it

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<sup>119</sup> Kretzmer (n. 100).

<sup>120</sup> For want of the chapeau requirement (their systematic or widespread nature) required by Article 7 of the ICC Statute, they are certain to fall outside the definitional scope of the crime against humanity.

<sup>121</sup> Apart from the discussions provided in the sentences immediately below in this paragraph, see also discussions on the *Tablada* case in Section 7.F below.

<sup>122</sup> ICRC’s revised Commentary to GC III (2020), para. 468.

provides is limited to the case where high-intensity violence can be read as evidence for the sufficient level of organization. It furnishes no example of the case where the adequacy in organization alone may be adduced as a trade-off to insufficiency in intensity. Even so, as will be explored in Section 8D, it is not excluded that the requirement of organization may be exceptionally deployed as a central vehicle in the end phase of NIAC.<sup>123</sup>

#### **F. Reading the Decision of the Inter-American Commission of Human Rights in *Abella* as Implicitly Informing the ‘Compensatory Model’**

In this author’s view, the approach followed by the Inter-American Commission of Human Rights in the *Abella* (or *La Tablada*) case<sup>124</sup> may be read as implicitly corroborating the proposed compensatory model. This well-known case pertains to the attack by 42 armed men on the *Tablada* military barracks and the subsequent fierce fighting between those attackers and the Argentinian armed forces which lasted for 30 hours. The Inter-American Commission of Human Rights (IACmHR) applied common Article 3 of the Geneva Conventions to the *Abella* incident, describing it as a NIAC, holding that it could not ‘be properly characterized as a situation of internal disturbances’.<sup>125</sup> The gist of its rationale can be gleaned from the following:

What differentiates the events at the La Tablada base from these situations are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective - a military base.<sup>126</sup>

The incident at issue, while certainly intense, hardly manifested violence of protracted

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<sup>123</sup> Bartels (2014) (n. 43) at 302-303 and 309-311.

<sup>124</sup> Inter-American Commission of Human Rights, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, 18 November 1997, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) (hereinafter *Abella* case). See Shana Tabak, ‘Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals’, (2016) 37 *Michigan Journal of International Law* 661 at 684-689, 703-704, 708-709.

<sup>125</sup> *Abella* case, *ibid.*, paras 154-156

<sup>126</sup> *Ibid.*, para. 155.



nature. Albeit referring to the ‘brief duration’ of the clash, the Inter-American Commission downplayed the significance (if not the pertinence) of the element of temporally protracted nature of violence, whether this is a separate criterion or part of the ‘intensity’ standard.<sup>127</sup> This is criticized for enabling common Article 3 of the Geneva Conventions to apply to ‘evanescent violence by mutinous troops’ and lowering the threshold for the ‘Common Article 3 NIACs’.<sup>128</sup> For the proponent for the view that *Abella*-like situation can constitute an NIAC, it may be explained that the Inter-American Commission eased the standard for protracted nature of violence in inverse proportion to its scale.<sup>129</sup> While such an explanation is certainly cogent, this paper proposes another possible way of reading this decision.

The deployment of the Argentinian forces was a factor of special pertinence. Still, it is hard to say that the well-organized nature of one party (that is, the Argentinian governmental forces) alone justifies the elimination of the assessment of the organizational structure of the opponent that precipitated the attacks. There is no escaping the impression that the Inter-American Commission made the hasty qualification of the violence as a NIAC without adequately weighing up the question if the impugned ‘group’ was sufficiently organized. The hostile acts, apart from their concerted nature, were seen by the Inter-American Commission as sufficiently destructive in terms of their magnitude. This was, it may be argued, decisive for warranting the view that the weight of the requirement of organization in determining the threshold for a NIAC should be depreciated.<sup>130</sup>

To explain how such an implicit reasoning may be read as verging on the proposed ‘compensatory model’, the relevant facts of the case need to be set in order. One can accept that those protagonists possessed the basic organizational elements such as the military capability to carry out heavy attacks in a coordinated manner. It is also reasonable to judge, as the Inter-American Commission did, that albeit of short length, attacks concerned were of intensive nature. Nevertheless, it is doubtful that the group was invested with a command structure and internal disciplines even of informal kind. If measured against the benchmark suggested by the ICTY, a group of armed individuals involved in *Abella* would not have been able to qualify as an organized armed group and as a ‘party’ to the conflict within the meaning of common Article 3 of the Geneva

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<sup>127</sup> Hrnjaz and Simentic-Popovic (n. 115), at 22.

<sup>128</sup> Dinstein (2014) (n. 12), at 33-34, para. 102.

<sup>129</sup> Akande (n. 13), at 53; and Lieblich (n. 114), at 49. See also Sivakumaran (2012) (n. 12), at 169.

<sup>130</sup> Compare La Haye (n. 12), at 12-13 (stressing the concerted nature of the acts).

