

# Decentralized armed groups: Can they be classified as parties to non-international armed conflicts?

Sylvain Vité<sup>1\*</sup>  and Isabelle Gallino<sup>2†</sup>

<sup>1</sup>Senior Legal Adviser to Operations, International Committee of the Red Cross, Geneva, Switzerland

<sup>2</sup>Prevention Adviser, International Committee of the Red Cross, Geneva, Switzerland

\*Corresponding author email: [svite@icrc.org](mailto:svite@icrc.org)

## Abstract

*This article explores the potential classification of decentralized armed groups in non-international armed conflicts (NIACs). Unlike centralized armed groups, decentralized groups consist of fluid alliances of small subunits or cells with loose coordination between them. The central question explored by the authors is whether such groups meet the minimum organizational criterion to be considered parties to an armed conflict under international humanitarian law (IHL). The authors argue that, while not possessing the same chain of command as centralized armed groups, decentralized armed groups can, under certain conditions, nevertheless fulfil the criteria for conflict classification. Judicial precedents and IHL interpretation point to this conclusion where the absence of a centralized command*

† The authors would like to express their gratitude to Tristan Ferraro, Ellen Nohle, Tilman Rodenhäuser and Thomas de Saint Maurice for contributing to the ideas developed in this article.

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

© The Author(s), 2024. Published by Cambridge University Press on behalf of International Committee of the Red Cross. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited. **931**

*structure within the group can be compensated by the existence of other factors attesting to the group's organization, such as the exercise of operational command over armed subunits, with the intensity of violence being an additional element suggesting the overall organization of the group. Ultimately, this interpretation would ensure the applicability of a legal framework that would better reflect the intensity of armed confrontations on the ground, and bind both States and non-State parties to a NIAC alike.*

**Keywords:** decentralized armed groups, non-international armed conflict, non-State armed groups, international humanitarian law, legal classification of armed conflict, organizational criterion, command structure, indicative factors.

.....

## Introduction

Today, many armed groups operating in countries affected by armed conflict and other situations of violence have a decentralized structure.<sup>1</sup> Unlike centralized armed groups, decentralized groups are generally characterized by fluid alliances of small subunits or cells with loose coordination between them.<sup>2</sup> These groups raise specific legal questions, including whether they may reach the minimum level of organization that would allow them to be classified as parties to an armed conflict and therefore be bound by international humanitarian law (IHL).

In this article, the authors argue that this question might be answered positively in some cases: while not possessing the same chain of command as centralized armed groups, decentralized armed groups can, under certain conditions, nevertheless fulfil the criteria for armed conflict classification. This approach would result in a balancing exercise whereby the absence of a centralized command structure within the group could be compensated by the existence of other factors attesting to the group's organization, and where the level of intensity of armed confrontations would be an important element to take into consideration.

## The “organization” of non-State armed groups as a constitutive criterion of the legal definition of non-international armed conflicts

The notion of armed conflict is a multifaceted concept of international law that sets the scope of application of IHL (also called the law of armed conflict). The prevalent form of armed conflict today is non-international armed conflict (NIAC), which is generally understood as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.<sup>3</sup> Nowadays, it is widely accepted that this definition requires the fulfilment of two

1 See Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, International Committee of the Red Cross (ICRC), Geneva, 2018, p. 46.

2 *Ibid.*

3 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

conditions, namely that the confrontation has reached a *minimum level of intensity* and that the parties involved have reached a *minimum level of organization*.<sup>4</sup> These conditions have been recognized as inherent components of the legal definition of NIACs and are used by States, international courts and tribunals, fact-finding mechanisms, and the International Committee of the Red Cross (ICRC).<sup>5</sup> The duration of hostilities, which is suggested by the notion of “protracted” armed violence, is considered as being part of the intensity assessment.<sup>6</sup>

The two cumulative criteria are relevant for distinguishing NIACs from other forms of violence, such as “internal disturbances and tensions”,<sup>7</sup> to which IHL does not apply. Those latter situations are typically governed by domestic law and international human rights law, including the rules and standards governing the use of force.<sup>8</sup>

Judicial practice has further refined the definition of NIACs by developing “indicative factors” to assess whether each of the two conditions has been met in a given case. Concerning the minimum level of organization, the International Criminal Tribunal for the former Yugoslavia (ICTY) considers that these factors include

the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan,

4 For detailed analysis of the organization criterion, see Tilman Rodenhäuser, “Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organization Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict”, *Yearbook of International Humanitarian Law*, Vol. 19, 2016; Yutaka Arai-Takahashi, “Thresholds in Flux – the Standard for Ascertaining the Requirement of Organization for Armed Groups under International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 26, No. 1, 2021.

5 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para. 562. See also ICTY, *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para. 84; ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, paras 32–62; ICTY, *Prosecutor v. Ljube Boškoski et al.*, Case No. IT-04-82-T, Judgment (Trial Chamber), 10 July 2008, para. 175. See also International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 619–620; ICTR, *Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber), 6 December 1999, para. 93. See also ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III), paras 456–471, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-3/commentary/2020?activeTab=1949GCS-APs-and-commentaries> (all internet references were accessed in November 2024); and see States’ practice as indicated in *ibid.*, para. 458.

6 ICTY, *Haradinaj*, above note 5, para. 49; ICRC Commentary on GC III, above note 5, paras 472–478.

7 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(2). See also International Criminal Court (ICC), *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-08/08, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 15 June 2009, para. 231: “an ‘armed conflict not of an international character’ is characterised by the outbreak of armed hostilities of a certain level of intensity, exceeding that of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.

8 See *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August–7 September 1990.

coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.<sup>9</sup>

The International Criminal Court (ICC) has also developed its own “non-exhaustive list of factors”, as follows:

the force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement.<sup>10</sup>

While these factors provide relevant reference for the purpose of assessing whether a situation involving armed violence by armed groups amounts to a NIAC, they are not prescriptive; rather, they are “indicative”, in the sense that none of them “are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled”.<sup>11</sup> In other words, the assessment of an armed group as sufficiently organized for the purpose of IHL does not require the fulfilment of all indicative factors.<sup>12</sup> While some authors argue that some indicative factors are more determinant than others, judicial practice does not prioritize any such factors, but rather leaves room to a case-by-case analysis based on a contextual balancing of relevant facts.<sup>13</sup>

## Decentralized armed groups in practice

Armed groups are not all organized along the same model.<sup>14</sup> Some closely resemble State armed forces, boasting substantial troop numbers, a clear line of command, established internal doctrines and regulations, and recruitment and training capabilities, as well as mechanisms for enforcing discipline.<sup>15</sup> On the other end of

9 ICTY, *Haradinaj*, above note 5, para. 60. See also ICTY, *Boškoski*, above note 5, paras 199–203.

10 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, para. 537. See also ICC, *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment (Trial Chamber), 7 March 2014, para. 1186.

11 ICTY, *Haradinaj*, above note 5, para. 60; ICC, *Lubanga*, above note 10, para. 537. See also ICRC Commentary on GC III, above note 5, para. 467.

12 See, for instance, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 170. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (ICRC Commentary on GC I), p. 50, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-3/commentary/1952?activeTab=1949GCS-APs-and-commentaries>.

13 As noted by the ICTY, “the determination of the intensity of a conflict and the organisation of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis”: ICTY, *Limaj*, above note 5, para. 90. See also ICTY, *Boškoski*, above note 5, para. 175; ICTR, *Rutaganda*, above note 5, para. 93; ICC, *Lubanga*, above note 10, para. 537; ICC, *Katanga*, above note 10, para. 1186.

14 F. Terry and B. McQuinn, above note 1, pp. 23–24; Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford, 2018, p. 75.

15 F. Terry and B. McQuinn, above note 1, p. 38.

the spectrum, some armed groups include small, independent units comprised of armed individuals not connected to a broader military structure. Between these extremes lies a vast array of groups exhibiting diverse levels of integration of fighters and organizational complexity.<sup>16</sup>

Based on its experience, the ICRC has observed that many armed groups around the world are “decentralized”.<sup>17</sup> Decentralized armed groups are characterized by the coexistence of various small subunits or cells, acting under a loose common leadership, with their respective commanders retaining significant authority and responsibility over their members. These groups are not “centralized”, in the sense that the central leadership does not exercise full command over the subunits and is not able to ensure internal discipline through established mechanisms. In practice, the degree of decentralization may vary significantly from one context to another. While some groups form fluid alliances, where subunits join together on a temporary basis to carry out coordinated military operations,<sup>18</sup> others are more tightly integrated. Cohesion among the constitutive subunits is ensured through internal structures enabling the development of shared military strategies, the identification of operational objectives and responsibilities, and the pooling of military resources. Thus, decentralization is not equivalent to lack of organization.