Conventions.<sup>131</sup> The organized level of the attackers in *Tablada* should be compared with that of armed narco-criminal groups in Global South. One may find some of the latter groups to be even better equipped with command structures and military capabilities.<sup>132</sup>

The approach of the Inter-American Commission in *Abella* that focuses on the criterion of intensity while downplaying the importance of that of organization has found an unusual echo in the context of the EU asylum law. In *Diakité*,<sup>133</sup> the Court of Justice of the EU (CJEU) considered the notion ‘internal armed conflict’ of Council Directive 2004/83/EC of 29 April 2004 autonomous and independent of the meaning under IHL.<sup>134</sup> A *sui generis* nature of the notion ‘internal armed conflict’ was highlighted by the holding that indiscriminate violence could suffice as an eligibility criterion for the subsidiary protection under this Directive without any need to examine the requisite degree of organization of armed groups under IHL.<sup>135</sup>

## **8. The Need for a Nuanced Assessment of the Standard for the Requirement of Organization**

### **A. A Fluid Situation in which the Legal Character of the NIAC in Progress is Turned into an IAC**

As compared with the initial stage at which the existence of a NIAC needs to be determined by a rigorous threshold, the standard for organization needs a more nuanced assessment in a situation where the legal character of an ongoing armed conflict shifts. This holds true with respect to the transition from a NIAC to an IAC because an outside State starts to wield the ‘overall control’ over the conduct of an armed group. As briefly discussed above, the legal character of the hostilities between an armed group and the governmental forces of the territorial State may switch from a NIAC to an IAC in view of such substantial degree of control exercised by a foreign State over that armed group. Recognizing such internationalization of the *prima facie* NIAC between the armed group and the governmental forces can be facilitated<sup>136</sup> if this conflict without rupture is raging

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<sup>131</sup> See Pejić (2011) (n. 13), at 3-4.

<sup>132</sup> See Rodiles (n. 32), at 277.

<sup>133</sup> CJEU, *Diakité* (n. 35).

<sup>134</sup> Ibid, paras 34 and 35. See also opinion of Advocate General Mengozzi, paras 71, 77, 91-92 and 97.

<sup>135</sup> According to this approach, emphasis was placed on intensity of violence, including that even of unilateral nature, insofar as this poses ‘real risk’ to asylum seekers in accordance with the jurisprudence of Article 3 ECHR. The result of this approach is to make of little consequence both the minimum level of organization and protracted duration of armed violence. For an assessment of this case under IHL, see C. Bauloz, ‘The Definition of Internal Armed Conflict in Asylum Law – The 2014 *Diakité* Judgment of the EU Court of Justice’, (2014) 12 JICJ 835 at 839-840.

<sup>136</sup> ICTY, *Tadić* Appeals Judgment (n. 74), paras 120, 122-123, 128, 131, 141, 145, 146, 154-157, 162. See also *Lubanga* Trial Judgment pursuant to Article 74 (n. 27), para. 541.

‘on a geographical and temporal continuum’.<sup>137</sup> When the configuration of the ongoing conflict<sup>138</sup> is deemed to turn (or get absorbed) into a single IAC,<sup>139</sup> the armed group can be portrayed as an ‘agent’ of the supporting State.<sup>140</sup> According to the reasoning of the *Tadić* Appeals Chamber, the inference that the ongoing conflict has been transformed into an IAC may be drawn as a result of (or alongside) the verdict that the armed group ‘belongs’ to the supporting State within the meaning of Article 4A(2) of the Third Geneva Convention.<sup>141</sup>

In such a fluid situation in which the conflict has become internationalized, one may put forward three approaches regarding how the requirement of organization of armed groups should be assessed under Article 4A of the Geneva Convention III. The first and second approaches assume that pursuant to the *Tadić* Appeals Chamber’s logic, an armed group that has been engaged in NIAC will come to be examined under Article 4A(2) of the Geneva Convention III. According to the first approach, the earlier finding that the armed group was sufficiently organized to trigger the application of the IHL of NIACs should be considered still valid when the question turns to that group’s status as an ‘independent force’ under Article 4A(2) of the Geneva Convention III. The second approach takes the opposite course. It proposes that upon the change in the conflict classifications as an IAC, a renewed assessment of the group’s organizational level be called for. For this approach, it is immaterial that such an armed conflict on the ground appears seamlessly continuing. Third, a yet another perspective is to suggest that armed groups which fall under ‘overall

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<sup>137</sup> ICRC’s revised Commentary to GC III (2020), para. 512; Kleffner (2019) (n. 29), at 177.