Importantly, decentralized armed groups are constituted of small units or cells that generally do not reach, on their own, the minimum level of organization necessary to be classified as a party to an armed conflict. They are not “coalitions” of organized armed groups. Even if participating units or cells share similar military objectives, usually joining forces in fighting the same enemy, they do not reach the level of organization that would allow each one of them to be considered as a non-State armed group and their respective military operations to be aggregated in order to assess the global intensity of violence.<sup>19</sup>

In this context, the question arises as to whether decentralized armed groups may be classified as parties to NIACs under IHL.<sup>20</sup> While in many contexts these groups participate in armed confrontations that clearly reach the required threshold of intensity, it may be challenging, both factually and legally, to assess whether they are organized enough to be considered as parties to an

16 As an illustration, see the article by Felipe Idrovo and Hugo Cahueñas in this issue of the *Review*: Hugo Cahueñas Muñoz and Juan Felipe Idrovo Romo, “Is Ecuador Facing a Non-International Armed Conflict against Organized Crime Groups? Reality, Inconsistencies and Jurisprudential Developments”, *International Review of the Red Cross*, Vol. 106, No. 927, 2024. The authors offer a discussion on the level of organization of the multiple criminal groups involved in armed violence in Ecuador in light of the indicative factors developed in the international jurisprudence.

17 F. Terry and B. McQuinn, above note 1, p. 46.

18 *Ibid.*, pp. 45–51. See also S. Sivakumaran, above note 12, p. 173.

19 For further details on the legal status of coalitions of organized armed groups and the aggregation of the intensity of violence for classification purpose, see Jelena Nikolic, Thomas de Saint Maurice and Tristan Ferraro, “Aggregated Intensity: Classifying Coalitions of Non-State Armed Groups”, *Humanitarian Law and Policy Blog*, 7 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/07/aggregated-intensity-classifying-coalitions-non-state-armed-groups/>.

20 On this issue, see Marishet M. Hamza, “Fragmented Armed Groups in International Humanitarian Law”, *Humanitäres Völkerrecht*, Vol. 4, No. 1–2, 2021.

armed conflict.<sup>21</sup> In the absence of a centralized chain of command that would unify the diverse subunits under one leadership, some would argue that these groups do not meet the organizational requirement for classification as parties to a NIAC. Yet, such an interpretation would create a significant contrast between the situation on the ground, with high-intensity armed confrontations, and the applicable legal framework. IHL would not be applicable despite being the more tailored legal framework for this type of circumstances. Instead, government forces would be bound to respect relevant rules and standards under international human rights law, including those governing the use of force in law enforcement operations, while no clear legal framework would apply to military activities undertaken by the armed group.

## The legal classification of armed violence involving decentralized armed groups

As mentioned above, the legal classification of armed violence involving decentralized armed groups requires a case-by-case analysis. The determination of whether these groups can be classified as parties to a NIAC requires careful weighing of all factual elements in each given context, and is thus impossible to address in the abstract. Still, a proper interpretation of the Geneva Conventions and judicial practice provides elements of reflection indicating that at least some of these groups may qualify as parties to a NIAC.

### The threshold of organization

First, the required level of organization for an armed group to become a party to a NIAC is relatively low. The 1952 Commentary on Geneva Convention I provides useful background on the discussions that happened at the time of the drafting of the Geneva Conventions, and the intentions of the drafters. Significantly, the Commentary highlights that the main reason for wanting to create specific criteria for the determination of the existence of an armed conflict was the fear by States that an armed conflict “might be taken to cover any act committed by force of arms – any form of anarchy, rebellion, or even plain banditry”.<sup>22</sup> The rationale for requiring such criteria, thus, was to avoid IHL being applicable to this type of situation involving no (or a too low) level of organization.

Judicial practice also confirms the relatively low threshold of the organizational criterion. The ICTY has stated that “for an armed group to be considered organised, it would need to have some hierarchical structure and its

21 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, EN 33IC/19/9.7, Geneva, October 2019, p. 40. For a detailed analysis on this issue in light of the Syrian context, see Laurie R. Blank and Geoffrey S. Corn, “Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition”, *Vanderbilt Journal of Transnational Law*, Vol. 46, No. 3, 2013.

22 ICRC Commentary on GC I, above note 12, p. 49.

leadership requires the capacity to exert authority over its members”.<sup>23</sup> While the ICTY stresses that the criterion of organization includes elements of hierarchy and leadership, it also suggests, by using the word “some”, that this criterion might be relatively modest. At the very least, the level of organization in this context is not equivalent to the pyramidal configuration that characterizes government armed forces.<sup>24</sup> There is a need to take into account the specificities and constraints of non-State armed groups, including their lack of State-like leadership and structure, their limited resources and their need to operate covertly in order to survive. International jurisprudence has reiterated this approach on other occasions by stating that non-State parties to NIACs must show “a minimal degree of organization”<sup>25</sup> or “some degree of organization”,<sup>26</sup> or must be “organized to a greater or lesser extent”.<sup>27</sup>

Some authors have tried to reduce this legal flexibility (some would say uncertainty) by identifying “minimum organizational attributes”<sup>28</sup> that would need to be fulfilled by any armed group to be classified as a party to a NIAC. While proposed minimum factual elements might change from one author to another, many seem to agree that the organizational criterion requires at least an identified “command structure”.<sup>29</sup> Kleffner, for example, is of the view that

the one factor without which one cannot reasonably conclude that an armed group is sufficiently organized is that it displays some form of a command structure and, as an expression of such a command structure, disciplinary rules and mechanisms within the group.<sup>30</sup>

23 ICTY, *Boškoski*, above note 5, para. 195.

24 *Ibid.*, para. 197: “the warring parties do not necessarily need to be as organised as the armed forces of a State”.

25 *Ibid.*, para. 197. In this paragraph, the ICTY compares the organizational threshold of AP II with the threshold of Article 3 common to the four Geneva Conventions: “By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application.”

26 ICTY, *Limaj*, above note 5, para. 89.

27 ICTR, *Akayesu*, above note 5, para. 620.

28 Y. Arai-Takahashi, above note 4, p. 85. The author prioritizes the following elements: “(i) responsible command; (ii) the capacity to undertake a military operation (supposedly pursuant to IHL); and (iii) the existence of an external representative function with the capacity to enter into a (political) negotiation”.

29 See Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, Elizabeth Wilmshurst (ed.), *International Law and the Classification of Armed Conflicts*, Oxford University Press, Oxford, 2012, p. 28.

30 Jan 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”, *International Law Studies*, Vol. 95, 2019, pp. 168–169. The author suggests that the “command structure” is in fact not an “indicative” factor of organization, but a “determinative” factor, “whose absence ipso facto defeats the existence of a NIAC” (p. 168). See also Martha M. Bradley, “Revisiting the Notion of ‘Organised Armed Group’ in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements”, *African Yearbook of International Humanitarian Law*, 2018. The author argues that one factor should be “regarded as constitutive in nature”, namely that “the armed group at minimum is sufficiently organised to launch a military operation at the level of protracted armed violence” (p. 75). D’Cunha would even consider that there exists an “established doctrine on the high-organization threshold”: Samit D’Cunha, “The Notion of External NIACs: Reconsidering the Intensity Threshold in Light of Contemporary Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 20, 2017, p. 103.



Based on a detailed review of treaty law, practice and jurisprudence, Rodenhäuser also identifies three interrelated “broad criteria” that characterize a non-State party to a NIAC, namely that the group (a) is a collective entity with a certain command structure, (b) is able to comply with basic humanitarian rules, and (c) is capable of engaging in sufficiently intense armed violence with an enemy.<sup>31</sup>

## Command structure

The notion of “command structure” is examined in the ICRC’s Commentary on Additional Protocol II (AP II), which provides some guidance:

The existence of a responsible command implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.<sup>32</sup>

This suggests that the existence of a “command structure” does not necessarily require a centralized type of organization with a leadership exercising full command over subordinates through a strict hierarchy.