<sup>138</sup> In situations of aggregate violence fomented by several armed groups that engage State armed forces (and at times with some fighting between themselves) as in Syria, doctrines are divided over how to evaluate the legal character of hostilities under way. One approach holds that the condition of organization (and that of intensity) should be tested with respect to *each* of the group, so that *each* should be considered a party to several separate NIACs. The other view suggests that the collective of those groups as a whole should be treated as a single party to a NIAC, and that the overall evaluation of the requirement of organization of the groups would absolve each group of fulfilling this requirement. See Bartels (2016) (n. 13), at 63. For proponents of the first view, see, for instance, L. Moir, ‘The Concept of Non-International Armed Conflict’ in: A. Clapham, P. Gaeta and M. Sassoli (eds), *The Geneva Conventions of 1949: A Commentary*, (Oxford University Press, 2015), at 406, para. 39; A. Bellal (ed.), *War Report – Armed Conflicts in 2018*, (Geneva Academy of International Humanitarian Law and Human Rights, 2018),

<sup>139</sup> Sivakumaran (2012) (n. 12), at 227; T. Ferraro, ‘The ICRC’s Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to This Type of Conflict’ (2015) 97 *International Review of the Red Cross* 1227, at 1249-1250. See also ICRC, *Pictet’s Commentary to Geneva Convention III*, at p. 57.

<sup>140</sup> *Tadić* Appeals Judgment (n. 74), paras 94-96. For the doctrine, Pejić (2007) (n. 11), at 90 and 92; and Ferraro, *ibid.*, at 1250.

<sup>141</sup> Okimoto (n. 83), at 48-49. However, the converse of this causal chain is not always the case. The threshold for the requirement of ‘belonging to a Party to the conflict’ under Article 4A(2) of the Geneva Convention III is lower than the degree of control entailed by the notion ‘overall control’.

control’ of a foreign State becomes ‘part of a State Party’ to an IAC. According to this suggestion, under Article 4A of the Third Geneva Convention these armed groups are treated as the ‘regulars’ covered by the first paragraph, not as the ‘irregulars’ falling within the second paragraph.<sup>142</sup> The nub of the third approach is to dispense with the need to evaluate the requirement of organization with specific regard to these groups.

The detaining power’s most likely course is to follow the first approach, supposing that the irregular armed group is sufficiently organized, and to proceed to the more substantive examinations of the four POW criteria. In *Tadić* and other cases, when implying a conceptual linkage between the requirement of belonging and the agency test based on the ‘overall control’ standard, the ICTY Appeals Chamber felt scarcely any need to re-evaluate the appropriate degree of organization when the conflict in progress was judged to be internationalized. As a result, it readily assumed that the Bosnian Serb entity, which had previously been judged to be involved in a NIAC,<sup>143</sup> qualified under Article 4A(2) of the Geneva Convention III. The *Tadić* Appeals Chamber did not contest the Trial Chamber’s pronouncement that the Bosnian Serb forces were well organized when formed.<sup>144</sup> While underscoring, as it did on numerous occasions, the importance of the minimum organizational structure of an armed group,<sup>145</sup> the Appeals Chamber did not engage even in any cursory verification of the relevant fact-finding.<sup>146</sup> Instead, the focus of its appraisal gravitated toward how the notion ‘overall control’ by a foreign State over an armed group can be connected to the requirement of belonging under Article 4A(2) of the Third Geneva Convention with a view to assessing internationalization of a *prima facie* NIAC.<sup>147</sup>

The perception that the interplay between the ‘overall control’ standard and the requirement of belonging seemed to outstrip in importance the requirement of organization could be explained by the Appeals Chamber’s apparent judicial prowess, which was nonetheless misconceived. Under its approach, the requirement of belonging was deflected from the drafters’ intention and ‘reinvented’ as the vehicle for determining

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<sup>142</sup> Bartels (2016) (n. 13) at 60-61.

<sup>143</sup> See ICTY, *Tadić*, Trial Judgment (n. 12), paras 584-608.

<sup>144</sup> See *Tadić* Appeals Judgment (n. 74), para. 145. See also *Tadić* Trial Judgment, *ibid.*, para. 564.

<sup>145</sup> *Tadić* Appeals Judgment (n. 74), para. 120. See also *ibid.*, paras 124, 127, 130, 132-137, and 146.

<sup>146</sup> See also C. Byron, ‘Armed Conflict: International or Non-International?’, (2001) 6 *Journal of Conflict and Security Law* 63 at 76.

<sup>147</sup> The test of ‘overall control’ is considered sufficient to internationalise the ongoing NIAC: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 27 February 2007, para. 404. This stance is supported by some authors. See, for instance, Del Mar (n. 84), at 116.

if the conflict afoot was internationalized. Under Article 4A(2) of the Third Geneva Convention, establishing an affiliation between an irregular armed group and a State party to an IAC had been originally scripted to play the role solely of ascertaining the personal status of captives (namely, the POW status).<sup>148</sup> Yet, in *Tadić*, the requirement of belonging was co-opted into the entangled process of the judicial reasoning that sought to tether it to two separate issues of conflict classification and State responsibility. The requirement of belonging was brought to the central stage precisely for the purpose of ascertaining internationalization of the armed conflict at issue and enabling the IHL of IACs and the war crimes law to come in full swing.<sup>149</sup> This was compounded by the *Tadić* Appeals Chamber's underlying (and flawed) suggestion that the 'overall control' standard, which it substituted for the notion 'effective control' as a standard for attribution under the general law of State responsibility, be a fitting yardstick for the requirement of belonging under Article 4A(2) of the Geneva Convention III.<sup>150</sup>

## **B. The Compensatory Model and the Armed Group That is Thinly Organized in the Liminal Situation Where the Legal Character of an Ongoing Conflict Shifts from a NIAC to an IAC**

In the above-mentioned fluid situation, where the *prima facie* NIAC between an armed group and the governmental forces of the territorial State turns into an IAC when the group concerned comes to act on behalf of a foreign State, consider the violence that has been evaluated by a lenient standard funnelled by the compensatory model. This may have been done notwithstanding some doubt over that group's organized structure. When the conflict is on the cusp of turning into an IAC, what would become of that group that remains as thinly organized as in the earlier phase of the conflict? In such a situation, this paper proposes that there be need to depart from the first approach as the preferred option. Instead, one should take cognizance of the second approach explained above. Hence, it is submitted that the level of organization of the group at hand be verified *de novo* when evaluating the eligibility of its members for prisoners of war status.<sup>151</sup> The reason for such a 'clean slate' approach to organization is that the specific level of intensity of armed

<sup>148</sup> Del Mar (n. 84), at 108 and 115-117.

<sup>149</sup> ICTY, *Tadić* Appeals Judgment (n. 74).

<sup>150</sup> Del Mar (n. 84), at 116-117; Okimoto (n. 83), at 49 and 51; Bartels (2016) (n. 13), at 61. Compare, however, ICRC's revised Commentary to GC III (2020), para. 443; Jorritsma (n. 75), at 410, 429 and 431. Compare David (n. 77) para. 2.293. See also ICTY, *Tadić* Trial Judgment (n. 12), para. 585.

<sup>151</sup> Compare Geiß (n. 15), at 138 (suggesting a renewed assessment of the conditions for NIAC for spillover violence that crosses the border into the territory of an adjacent State). Here, it should be assumed that common Article 3 GCs (and its customary law equivalent) applies to NIACs of cross-border type: ICRC's revised Commentary to GC III (2020), paras 504-506.

confrontations, albeit not irrelevant, is hardly the prerequisite for ascertaining an IAC.<sup>152</sup> There is no rational ground for applying the compensatory model in IACs.

Alternatively, one might turn to the third approach suggested above and consider an armed group ‘part of a Party’ to an IAC and the ‘regulars’ under Article 4A(1) of the Third Geneva Convention. Under this rationale, any need for re-evaluating the organizational level of the armed group could be obliterated on the conviction that the ‘regulars’ are by nature supposed to be organized.<sup>153</sup> The cogency of this approach is strengthened when one recognizes a parallel operation of an IAC alongside a NIAC pursuant to the so-called ‘pairing thesis’.<sup>154</sup> However, contrariwise, when a foreign State Party to the IAC, to which the group appertains, has never intervened with its own regular armed forces, the premise for such a suggestion is entirely missing. It seems counterintuitive to contend that the group in question is an integrated militia of the national armed forces of that State. It makes more sense to advance that such an armed group be classified as an independent force covered by Article 4A(2) of the Third Geneva Convention.

### **C. A Possible Pendulum That the Compensatory Model Implicitly Operates Where the Armed Conflict Switches (back) from an IAC to a NIAC**

In the above fluid situation again, suppose the opposite scenario in which the level of control over the armed group exercised by an outside State peters away. In case that level falls below that of ‘overall control’, the legal character of the IAC in progress may be deemed to switch (back) to a NIAC.<sup>155</sup> Consider the armed group whose organizational level has never been at issue throughout the period when the conflict has been classified as an IAC. When the conflict in progress is transformed (or reverted) into a NIAC due to the waning degree of control by the external power, it is reasonable that the assumption of the armed group being sufficiently organized be upheld as still valid. This is most likely to be the case in practice notwithstanding that the group concerned *appears* to be losing organizational control over its members. This in turn suggests that the level of organization demanded of an armed group at such a transitional phase may be tolerated at a level that is lower than that required at the inception phase of a NIAC. Hence, there

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<sup>152</sup> ICRC’s *Commentary to the Geneva Convention I* (2016), para. 243. See also its detailed rationales to defend this position: *ibid.*, paras 236-242.

<sup>153</sup> Bartels (2016) (n. 13) at 60-61.

<sup>154</sup> For a pairing thesis/approach, see Sivakumaran (2012) (n. 12), at 223-224.

<sup>155</sup> Again, this is based on the assumption that at the time when such evaluations are done, an armed group that has been under ‘overall control of a foreign State’ be seen as an independent force within the meaning of Article 4A(2) of the Third Geneva Convention, and that there has been no concurrent military intervention by that State.

is a sliding scale of the threshold for the requirement of organization as a benchmark for a NIAC. This paper argues that such varying standards can be explained by the implicit operation of the compensatory model.