Judicial practice further supports this view by providing examples where non-State armed groups with relatively loose internal structures were considered as parties to a NIAC. In the *Haradinaj* case, the Trial Chamber of the ICTY deemed that the Kosovo Liberation Army (KLA) had reached the required level of organization despite a relatively rudimentary command structure consisting of a “*de facto* authority” led by a charismatic leader whose activities mostly involved coordinating different village defence units that had formed spontaneously.<sup>33</sup> The Trial Chamber came to this conclusion even though the KLA had no functioning internal discipline system at the time.<sup>34</sup>

## The organization of decentralized armed groups

The relatively low threshold of the organizational criterion and judicial practice concerning the notion of “command structure” suggest that certain decentralized armed groups may be deemed sufficiently organized for the purpose of conflict classification. This would be the case where the leadership of these groups, while not relying on a *centralized* command structure, has the capacity to exercise

31 T. Rodenhäuser, above note 14, esp. pp. 61–111.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4463.

33 ICTY, *Haradinaj*, above note 5, paras 65–68.

34 *Ibid.*, para. 69.



*operational command* over its constitutive subunits – i.e., it has the authority to assign missions or tasks to subordinate commanders, to deploy units, to redistribute forces and to retain or delegate operational and/or tactical control. Operational command creates a relationship of authority/subordination between the leadership and its subunits.<sup>35</sup>

Therefore, decentralized armed groups are not “disorganized”, but are organized differently.<sup>36</sup> They have their own form of command structure, with a certain level of authority over the subunits. The leadership of these groups is not necessarily directly involved in all phases of military operations, but it may have, as a minimum, the capacity to meet most indicative factors with regard to organization. For instance, it is often able to define a unified military strategy and tactics; to adopt common disciplinary rules; to plan and coordinate military operations, including troop movements and logistics; to gain access to weapons and other military equipment; or to recruit and train fighters. In other words, while operational command is exercised at the central level, the control over and execution of military operations may be assigned to the lower levels, notably at the tactical level, when it comes to choosing the means and methods used by the fighters on the ground to implement orders/instructions received from the central level (for example, identification of targets or execution of an attack).

In situations where this minimum level of organization has not been reached (i.e., where fighting subunits are not unified under the umbrella of a common decentralized leadership), their members might be considered as civilians taking direct part in hostilities. This would be the case if these subunits were not organized armed groups on their own and if each individual fighter were to meet the relevant legal criteria to be classified as a civilian taking a direct part in hostilities.<sup>37</sup> This situation is foreseen under both treaty and customary law.<sup>38</sup> Where subunits are part of an organized armed group, individuals assuming a “continuous combat function” would be considered not as civilians but as members of the group, and as such would not enjoy immunity from attack.<sup>39</sup>

35 Rodenhäuser describes this relationship by explaining that the leadership should exercise “a degree of both *operational coordination* and *strategic authority*” over the subunits. Operational coordination involves “the ability to coordinate military activities and to distribute logistics”, while strategic authority supposes the capability to “determine the overall military objectives and the internal rules that all subunits have to follow”. T. Rodenhäuser, above note 14, p. 84 (emphasis in original).

36 S. Sivakumaran, above note 12, pp. 173–174.

37 These criteria are (a) a threshold of harm, (b) a direct causation and (c) a belligerent nexus. For further details on the constitutive elements of “direct participation in hostilities”, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance).

38 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 51(3); AP II, Art. 13(3); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 6, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>.

39 On the notion of “continuous combat function” and determination of membership in organized armed groups, see ICRC Interpretive Guidance, above note 37, pp. 32–36.

## The interplay between level of organization and level of intensity

The classification of decentralized armed groups as parties to NIACs does not only depend on an assessment of their level of organization in light of relevant indicative factors. The other constitutive component of the definition of a NIAC, the level of intensity of armed confrontations, is also an important element to be taken into consideration when assessing the level of organization of a group. As indicated by the ICRC,

[d]epending on the circumstances, ... it may be possible to draw some conclusions from one criterion for the other. For example, the existence of highly intense armed confrontations between State authorities and non-State armed groups, or between several non-State armed groups, may indicate that these groups have reached the level of organization required of a Party to a non-international armed conflict.<sup>40</sup>

After all, the connection between intensity and organization is a natural one, with the indicative factors established for intensity implying a certain level of organization. For instance, intense and repeated armed confrontations, with high numbers of casualties and high levels of destruction (indicative factors for intensity), are more likely to be caused by groups that are capable of mobilizing and organizing their forces in order to conduct military-type operations; similarly, the use of heavy weapons, another indicative factor for intensity, also suggests that the groups involved have the organizational capacity necessary to obtain such weapons and to use them. Lastly, the duration of armed confrontations, which has been interpreted as an element attesting to the intensity criterion,<sup>41</sup> can also be seen as a relevant indicator of an armed group's level of organization, as it implies the group's ability, over time, to carry out sustained military operations, coordinate attacks or maintain control over a territory. Obviously, these activities could not be conducted without a certain level of organization.<sup>42</sup>