#### **D. A Liminal Situation in which the NIAC is Considered to End**

In a situation of ongoing armed violence that has been characterized as a NIAC, consider that the armed group's organizational structure comes to be challenged due to its gradual loss of control over conduct of its members. It is also conceivable that the ongoing violence becomes sporadic and less destructive, leaving uncertainty about whether the requirement of intensity is still met. In such a situation, it seems necessary to re-examine the group's organizational level with a view to verifying if the violence imputable to that group is still classified as a NIAC. One pertinent question in such a perceived closing chapter of a NIAC is if the standard for the organization of the armed group should be pitched at the same level as the one for evaluating the onset anew of a NIAC.<sup>156</sup> On this matter, two approaches can be put forward.

The first approach leans toward a relatively stringent assessment of the requirement of organization. It argues that the continued applicability of IHL in such a seemingly final stage of a NIAC should boil down to the requirement of organization. The stated rationale is that this is a more reliable benchmark than that of intensity when assessing the continued applicability of IHL of NIACs.<sup>157</sup> Arguably, the requirement of organization may be seen relatively more tangible than that of intensity. An armed group may be left in tatters such as never to recover. For a nearly broken-down group, it is often its resilience in (re)organizing itself that proves decisive for evaluating its ability to launch attacks. Hence, it makes sense to focus on the requirement of organization as the touchstone for verifying the end of a NIAC. A crucial implication for the first approach is that when ascertaining the end phase of a NIAC, there may exceptionally arise a reverse flow of 'compensatory effect': uncertainty over intensity of violence may be superseded by the overriding importance of the capacity of an armed group to reconstitute itself.

By comparison, the second approach is to err on the side of caution in not demanding a

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<sup>156</sup> Here, one assumes that within the State's territory, there is no other armed group operating independently or in alliance with the armed group concerned. Hence, there is no holding the continuation of a NIAC on the basis of the cumulative (rather than bilateral) evaluation of instances of violence. Compare Kleffner, (2019) (n. 29), at 175-177.

<sup>157</sup> For the discussion along this line, see Bartels (2014) (n. 43), at 302-303 and 309-311.

rigorous standard of organization (and even of intensity).<sup>158</sup> When it comes to evaluating the gradual dissolution of an downscaled armed group, this approach proposes that the standard for organization be eased. It is possible that the practice may follow this approach. According to this approach, the end threshold for the organizational level (and for intensity) should be set lower than that for triggering a NIAC.<sup>159</sup> It considers that as with the transitional phases in which the conflict classification changes (from a NIAC to an IAC or vice versa), the case for a sliding-scale approach to the threshold for organization becomes more potent.<sup>160</sup> Intuitively, this circumspection and the resulting lower standard of organization are comprehensible. After all, the principal ground for ceasing the application of the IHL of NIACs is related, as here, none other than to the insufficient level of organization of the armed group, the question already addressed when the initial violence was judged as triggering the IHL of NIAC.

As discussed above, the present author assumes that generally the law-enforcement paradigm should be the preferred model for as long as this remains viable enough to address violence. Yet, when it comes to assessing the tail end of an ongoing NIAC, there are two reasons why notwithstanding the gradual importance of the IHRL, the switch in the normative regimes from the IHL of NIACs to the law-enforcement paradigm should not be proclaimed lightly. In the first place, there is a risk that a NIAC remains only ‘dormant’, with embers of violence rekindled at any time.<sup>161</sup> While armed groups defeated in one armed confrontation and left in disarray drop to near or at the lowest threshold of organization, they may be hardy enough to regroup in a relatively short period of time. A cautious approach has practical advantage of sparing the need for a potentially frequent reappraisal and reclassification of the legal character of the continuing violence imputable to an armed group. This can avoid a symptom of a

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<sup>158</sup> Compare ICTY, Trial Chamber, *Prosecutor v. Gotovina*, Judgment, 15 April 2011, IT-06-90-T, para. 1694; ICRC’s revised Commentary to GC III (2020) para. 519.

<sup>159</sup> Bartels (2014) (n. 43), at 310.

<sup>160</sup> It may be argued that in the concluding phase of a NIAC, such a sliding-scale approach facilitates a smoother transition from the IHL paradigm of conduct of hostilities to the law enforcement paradigm: Bartels (2014), *ibid.*, at 310. Compare M. Milanovic, ‘End of Application of International Humanitarian Law’, (2014) 96 (No. 893) *IRRC* 163 at 180 (proposing the end point at which either of the two requirements for the NIAC has factually eroded); J. Grignon, *L’applicabilité temporelle du droit international humanitaire*, (Geneva: Schulthess, 2014), at 271-275 (suggesting that the general end of military operations should be the demarcation point for ending a NIAC and IAC).

<sup>161</sup> Dinstein (2014) (n. 12), at 48, para. 153; ICRC’s revised Commentary to GC III (2020) para. 526.



‘revolving door between applicability and non-applicability’ of IHL.<sup>162</sup> In the second place, the verdict that the armed group is no longer sufficiently organized in a NIAC results in a ‘volte-face’ in the applicable legal regimes.<sup>163</sup> With the exception of a handful of rules,<sup>164</sup> the applicability of the corpus of the IHL of NIACs<sup>165</sup> is revoked from the entire territory of the State where it has been judged to be saddled with a NIAC.<sup>166</sup> The ongoing violence as such and any measure taken by Parties that has a certain nexus to that violence<sup>167</sup> fall to be governed by domestic law and IHRL. It is likely that cogency of this second rationale is bolstered where isolated but fierce attacks are still under way, involving numerous civilian casualties.<sup>168</sup>

## 9. Limited Relevance of the Proposal to Lower the Organizational Level in Assessing Crimes against Humanity

The compensatory model proposed in the context of the IHL of NIACs seems to tie in with a parallel ‘tendency’ emerging in the context of crimes against humanity. Under Article 7(2)(a) of the Rome Statute of the International Criminal Court (Rome Statute or ICC Statute), the notion ‘organization’ forms part of the ‘organizational policy’

<sup>162</sup> See, ICTY, *Gotovina* Trial Judgment (n. 158), para. 1694; and ICRC’s revised Commentary to GC III (2020), paras 523 and 528-530.

<sup>163</sup> This is the case despite some cautious hedging expressed in the case-law and in the doctrine. It might be proposed that one exception to this be recognized where an armed group retains control over a portion of the State’s territory. For such a suggestion, see ICTY, Appeals Chamber, *Prosecutor v. Kunarac*, IT-96-23& IT-96-23/1-A, Judgment, 12 June 2002, para. 57; Liebllich (n. 114), at 49.

<sup>164</sup> Some IHL rules continue to apply even after the cessation of active hostilities. See, for instance, AP II, Articles 2(1), 5 and 6; Conventional Weapons Convention, Second Protocol II, Articles 9(2) & 10(1); Conventional Weapons Convention Fifth Protocol, Fifth Protocol, Article 4(2). On this matter, see D.A. Lewis, G. Blum, N.K. Modirzadeh, Harvard Law School Program on International Law and Armed Conflict (hereinafter Harvard, PILAC), *Indefinite War: Unsettled International Law on the End of Armed Conflict*, (Feb. 2017), at 59-61. See also, the ICRC’s revised Commentary to GC III (2020), para. 535.

<sup>165</sup> On one hand, all the IHL rules on conduct of hostilities are considered to become inoperative once the NIAC at issue is determined to cease. Compare ICTY, *Tadić*, Decision on Interlocutory Appeal (n. 12) para. 70. The end threshold based on a ‘peaceful settlement’ suggested by the *Tadić* Appeals Chamber was more a jurisdictional delimitation: Milanovic (n. 175) at 179-180.

<sup>166</sup> This author assumes that in accordance with the words of common Article 3 Geneva Conventions ‘in any place whatsoever’ the IHL of NIACs should apply to the entire territory of a State where a NIAC occurs. Note that while common Article 3 Geneva Conventions does not address rules on conduct of hostilities, crossing the bar for this provision can trigger the application of the entire corpus of the IHL of NIACs, including those rules: ICRC’s revised Commentary to GC III (2020), paras 423 and 491.

<sup>167</sup> Even assuming in principle that the IHL of NIACs applies to the whole territory of the State where a NIAC takes place, this ‘does not mean that all act within that territory therefore fall necessarily under the humanitarian law regime’: ICRC’s revised commentary to GC III (2016), para. 494. What is called for is a ‘close relation or nexus’ or ‘close or sufficient linkage’ of acts at hand to hostilities: ICTY, *Tadić* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (n. 12), para. 70; ICC, *Katanga* Trial Judgment (n. 2), para. 1176; *Bemba*, Trial Judgment (n. 12), paras 142–143; Lubell and Derejko (n. 16), at 76. Such acts with close linkage to hostilities do not, however, need to meet the threshold for the concept of ‘direct participation in hostilities’: *ibid.*, at 84-85.