An assessment of the intensity of violence thus further supports the possibility that a decentralized armed group can be considered to be sufficiently organized to become a party to a NIAC. In situations where this type of armed group participates in an armed confrontation of a certain intensity, notably

40 ICRC Commentary on GC III, above note 5, para. 468. Arai-Takahashi supports and develops this view by suggesting that the interplay between the two criteria may be understood in two different ways. First, the required minimum level of organization could be inferred from “the armed group’s capacity to pursue violence of intensive nature” (interdependence model); second, a lower threshold of organization could be admissible in situations where “the violence at hand is of considerable intensity in terms of destruction, casualties, scale, temporal length, and other factors” (compensatory model). Y. Arai-Takahashi, above note 4, p. 96.

41 ICTY, *Haradinaj*, above note 5, para. 49; ICRC Commentary on GC III, above note 5, paras 473–474.

42 ICC Pre-Trial Chamber I considers that the reference in Article 8(2)(f) of the Rome Statute of the ICC to the notion of “protracted armed conflict” suggests the need for the armed groups concerned to have “the ability to plan and carry out military operations for a prolonged period of time”. ICC, *Lubanga*, above note 10, para. 234.

involving frequent armed clashes, high numbers of casualties and high levels of destruction, and significant duration, this would be additional indication that the group has reached the required level of organization.<sup>43</sup> This would be especially relevant in instances involving the use of war-type weapons and tactics, where IHL appears to be the most suitable legal framework for addressing the situation, even in the absence of a *centralized* authority unifying the fighting units involved. This is the case not only for rules governing the conduct of hostilities, but also for other rules that address specific issues in more detail under IHL and are better tailored for war-like situations, such as those on humanitarian assistance or the provision and protection of health care.

## Conclusion

In this article, the authors have argued that some decentralized armed groups are organized enough to be considered as parties to a NIAC. This means that these groups must comply with IHL and that certain violations may be prosecuted as war crimes. This is based on two main arguments.

First, decentralization is not equivalent to disorganization. Even in the absence of a centralized command structure, some decentralized armed groups may have reached the required level of organization. This would be the case whenever these groups exercise *operational command* over armed subunits, involving a degree of operational direction, coordination and strategic authority. This allows them to meet most indicative factors relating to the organizational criterion, such as the ability to carry out coordinated military operations, to adopt and circulate common disciplinary rules, to gain access to weapons and other military equipment, or to recruit and train new combatants.

Second, the intensity of armed confrontations is also a key element that needs to be considered when assessing the level of organization of the parties. There are clear connections between the two criteria for conflict classification; in particular, the indicative factors traditionally used to assess the intensity element may also be relevant to assess whether groups might in fact be sufficiently organized for classification purposes. Using the intensity of violence to infer a sufficient degree of organization of the armed groups is particularly pertinent in situations where the parties are using war-like means and methods and causing war-like types of consequences on the civilian population – i.e., where IHL would be better tailored to address the situation.

With many of today's armed groups being decentralized, it seems that the question of whether such groups can become parties to NIACs is here to stay. The

43 See T. Rodenhäuser, above note 14, p. 70, who suggests that in exceptional circumstances, it might be legitimate “to make the reasonable assumption that a group would have a certain command and disciplinary structure if it is able to engage in coordinated and intense military confrontations against an adversary, to recruit and train members, to provide for necessary logistics, and to have structures in place to keep the group united over a certain period of time”. See also L. R. Blank and G. S. Corn, above note 21, pp. 738–742.

approach presented in this article suggests that the existing criteria for conflict classifications remain relevant for addressing this question. Decentralized armed groups do meet the required level of organization, whenever they possess a leadership exercising *operational command* over their constitutive subunits. Categorizing these groups as parties to NIACs would thus not only be in line with judicial practice but would also ensure the applicability of a legal framework that would better reflect the reality on the ground – i.e., one that would be better adapted to the intensity of armed confrontations and would bind both States and non-State parties to a NIAC alike.