<sup>168</sup> Geiß (n. 15), at 137.

requirement of the crimes against humanity. When assessing the meaning of ‘attack’ defined under this sub-paragraph, some scholars have proposed a lower threshold for ‘organizational policy’<sup>169</sup> in a trade-off to high-intensity violence.<sup>170</sup>

The debate on what sort of organization is envisaged under that provision was precipitated by the ICC Pre-Trial Chamber II’s decision in the Kenyan situation dealing with post-election violence.<sup>171</sup> In that case, the majority of two judges, contrary to the one dissent,<sup>172</sup> discounted the ‘formal nature’ of the group in favour even of ‘private’ criminal organization, which was an assembly of heterogeneous people such as local leaders, businesspersons, politicians and police officers.<sup>173</sup> The majority of the Kenyan Pre-Trial Chamber held that a group’s ‘level of organization’ should be evaluated on the basis of its ‘capability to perform acts which infringe on basic human values’.<sup>174</sup> Along the line of this decision, it may be asked if the lower threshold for organization under Article 7(2)(a) of the Rome Statute can be recognized in view of the grave nature of human rights impinged upon.<sup>175</sup>

On surface, it seems tempting to suggest that the compensatory model advanced by this paper in the context of IHL may be bolstered by the approach of the ICC Pre-Trial Chamber in the Kenyan situation. The Pre-Trial Chamber gave an imprimatur to the approach of lowering the threshold for ascertaining the contextual requirement of organization relative to crimes against humanity. Yet, on closer inspection, it transpires that any perceived relevance of such a ‘propensity’ emerging from the context of crimes against humanity to the compensatory model in IHL is elusive. Once inquiries are made

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<sup>169</sup> As noted by the ILC, the notion ‘organization’ inserted in this provision emanates from the ICTY’s *Tadić* Decision in 1997: ILC, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries*, A/74/10, at pp. 37-38, commentary to Article 2, para. 22; and *Tadić* Trial Judgment (n. 12), paras. 626, 644, and 653–655.

<sup>170</sup> Bartels and Fortin (n. 62), at 41 and 47.

<sup>171</sup> ICC, Pre-Trial Chamber II, *Situation in The Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya), ICC-01/09 (31 March 2010) (hereinafter Kenya Article 15 Decision).

<sup>172</sup> *Ibid.*, dissenting Opinion of Judge Hans-Peter Kaul (31 March 2010), paras 42-51.

<sup>173</sup> Kenya Article 15 Decision, *ibid.*, para. 117.

<sup>174</sup> *Ibid.* para. 90. For proponents of the majority, see M. Halling, ‘Push the Envelope-Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity’, (2010) 23 *Leiden Journal of International Law* 827; G. Werle and B. Burghardt, ‘Do Crimes against Humanity Require the Participation of a State or a “State-like” Organization?’, (2012) 10 *Journal of International Criminal Justice* 1151. *Contra*, C. Kress, ‘On the Outer Limits of Crimes Against Humanity: the Concept of Organisation within the Policy Requirement: Some Reflections on the march 2010 Kenya Decision’, (2010) 23 *Leiden Journal of International Law* 855, at 861 and 866; W.A. Schabas, ‘Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes’, (2010) 23 *Leiden Journal of International Law* 847, at 852.

<sup>175</sup> Bartels and Fortin (n. 62), at 41 and 47.

into the structural differences lying between them, it becomes clear that there is little foundation for comparing between them. First, as briefly mentioned above, in the IHL of NIACs, the requirement of organization that is deemed equivalent to the requirement of ‘parties’ to the conflict suggests at least two foes battling against each other.<sup>176</sup> Clearly, the intra-State violence in which only one ‘group’ is involved in a unilateral manner, as exemplified by the configuration of violence in the post-election Kenyan situation, falls outside the realm of a NIAC, however well-organized the ‘armed group’ concerned may be. Second, due account should be taken of the underlying differences in the context in which (and the purpose for which) the notion ‘organization’ is employed.<sup>177</sup> In *Katanga*, the ICC Pre-Trial Chamber stressed that the adjective ‘organizational’ in Article 7(2)(a) of the Rome Statute was constitutive of the overall requirement of policy that stems from the expression ‘directed against any civilian population’. This adjective was tailor-made to the commission of a crime against humanity. It was taken to suggest ‘any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack’.<sup>178</sup>

## 10. Conclusion

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<sup>176</sup> Lubell (2010), (n. 13) at 109.

<sup>177</sup> The contextual difference explains why the list of organizational elements indicated in relation to the crime against humanity, while partially overlapping with the parallel list in NIACs, is peppered with the elements specifically destined for this international crime. Of the six *indicative* elements which the Pre-Trial Chamber in *Ruto* provided when evaluating the notion ‘organization’ under Article 7(2)(a) of the ICC Statute, the element of responsible command or a hierarchy aside, note should be taken of the following elements: (i) ‘whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population’; (ii) ‘whether the group exercises control over part of the territory of a State’; (iii) ‘whether the group has criminal activities against the civilian population as a primary purpose’; (iv) ‘whether the group articulates, explicitly or implicitly, an intention to attack a civilian population’; (v) ‘whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria’: ICC, Pre-Trial Chamber II, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the confirmation of charges pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 185. See also Situation in the Republic of Kenya, Decision, 31 March 2010, para. 93; Case No. ICC-02/11, Corrigendum to the Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the situation in the Republic of Côte d’Ivoire, 15 November 2011, Pre-Trial Chamber III, International Criminal Court, paras 45–46.

<sup>178</sup> Compare ICC, Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, para. 396. That said, some judges have provided a lower threshold for organization. On this matter, see ICC, *Bemba* Trial Judgment (n. 12), separate opinion of Judge Kuniko Ozaki, para. 29, 31-32; Trial Chamber, *Prosecutor v. Ruto and Sang*, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016, ICC-01/09-01/11, Reasons of Judge Eboe-Osuji, paras 403-429 (a teleological proposal for even a lower threshold for organization).

According to Niklas Luhmann, an organization is an autopoietic and operationally closed system of communications based on some cohesive membership, which may be linked through ‘self-produced dependencies’.<sup>179</sup> Both independent armed groups covered by Article 4A(2) of the Third Geneva Convention and armed groups involved in NIACs can be considered to possess the attributes of organizations suggested by Luhmann. They are infused by the sense of belonging and dependency among its members and a spirit of pursuing specific common purposes by means of politico-military struggles. They are characterized by the institutional specifics designed to achieve those purposes.

It emerges from the preceding analyses that the standard for the requirement of organization is generally set higher in NIACs than under Article 4A(2) of the Third Geneva Convention. The stringent standard for organization in NIACs can be gleaned from the international criminal tribunals’ punctilious evaluations of the elements of organization possessed by an armed group. Such a judicial strategy may be warranted precisely because this requirement entails, as it were, ‘existential implications’ for the IHL of NIACs. As discussed above, establishing this requirement, alongside that of intensity, results in a paradigmatic shift in the applicable legal regimes. The ‘below-the-threshold-violence’ governed by the combination of domestic law and IHRL is turned into a NIAC, triggering the application of IHL alongside IHRL. In contrast to a territorial State’s general hesitancy to apply IHL to internal violence, the international tribunals are more incentivized to test this requirement because of their concern to operationalize IHL and the war crimes law. In contrast, no such rationale underpins this requirement when a detaining power examines the POW status of captured members of an irregular armed group in IACs. Under Article 4A(2) of the Third Geneva Convention, the detaining power feels ready to shift the focus of examinations to the four POW criteria, safely convinced that these constitute the practically viable gauge for measuring the organizational level of an armed group.

Still, the foregoing examinations reveal the need for more nuanced and context-specific assessment of transitional and liminal situations of an ongoing conflict. In many circumstances, what is decisive for the threshold for the requirement of organization is not the distinction between IACs and NIACs. Instead, the key to unravelling the knot of the potentially ‘freckle’ threshold lies in the specific context and phase in which an armed group finds itself, and the divergent purposes for which the requirement of organization is purported to serve. In case where the conflict classification switches from a NIAC to

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<sup>179</sup> N. Luhmann, *Theory of Society*, Vol. 2, (translated by Rhodes Barrett), (Stanford University Press, 2013/ Suhrkamp, 1997), at 141-143.

an IAC due to an ‘overall control’ that comes progressively to be exerted by a foreign State over an armed group involved in a NIAC, this paper has argued that the earlier finding that the armed group has been sufficiently organized to trigger a NIAC should remain safely unaffected and prevail. This should hold true not least because going through the requirement of organization in the IAC context is generally considered an ‘easy passage’. This requirement is a prelude to the more searching scrutiny in respect of the four POW conditions laid down in Article 4A(2) of the Geneva Convention III.

Yet, such a presumption in favour of validating the earlier finding on the organized level of an armed group may be overturned in circumstances where the group’s seemingly doubtful organizational level has been finessed by the ‘compensatory model’. As explained above, this model has been proposed as a mechanism to rationalize a sliding scale of the standard for the requirement of organization. It is submitted that upon the shift in the legal classification of the ongoing conflict from a NIAC to an IAC, the question of the group’s organizational level that has been assessed by a lenient standard rationalized by this model needs to be carefully probed by reference to its ability to meet the other POW conditions. In the event that the external power that has come to control the armed group fails to deploy its own troops, this paper rejects an otherwise insightful suggestion that such an armed group be considered an integrated component of a State Party to an IAC *per* Article 4A(1) of the Third Geneva Convention.

It has been suggested that the transition from an IAC to a NIAC is another situation in which the proposed ‘compensatory model’ may be tacitly in operation. Insofar as violence orchestrated by an armed group is of considerable magnitude, the threshold for its organization may be set lower than that for ascertaining the onset of a NIAC. In the liminal situation where a NIAC is found to come to a close, this paper has suggested that the operational modality of the ‘compensatory model’ may present a picture different from that discernible in the opening and intermittent phases of a NIAC. It is the requirement of organization that may be factored into the equation as the dominant force. This requirement may serve as the central vehicle for determining if the waning violence is of such nature as to be still categorized as a NIAC. Alternatively, this may assist in declaring that the normative change should be shifted from the IHL to the law-enforcement regime.